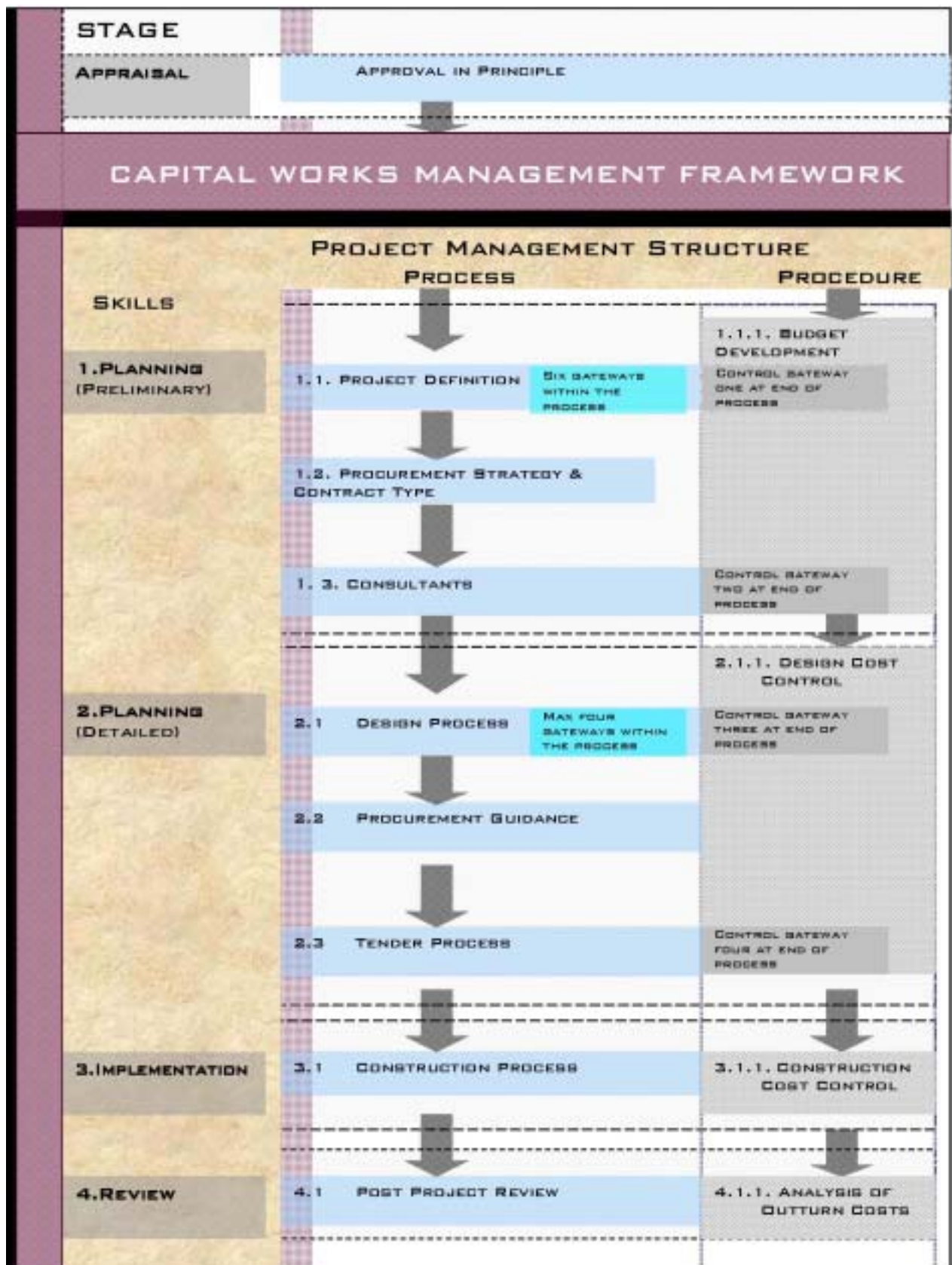


Capital Works Management Framework

Guidance Note on the Appointment of Consultants for Construction-related Services

1st December 2006



Preface

What is in this document?

This document provides guidance to sponsoring agencies and contracting authorities, such as Government Departments, local and regional authorities and other State bodies, who wish to appoint professional consultants for the planning, design and supervision stages of construction projects.

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Audience for this document

This document is intended primarily for the guidance of sponsoring agencies and contracting authorities embarking on traditional employer-designed projects. The guidance can also be used where the employer engages professional design consultants to produce initial designs or design studies which are subsequently handed over to a contractor under a contractor-design contract.

The principles in this document apply equally to the appointment of construction professionals by a sponsoring agency or contracting authority to advise on Public-Private Partnership (PPP) projects. (Note that the procedures for these consultants are different from the procedures for construction consultants employed by a consortium on a PPP project.)

The guidance in this document applies to the engagement of consultants following a design contest, but it does *not* apply to the design contest itself.

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Preface, Continued

Other documents of relevance

This document should be read in conjunction with the *Standard Conditions of Engagement between the Client and the Consultant* developed for use (un-amended) for consultancy services on public works construction projects.

Several publications, including national standard Forms of Contracts and corresponding guidance notes, are available to help public sector bodies to manage capital works projects in accordance with best practice. These documents form part of an integrated package that makes up the Capital Works Management Framework.

Appraisal is dealt with in *Guidelines for the Appraisal and Management of Capital Expenditure Proposals in the Public Sector* (Department of Finance, February 2005: www.finance.gov.ie/viewdoc.asp?DocID=2968).

Budgeting is dealt with in *Capital Works Management Framework Guidance Note on Project Budgeting*

Planning is dealt with in a number of documents, including:

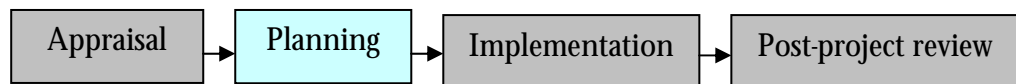
- *Capital Works Management Framework Guidance Note on Project Definition and Development of the Definitive Project Brief*;
- This document, which deals with the appointment of consultants for construction-related services; and
- Procurement of services is also dealt with in *Capital Works Management Framework Guidance Note on Pre-Qualification of Consultants*, which is a guide to meeting the requirements of the EU procurement directives.

Post-project review is dealt with in the Capital Works Management Framework (guidance note yet to be developed).

1: Overview

Four major stages in capital works management

The four major stages detailed in the *Guidelines for the Appraisal and Management of Capital Expenditure Proposals in the Public Sector* are a backdrop to the Capital Works Management Framework (CWMF). These four stages apply to the initiation and the management of any capital works project. The Appraisal stage is outside the CWMF, which commences with the Planning stage and runs through the Implementation and Post-Project review stages.



Stage	What happens
1. Appraisal	The needs are identified, the broad parameters of a solution are agreed, and a decision-in-principle is made to proceed.
2. Planning	The needs are quantified and assumptions verified, the desired outputs are specified, and the solution is designed in sufficient detail to enable it to be constructed.
3. Implementation	The solution is constructed.
4. Post-project review	An assessment is carried out and documented of how successfully the delivered solution addresses the needs within the resource commitments. The performance of all participants is also assessed and recorded for future reference.

Nine steps in project planning

The planning stage involves nine steps:

1. Establishing a project management structure;
2. Project definition and development of the definitive project brief;
3. Budget development;
4. Procurement strategy and Contract type;
5. Consultants;
6. Design process;
7. Design cost control;
8. Procurement guidance; and
9. Tender process.

This document is concerned with the fifth of these steps – appointment of consultants. It is at this stage, early in the design process, that the largest single impact on costs can be made, and value-for-money decisions are at their most important.

Note: The planning stage does *not* involve placing construction contracts or making any irrevocable commitment to undertake the project/scheme.

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1: Overview, Continued

Why engage consultants?

During the planning and design of a capital works project, the sponsoring agency is unlikely to have the full range of necessary expertise in-house, and may have to engage the services of planners, architects, engineers, designers, archaeologists, geologists and other experts in order to ensure that the project meets the requirements effectively.

Underlying principles

Government procurement policy seeks to maintain high standards and to ensure value for money. In meeting these requirements, sponsoring agencies and contracting authorities are required to ensure that:

- The consultants they employ can deliver high standards in the planning, design and supervision of the construction projects;
 - Good consultancy advice is sought from professionals with relevant competency and experience;
 - The procedure used for the procurement of such services is conducted in a transparent, fair and equitable manner;
 - Competitive tendering is used which allows quality to be assessed in a way that achieves best value for money;
 - The estimates for project designs submitted by consultants or by in-house design teams are subjected to independent scrutiny to confirm that they are reasonable to within acceptable margins of accuracy, and to confirm that the proposed designs represent good value for money; and
 - Design information is subjected to independent examination *before* tenders are sought to verify its completeness and to fill in any gaps identified.
-

Categories of service covered by this guidance

The activities covered by this guidance are the construction-related service activities listed under Category 12 in Annex XVII of Directive 2004/17/EC and Annex II of Directive 2004/18/EC.

Sponsoring agencies should adopt a broad interpretation of this category of activity listed in the Directive. This means that the services of a wide range of consultants come within the scope of this guidance – including planners, process engineers, interior designers, archaeologists and geologists.

Each of the principal construction-related consultants employed as a member of a design team for a single requirement should be engaged directly by the contracting authority. Where the services of specialist sub-consultants are required, these sub-consultants may be contracted directly or via the principal consultants, at the discretion of the contracting authority.

Note: A ‘single requirement’ means the Sponsoring Agency’s overall requirement in service terms for capital works. This requirement may be met by one or more professional disciplines whose collective input is necessary to produce the desired result.

Continued on next page

1: Overview, Continued

Defining the stages of a requirement

A specific requirement may be broken down into five discrete stages that can, at the discretion of the contracting authority, be combined into a single Request for Tenders or issued as multiple Requests for Tenders.

It is not permitted, however, to split a single requirement into a number of contracts in order to use a negotiated procedure or to avoid compliance with the Directives.

The extent to which these stages apply to a particular project will depend on whether the project is a traditional (Employer-designed) one or a design-and-build (Contractor-designed) one.

Tenders should indicate the cost for each stage.

Stage	Description
1	Feasibility study or preliminary report stage: This involves a contracting authority defining in detail all its requirements in an output specification prior to commissioning consultants to carry out a study/report before the Planning/Statutory Approval stage.
2	Design stage: There are normally two parts to the Design stage: <ul style="list-style-type: none">▪ The first usually involves a contracting authority commissioning designers to develop designs which meet its requirements and are in line with results approved at Stage 1 up to and including Planning/ Statutory Approval for both Traditional and Design & Build projects; and▪ The second usually involves a contracting authority developing designs after receipt of Planning/Statutory Approval up to tender document stage for Traditional projects.
3	Tender action/evaluation/award stage
4	Construction stage
5	Handover stage: Prior to handover, outstanding issues, such as delivery of operating and maintenance manuals, commissioning certificates and preparing a snag list, are dealt with. After handover, the final account is prepared, and all snags are rectified within the Defects Period.

Intermediate stages

Contracting authorities may elect to introduce other intermediate sub-stages in the design stage.

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1: Overview, Continued

Government policy

It is a basic principle of Government policy in relation to construction procurement that **fixed-price lump-sum construction consultancy contracts are tendered on a competitive basis** as the norm.

Types of procurement procedures

The four types of procurement procedures available for awarding contracts by public bodies are:

- **Open**, in which a Request for Tenders is published at the same time as the advertisement/Contract Notice is published. All tender submissions are evaluated and awarded first under qualification criteria and then (for those meeting the minimum qualification criteria) under award criteria (which includes quality as well as price).
- **Restricted**, which is a two-stage process: a Request for Expressions of Interest is published, and the resulting expressions of interest are subjected to qualitative evaluation. A Request for Tenders is then issued to a number of qualifying suppliers; the tenders are then evaluated and contracts awarded.
- **Negotiated** (exceptional procedure), in which the contracting authority negotiates the services required and the fees for those services with a number of competing service providers (competitive negotiated procedure) or with one service provider (non-competitive negotiated procedure).
- **Competitive dialogue**: this procedure is available for particularly complex contracts where neither the open nor the restricted procedure will allow the award of a contract. It will rarely, if ever, be used for construction-related services.

Under most circumstances, the **Restricted** procurement procedure is to be used. Other procedures may on occasion be appropriate – see Chapter 2.

2: Choosing the Correct Procurement Rules or Guidelines

EU rules and national guidelines

There are two sets of rules governing the conduct of public procurement:

- **EU rules** (as outlined in Directives 2004/17/EC and 2004/18/EC) apply to contracts for services where the value of the *service* is (or is expected to be) above a threshold value.
- **National guidelines** apply to all other contracts for services.

In this document, where procurement advice relates to EU rules, this is so indicated; all other guidance relates to national requirements.

Selecting the appropriate procedure

The procurement rules or guidelines that apply to a particular contract¹ depend on the nature of the contracting authority, the value of the service contract and/or the expected value of the construction contract, as follows:

If the contracting authority is and the value ² of the service contract is greater than then ...
In the Utilities sector (i.e. water, energy, transport or postal services)	422,000	EU rules apply, and contract notice must be published in the <i>Official Journal</i> .
A Government Department or Office	137,000	
Other public sector body (e.g. local or regional authority, public body outside the utilities sector)	211,000	

If the above criteria do *not* apply, **national guidelines** apply, as described on the next page.

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¹ Except in the case of a contract following a design contest, in which case negotiated procedures are permitted, irrespective of the value of the construction contract. See page 13.

² The threshold figures are revised by the EC Commission every two years – those shown are for the period 2006 to 2008. Up-to-date thresholds are published on www.Simap.EU.Int/.

2: Choosing the Correct Procurement Rules or Guidelines, Continued

Selecting the appropriate procedure (continued)

If the value of the *service contract* falls below the thresholds given on the previous page (where EU rules apply), the procurement procedure to be used is determined by **national guidelines**, as follows:

If the expected value of construction (ex VAT) is then use and ...
Over 500,000	Competitive tendering (open or restricted)	Publish contract notice on eTenders website.
Below 500,000	Competitive tendering (open or restricted), or, exceptionally, competitive or non-competitive negotiation	Consider publishing contract notice on eTenders website (except for non-competitive negotiation).

Preferred option It is a basic principle of Government policy that a competitive process should be used to procure construction-related services for capital works projects, unless there are justifiable exceptional reasons for not to do so. The **Restricted** procurement procedure should normally be used.

It is permissible to use the **Open** procedure where this is considered appropriate. The **Negotiated** procedures should be used only in exceptional circumstances, as outlined below and in Chapter 4.

Using negotiated procedures

While the restricted procurement procedure should normally be used, negotiated procedures are permissible in the following circumstances:

- For projects where the construction costs (ex VAT) are (or are expected to be) below 500,000
- In the exceptional circumstances listed in Article 30 of Directive 2004/18/EC.
- When Article 40 of Directive 2004/18/EC (Utilities Directive) allows a free choice of Open, Restricted or Negotiated procedures
- In the case of a contract following a design contest under EU rules (that is, a contract for design development and construction supervision) – see also Chapter 4.

Note: The fact that construction-related services may be classified as intellectual services is not grounds for the use of the negotiated procedure.

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2: Choosing the Correct Procurement Rules or Guidelines, Continued

Aggregation of value

In determining the value of the contract to be awarded and thus whether or not the applicable threshold is reached, the contracting authority must aggregate the value of services to be provided by all of the professional disciplines involved in the delivery of the complete construction project. In other words, where consultants in a design team independently tender for the professional services and subsequently enter into separate contracts with a contracting authority to meet a single requirement, the value of each of their contracts must be aggregated to establish if the value thresholds are reached.

The aggregation rules apply to consultancy contracts for a single requirement, whether they are placed on the market and awarded at the same time, or they are placed on the market at different times and awarded at different times.

Exception to aggregation rule

If, out of a number of contracts which together form a single requirement, a particular contract or group of contracts has a value of not more than 80,000 and the aggregated value of all such contracts does not exceed 20% of the aggregate value of the total single requirement, the EU rules need not be applied to the contract or group of contracts. National guidelines will apply to such contracts. See example on next page.

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2: Choosing the Correct Procurement Rules or Guidelines, Continued

Example of exception

A design team of five consultancy firms is required to provide construction-related services for a project valued at 2.5m (excluding VAT). The total fee is 337,500³ (excluding VAT) made up as follows:

Services	Value (ex. VAT)	% of total
Architectural	150,000	44%
Quantity Surveying	75,000	22%
Mechanical and Electrical	50,000	15%
Civil Engineering	37,500	11%
Landscape Architectural	25,000	8%
Total	337,500	100%

As the value of the **architectural** services exceeds 80,000, the tender must always be advertised in the OJEU.

Similarly, as the value of the **quantity surveying** services exceeds 20% of the total service requirement, the tender must always be advertised in the OJEU.

In relation to the three remaining services contracts:

- If the **mechanical and electrical** services are advertised, it is not mandatory to advertise the **civil engineering** and **landscape architectural** services (as the value of each contract is less than 80,000 and the aggregate value of the two is less than 20% of the total).
- If any two of the three contracts are advertised, it is not mandatory to advertise the third (as the value of each contract is both less than 80,000 and less than 20% of the total).

Framework agreements

Construction-related service contracts (irrespective of value) under an existing framework agreement are not subject to the aggregation rules a second time round. However, their value is to be taken into account to establish the threshold of a single requirement where other construction-related services are required that are not covered by a framework agreement. Framework agreements should be used wherever possible to achieve greater efficiency and reduce administrative overheads.

³ See EU threshold for public body on page 5

3: Restricted Procedures – Qualitative Selection of Candidates

Purpose of qualitative selection

The purpose of qualitative selection is to identify suitably qualified candidates for inclusion in a short list of candidates who will be invited to submit tenders.

Invitation for expressions of interest

The contracting authority initiates the process by publishing in the *Official Journal* and/or the eTenders website (as appropriate to the value of the contract) an invitation to interested parties to submit qualitative selection material in relation to a specific service requirement.

Note: From the eTenders website, the contracting authority can choose to send a notice automatically to the *Official Journal* for publication.

All submissions should be kept confidential and should not be opened until after the latest closing date for receipt of that material.

The contracting authority may subsequently seek tenders from those consultants that are suitably qualified.

Submission from groups

The contract notice should clearly state:

- Whether it is permitted for consultants from the same or different disciplines to group together to put themselves forward as candidates for a tender competition;
 - Whether a group of economic operators tendering for a project (if not already a legal entity) is required to assume a legal form prior to execution of a contract with them.
-

Participation in more than one submission

Where consultants put themselves forward more than once for the same contract, as individuals or as members of one or more groups of consultants, they (the individual or the lead consultant in the group, as appropriate) should provide a statement that they are aware of this multiple participation, and that it has been brought to the attention of all concerned.

The contracting authorities should investigate the circumstances to see if this multiple participation could result in a distortion of competition. Where it is felt that competition may be distorted, the consultant (or group of consultants) must be informed of this and instructed that if it still wishes to participate in the competition it must go forward as a single candidate or number of candidates, as considered appropriate by the contracting authority.

Contracting authorities must make this clear at least in the pre-qualification document (in a restricted procedure) or the request for tenders (in an open procedure), so that all candidates are aware of the rules. Following recent European case law, an outright ban on participation in more than one bidding team is not advised, as this could be viewed as disproportionate.

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3: Restricted Procedures – Qualitative Selection of Candidates, Continued

Qualitative selection criteria

Details of the qualitative selection criteria must be included in the invitation notice or in supporting documentation made available to candidates.

In expressing interest, applicants must submit appropriate evidence to demonstrate that they meet the qualitative selection criteria, including the identification of adequate resources. Candidates who fail to submit such evidence will be eliminated automatically from the procedure if this is stated in the pre-qualification document or the contract notice. If it is not so stated, the sponsoring agency has discretion to eliminate or not.

Both EU rules and national guidelines apply to the qualitative selection criteria.

EU rules

The EU rules governing qualitative selection are set out in Articles 52–4 of Directive 2004/17/EC and Articles 45–52 of Directive 2004/18/EC. These are dealt with in *Capital Works Management Framework Pre-Qualification Guidance Note 14*.

National guidelines

The outline criteria for national procedures are as follows:

- ***Legal Situation of Service Provider:*** failure to meet a satisfactory standard would arise where candidates were found to be, for example undischarged bankrupts, currently in default of their tax liabilities, to have made serious oral or written misrepresentation in a submission, to have gravely misconducted themselves in the course of business, or to have been convicted of a criminal offence in relation to the business or profession;
- ***Financial and Economic Standing:*** for example, financial status such as certified turnover in the last three financial years or Balance Sheets (where required legally to publish) for the last three financial years and/or the level of Professional Indemnity Insurance carried for each of the last three years; and
- ***Ability and Technical Capability:*** for example, professional qualifications (see Recognition of Qualifications below), resources, past performance (e.g. ability to work within a team), experience of risk management, references from other clients, experience of quality management, technical suitability for the contract; specialist design experience relevant to the project.

Written clarification of submissions

The contracting authority can seek clarification on aspects of the applicants' submissions. This can be in the form of written clarification from the candidate.

Under no circumstances should new material which changes a submission be accepted by contracting authorities as part of the clarification process, as this would put other participants at a disadvantage and would constitute a breach of procedures.

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3: Restricted Procedures – Qualitative Selection of Candidates, Continued

Candidate interviews

As part of the qualitative selection process and where appropriate, all eligible candidates may be invited to attend an interview to clarify aspects of their submission.

It may not be necessary to interview candidates for particular projects, especially if a Contracting Authority is satisfied that the material in the submissions is adequate and from competent firms with proven track record.

Interviews can be conducted only if signalled in advance in the Contract Notice/ Advertisement.

Interviewers should be careful not to invite or accept new information at interview, as consideration of new material would invalidate the whole procedure.

Recognition of qualifications

The EU Directives on mutual recognition of qualifications for consultants, including non-resident consultants should be observed. The current Directives⁴ are:

- Architects Directive 85/384/EEC; and
- The First General Directive on Professional Qualifications 89/48/EEC.

In the case of consultants whose professional title is required by Irish law⁵ to be registered with a competent authority, by being so registered the consultant automatically qualifies as having met the minimum requirements set by contracting authorities for technical eligibility.

Shortlisting of qualifying candidates

Based on the evaluation of the qualitative selection material submitted by applicants in their expressions of interest, a number of candidates may be placed on a shortlist of service providers who will be invited to tender under the restricted tendering procedure. The minimum number of candidates that will be invited to tender should be stated in the notice.

In a restricted procedure, the contracting authority must intend to invite at least five candidates to tender. The contracting authority cannot put a number less than this in the contract notice. However, if it transpires that there are fewer than five qualified candidates, the competition may proceed provided there are sufficient candidates for genuine competition.

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⁴ Amended by Directives 85/614/EEC, 86/17/EEC, 90/658/EEC, 2001/19/EC, Corrigenda 2/4/86 and 21/03/96 to 86/17/EEC and 85/384/EEC; Act of Accession of Austria, Sweden and Finland [adopted by Council Decision 95/1/EC, Euratom, ECSC], and an Act concerning conditions of accession [23/9/03] of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia.

⁵ The Department of the Environment, Heritage and Local Government is developing proposals for the *Registration of Building Professionals*, which will give statutory protection to the titles of 'Architect', 'Quantity Surveyor', and 'Building Surveyor'. These proposals are included in the Building Control Bill, 2003.

3: Restricted Procedures – Qualitative Selection of Candidates, Continued

Qualitative selection criteria and award criteria

The criteria used in qualitative selection are different from those used in contract award, and they are not interchangeable. While some criteria, such as technical skills, may appear to be similar, in the qualitative selection stage they relate to the totality of the organisation, whereas in the award stage they relate solely to the specific resources dedicated to the particular project.

Subsequent check for deficiencies

Whilst a contracting authority cannot revisit its decisions on qualification in the absence of a change in the position of the candidate, it is permissible to ask candidates at later stages in a procedure to confirm that the evidence supplied in the pre-qualification stage is still valid. If the candidate's position has changed, such that it would no longer have met the minimum criteria, or would not have been shortlisted to participate in the competition, the contracting authority can disqualify the candidate even at a later stage in a procedure.

While candidates can be excluded for failure to meet the qualifying criteria right up to the award of the contract, contracting authorities should make every effort to ensure that candidates who do not qualify do not pass the pre-qualification stage. Candidates who do not meet the minimum criteria for qualification, or do not make the pre-qualification short list, should not be admitted through to later stages in the competition.

4: Competitive Negotiated Procedures – Selection of Candidates

Introduction

Article 40 of 2004/17/EC and Articles 30 and 31 of 2004/18/EC as interpreted by the case law of the European Court outline the circumstances in which the negotiated procedures may be used. These circumstances are set out in Chapter 2, above.

If a negotiated procedure is used, the Contracting Authority is required to demonstrate, by means of third-party verification, that the negotiated procedure is the *only option appropriate* for the proposed project.

For negotiated procedures, the Client Output Specification need not be very well defined, but the service required must be clearly defined.

Competitive negotiated procedures are those where the contracting authority consults parties of its choice (minimum of three), with or without prior advertising, and negotiates the service required and the associated fees.

Use of negotiated procedure in design contests

With regard to a contract following a design contest, if a contracting authority intends to use the negotiated procedure and to negotiate with more than one of the leading contestants, the Contract Notice or the design contest competition material must make that explicit, and also state that the winner(s) and runner-up(s) will be invited to negotiate to the exclusion of all other participants. If there is no clear link between the design contest and the design service contract that follows, the negotiated procedure cannot be used⁶ and that service must be tendered for separately under either the open or restricted procedures.

Contracting authorities, in indicating their intention to use the negotiated procedure, should be careful not commit themselves to a follow-on contract if it is not certain that a contract will be awarded.

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⁶ European Court judgement C-340/02, *The Commission-v-France*

4: Competitive Negotiated Procedures – Selection of Candidates, Continued

Design contest notices

The following practical steps should be adopted in relation to design contests:

- The **subject matter** of all contracts to be awarded on the basis of the design contest should be fully described in the design contest notice;
 - The contracting authority should indicate, as part of the design contest notice, that it reserves the right not to proceed with the award of any contract following the design contest, and that if it does proceed, the award will be made, after competitive negotiations have been conducted with the winner(s)/runner up(s) of the competition, to the candidate who emerged from the negotiations with the most economical advantageous offer.
 - There must be a **functional link** between the follow-on contract to be awarded and the original design contest contract awarded; and
 - The **award criteria** identified in the contract notice for the design competition must not only relate to the merits of the design, but also be appropriate to the award of any 'follow-on' contract. As part of the design process, participants must be asked to submit all information necessary to apply the full set of award criteria. The winner of the design contest must be determined by applying all of the stated award criteria.
-

Conduct of a competitive negotiated procedure

In competitive negotiation, at least three suitable service providers from each professional discipline are invited by the contracting authority (following a pre-qualification procedure conducted as per the pre-qualification stage of the restricted procedure [see above]) to negotiate on the basis of an outline preliminary service contract brief.

The negotiations should begin with an invitation for submissions, including fee proposals, from three or more firms. Discussions should then start simultaneously with each of the firms on their submissions and fee proposals. In addition to price, the discussions should cover the following general areas:

- The approach of the service provider to the project;
- Relevant experience of staff (**Note:** This can be looked at only if it was not considered at pre-qualification stage.); and
- Resource proposals.

In the case of Design Contests, the winners, or the winner and the runner(s) up, as selected by a jury, should be invited to negotiate where the award criteria permits this to happen. If this is not stated in the competition material, the negotiated procedure cannot be used for the award of the follow-on contract, and a separate restricted or open tendering competition must be held.

5: Non-competitive negotiated procedures

Conditions under which non-competitive negotiation is permitted

Negotiated procedures are permitted only in the limited circumstances set out in Chapter 2, above, and contracting authorities are required to demonstrate, by means of third-party verification, that the negotiated procedure is the *only option appropriate* for the proposed project.

The conditions governing non-competitive negotiated procedures are very strict and such procedures may be used only in very exceptional circumstances as determined by EU Directives and national guidelines.

The exceptional circumstances in which non-competitive negotiated procedures may be used are all set out in Article 31 of Directive 2004/18/EC. Of these, the most frequent are:

- In cases where a contracting authority, due to unforeseen circumstances, is forced to extend a service under an existing contract, and the value of the additional services provided do not exceed 50% of the original contract value. If additional services of the same nature do exceed 50% of the original contract value, new award procedures should be initiated.
 - or –
- In circumstances of extreme urgency – under National Guidelines and EU Rules [i.e. Directives 2004/17/EC Article 40(3) (d) and 2004/18/EC Article 31(1) (c)] the use of ‘extreme urgency’ should be very narrowly and strictly interpreted. It must be justified and brought about by events unforeseeable by a contracting authority that precludes the use of an open or restricted procedure. Delay or inaction attributable to a contracting authority is not sufficient to justify invoking extreme urgency.

Conduct of a non-competitive negotiated procedure

In a non-competitive negotiated procedure, a single service provider is selected and negotiations proceed on the basis of an outline preliminary service contract brief. If no agreement is reached, negotiations must end definitively and the firm involved should be advised of the outcome. Another firm should then be selected and the same procedure followed.

Under this procedure, the appointment should be for part of a stage where a particular study is required.

6: Contract Award Procedures

Call for competition

The Request for Tender (RFT) must include the following information for candidates:

- Instructions to the tenderers See *Guidance Notes* (yet be developed)
- Form of Tender See *Guidance Notes* (yet be developed)
- Conditions of contract See the *Standard Conditions of Engagement between Client and Consultant*
- Specification of service required and detailed description of project See *Guidance Note No.8: Project Definition and Development of the Definitive Project Brief*
- Award criteria See Appendix A of this document.

Allowing adequate time for responses

The contracting authority must allow candidates adequate time to submit tenders, and the timescale should be indicated in the tender documentation. Contracting authorities should have regard for the minimum timelines for tender submissions as set out in the EC Directive. In considering the minimum timelines, contracting authorities must take the complexities of a contract into account.

All tenders should be kept confidential and should not be opened until after the latest closing date for receipt of tenders.

Note: Tenderers whose submissions omit information that is vital to their tender should be eliminated from the award procedure.

Tender evaluation criteria

Strictly speaking, there are two ways to evaluate tenders:

- Based on price only; or
- Based on the most economically advantageous tender (MEAT) criteria.

However, to protect quality and ensure long-term value for money, *the MEAT criteria should be used in all circumstances*. These criteria take both quality and price into account.

The contracting authority should identify these criteria clearly and in sufficient detail, either in the published notice or in the Request for Tenders.

The criteria should be relevant to the specific contract and appropriate to the nature, type and complexity of the project, and, where no weightings are allocated, they should be stated in descending order of importance. If weightings have been allocated, they should be stated. Contracting authorities should follow equitable, fair and transparent procedures in assessing quality and price in a tender.

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6: Contract Award Procedures, Continued

Tender evaluation criteria (continued)

In all cases price must be included as an important criterion. The following example illustrates typical headings under each criterion:

Criterion	Headings
Quality	<ul style="list-style-type: none"> ▪ Qualification and experience (including ability to innovate) of individuals assigned to the project (Note: 'ability to innovate' relates to innovative solutions which the tenderer has provided on other projects, and particularly on projects of a similar size and nature.); ▪ The share of the contract the tenderer intends to subcontract; ▪ Tenderer's understanding of the service contract brief; ▪ Workload and resources (if not already requested at pre-qualification stage); ▪ Detailed statement as to how the services will be delivered on time; ▪ Risk management; ▪ Commitment and enthusiasm; ▪ Communication skills; ▪ Approach to health and safety; and ▪ Technical assistance and after-sales service (where relevant).
Price (time and money)	<ul style="list-style-type: none"> ▪ Cost of the project ▪ Delivery date; and ▪ Delivery period or period of completion

Submission from groups

The tender documents or contract notice should clearly state:

- Whether it is permitted for consultants from the same or different disciplines to group together to put themselves forward as candidates for a tender competition;
 - Whether a group of economic operators tendering for a project (if not already a legal entity) is required to assume a legal form prior to execution of a contract with them.
-

Continued on next page

6: Contract Award Procedures, Continued

Participation in more than one submission

Where consultants put themselves forward more than once for the same contract, as individuals or as members of one or more groups of consultants, they (the individual or the lead consultant in the group, as appropriate) should provide a statement that they are aware of this multiple participation, and that it has been brought to the attention of all concerned.

The contracting authorities should investigate the circumstances to see if this multiple participation could result in a distortion of competition. Where it is felt that competition may be distorted, the consultant (or group of consultants) must be informed of this and instructed that if it still wishes to participate in the competition it must go forward as a single candidate or number of candidates, as considered appropriate by the contracting authority.

Contracting authorities must make this clear at least in the pre-qualification document (in a restricted procedure) or the request for tenders (in an open procedure), so that all candidates are aware of the rules. Following recent European case law, an outright ban on participation in more than one bidding team is not advised, as this could be viewed as disproportionate.

Fee tenders options

There are two ways in which competitive tenders can be obtained for consultants' fees:

- By asking for a fixed-price lump-sum fee, which is described hereinafter as a **service contract for well-defined services**. This approach, which is to be the norm, is where a fixed-price lump-sum fee is competitively tendered on the basis of a comprehensively defined project brief and well-defined service requirements.
- By asking for a percentage fee, which is to be capped at the earliest opportune time, which is described hereinafter as a **service contract that cannot be clearly defined**. This approach, which should be used in exceptional circumstances, is where a percentage fee is competitively tendered based on a band of costs within which the project is to be built. It should be used only where project briefs and service requirements cannot be clearly defined, and must not be used for well-defined services. Before adopting this approach contracting authorities must demonstrate by means of approved third-party verification that the use of this procedure is the only option appropriate for the proposed project, and they must record that justification on the project file.

Continued on next page

6: Contract Award Procedures, Continued

Service contracts for well-defined services

Where the service being tendered for is well-defined, contracting authorities must be able to describe the specific time frame and scope of the service in unambiguous, comprehensive and well-defined terms. If in-house resources are not available to draw up such a scope document, the use of a scoping contract to clearly define the needs should be considered.

This information should be part of the material conveyed to candidates, so that they can tender for the provision of the service on a *fixed-price, lump-sum* basis with a considerable degree of pricing certainty.

A breakdown of the lump sum, at a minimum into the five stages indicated on page 3 above, should always be supplied by the tenderers. The overall lump sum tender price should also be disaggregated by giving time estimates and hourly/daily rates, so that the resourcing aspects of the tender can be properly assessed. However, the contracting authority must ensure that this does not undermine the integrity of the lump sum and leave the way open for a subsequent tender price increase without change in service or circumstances. A contracting authority can, if it wishes, request tenders for discrete single service packages at any stage.

If there is significant uncertainty as to when the service is to be provided, consideration should be given to awarding the contract for those stages where there is time certainty.

Service contracts that cannot be clearly defined

Where the service being tendered for cannot be sufficiently well defined to enable candidates to tender on a *fixed-price lump-sum* basis, they may instead tender on a *percentage fee* basis. The percentage rate tendered should be for four of the five project stages listed on page 3 above (i.e. excluding Feasibility Study/Preliminary Report). In such cases, the tender documents should show an indicative project budget range. A single capital value from within the indicative project range should be selected and recorded on file before tender documents are issued, so that the percentage fees tendered can be reduced to actual financial amounts for the purpose of tender evaluation.

Conversion to fixed-price lump-sum

The percentage rate tendered should, at the earliest opportunity after the extent of the project brief and/or service requirements have been fully defined (or, at the latest, at the end of the first part of design stage 2, as described on page 3), be converted to an overall fixed-price lump-sum and capped for each of the remainder of the stages for which services are to be provided. There should be no subsequent adjustment to the competitive percentage tendered at award stage.

The arrangements relating to the application of the percentage rate to a contracting authority's budget estimate/final cost is also set out in chapter 7 of this document (see page 28). In all cases, these procedures should be clearly stated in the consultancy tender documents.

Continued on next page

6: Contract Award Procedures, Continued

Quality/Price Ratio

In awarding public service contracts, robust criteria must be developed for both quality and price, and these criteria must be applied in a balanced way to ensure best value for money.

The weighting of quality against price will be influenced by the complexity of the project and the degree of creativity or flexibility that is required in its execution.

Contracting authorities should therefore always ensure that the precise relationship between quality and price is established prior to any call for competition and that this is recorded on file to ensure transparency. In determining the correct relationship between quality and price, the principle of proportionality should be observed.

While the quality/price ratio will differ across project types, the policy approach and core principle is that price must be given significant weighting without undermining quality.

The *Qualitative Price Assessment Mechanism* set out in Appendix A of this document should be used as a guide to evaluate quality and price in order to identify the most economically advantageous tender.

Interviewing tenderers

As part of the tender process and where appropriate, bona fide tenderers may be invited to attend an interview to clarify aspects of their tender.

It may not be necessary to interview tenderers for particular projects, especially if the Contracting Authority is satisfied that the material in the tender submission is adequate to assess the tender and that it is from a competent firm with a proven track record.

Interviewers should be careful not to invite or accept new information at interview, as consideration of new material would invalidate the whole procedure.

7: Fee Agreements and Payment Arrangements

Introduction

Contracting authorities should state clearly *in the RFT* what fee payment procedures are to be applied to the consultancy service contract. Appendix B of this document sets out a worked example of a model fee payment mechanism. This Chapter deals with the following:

- Fee Agreement and Conditions of Engagement; and
- Fee Structure.

Fee adjustments are dealt with in Chapter 8.

Written agreements

The *Standard Conditions of Engagement between Client and Consultant* should be signed or sealed, with Schedule B completed setting out the service and fee arrangements, as well as other material which should be in place before commencement of service. Separate agreements and conditions of engagement should be drawn up for the following:

- Feasibility study/preliminary report; and
- The combined pre-construction and construction stages of the project

In some cases it may be appropriate to have separate service agreements for pre-construction and construction stages of the project.

Extent of consultant's liability

Where the consultant just signs the *Standard Conditions of Engagement between a Client and a Consultant* (without seal) the consultant's liability is limited to six years. Where a consultant signs the *Standard Conditions of Engagement between a Client and a Consultant* under seal, the consultant's liability is 12 years; this should only be done in circumstances where the Client considers it absolutely necessary.

In the rare case of a consultant with no design responsibility, the contracting authority may waive the six years' liability by separate letter to the consultant at appointment stage. An example of such a consultant would be a Quantity Surveyor whose Bills of Quantities do not include any design or specification material. However where design or specification material is included in Bills of Quantities, the Quantity Surveyor's liability should be no different from that of the other design consultants.

Continued on next page

7: Fee Agreements and Payment Arrangements, Continued

Termination/ Suspension/ Prolongation

In relation to Termination, Suspension or Prolongation, the following key provisions are included in the *Standard Conditions of Engagement between Client and Consultant*:

- **Termination-at-will:** this provision allows for termination-at-will of a contract prior to the completion of the service. Termination takes effect 14 to 28 days after the notice to terminate is served. Compensation is payable only in the event of a project proceeding without the Consultant. Where a project does not proceed, the Consultant is paid for work done up to the date of termination-at-will, with a reasonable apportionment for any incomplete, unsatisfactory performance. Where termination-at-will arises during a stage and the project proceeds, the compensation shall be the Scheduled percentage applied to the fees for the stage in which the termination occurs. This is additional to the Fee for work done up to the date of termination, with a reasonable apportionment for any incomplete, unsatisfactory performance.
- **Termination with cause:** this provision allows either party to terminate a contract for substantial breach of contract by the other and provides compensation to the party terminating the contract. A minimum of 14 days and a maximum of 28 days must elapse after the warning notice is served before the termination notice may be served. This is to allow time for the breach to be remedied to prevent termination. The compensation is damages as if termination was for repudiation of the contract.
- **Suspension:** this provision allows a contracting authority formally to suspend the Consultant's performance of services, but only during a stage. The compensation payable for suspension is a percentage of the fees payable for the stage in which the suspension starts. (The percentage that applies to each stage is specified in Schedule B of the *Standard Conditions of Engagement*). Direct costs shall also be paid for any specific actions requested by the client.
- **Prolongation:** this provision deals with what happens when completion of a stage is delayed by a client. Where completion of a stage overruns the Total Performance Period less all remaining Stage Performance Periods, the Consumer Price Index applies to all remaining fees after the start of the over-run. In relation to the stage in which the over-run occurred, a reasonable apportionment is to be allowed for the outstanding service fees for that stage.

Furthermore, specific payment rules and service adjustment provisions should be clearly expressed in any agreement, as below.

Continued on next page

7: Fee Agreements and Payment Arrangements, Continued

Copyright

Contracting Authorities should be aware that there are two options in the Standard Conditions of Engagement in relation to ownership of intellectual property rights (copyright) in design documents:

- The first is where a royalty-free license is granted to the Contracting Authority.
- The second is where the copyright is owned outright by the Contracting Authority.

If outright ownership of the copyright is required by the Contracting Authority, this should be clearly stated in the tender documents, so that the design consultants can provide for the cost of this arrangement in their tender prices when tendering for the service.

Contracting authorities should state very clearly in the tender documents what specific aspects of copyright they require – for instance, whether it is the iconic visual image of a facility, or the detailed designs of a facility, or both.

Similarly if a royalty-free, perpetual, non-exclusive, irrevocable, assignable license to reproduce and/or use the documents is required by a Contracting Authority, this should be clearly stated in the tender documents, so that the design consultants can provide for this arrangement in their tender prices when tendering for the service.

In relation to sub-paragraph 11 (9) of the *Standard Conditions of Engagement*, the number of times the design documents can be reused under the royalty-free licence is restricted by the Services referred to in sub-paragraph 11 (7). These Services are identified in Schedule B, and the project(s) that they apply to are the project(s) identified in 1.2 'Project' Schedule A, which will normally be only one project. If this is the case, the client is not entitled to use the consultant's design documents on any other project. If more than one project is identified, the extent of use will be determined by the number of projects identified.

Once ownership of copyright is transferred to the client, there is no limit on the number of times or the time period in which it can be used.

Continued on next page

7: Fee Agreements and Payment Arrangements, Continued

General points regarding payment of fees

Contracting authorities should take note of the following general points in relation to fee payment.

Prompt Payment

The Prompt Payment of Accounts Act 1997 and The European Communities (Late Payment in Commercial Transactions) Regulations 2002 (SI 388 of 2002) apply; contracting authorities should therefore ensure that all undisputed outstanding fee claims due to consultants are paid promptly.

Withholding Tax and VAT

Fee payments are to be subject to the deduction of withholding tax current at time of payment. In exceptional circumstances, where there are percentage fees (subject to being capped at earliest opportune time), the percentage fee payments should be calculated by reference to the VAT-exclusive value of the approved construction project.

Traveling and Other Incidental Expenses

Traveling and other incidental expenses should be included as part of a tender or negotiated price depending on which award procedure has been followed. Either way, a fixed price should be quoted and supported with appropriate backup detail to cover all expenses that will arise in connection with the service to be provided, insofar as they can be foreseen.

Fee Payment Stages

Payments for Design and Construction Contract services should be divided into *at least* five stages to correspond with the five discrete project stages (where services for all stages [except Feasibility Study] are awarded in a single contract):

1. Feasibility study or preliminary report stage;
2. Design stage;
3. Tender action/evaluation/award stage;
4. Construction stage; and
5. Handover stage.

Contracting authorities may opt to introduce other intermediate planning and payment stages for design services.

Continued on next page

7: Fee Agreements and Payment Arrangements, Continued

Fixed-price, lump-sum payments

Agreed fixed-price, lump-sum payments are payable on delivery of the approved project milestones (corresponding to the five discrete project stages outlined above).

Fees for Stage 1 (Feasibility study or preliminary report stage)

These fees should always be on a fixed-price, lump-sum basis and should only be paid on delivery of client-approved documentation. This provision should be clearly stated in the consultancy tender documents.

Fees for Stages 2 to 5 (Design stage, Tender action/evaluation/award stage, Construction stage, Handover stage)

Fees on a fixed-price lump-sum basis for provision of services at Stages 2 to 5 should be subdivided into milestone payments. Additions approved by the contracting authority for such issues as unforeseen client-approved extras should be added to the relevant milestone payment and the contract sum adjusted accordingly.

Percentage fee payments

Contract percentage fees are payable on delivery of the approved project milestones (corresponding to the five discrete project stages outlined above).

Fees for Stage 1 (Feasibility study or preliminary report stage)

This is always a fixed-price lump-sum, and it is payable on delivery of the agreed project milestone.

Fees for Stages 2 and 3 (Design stage, Tender action/evaluation/award stage)

Fees for Stages 2 and 3 are based on the appropriate part of the contract percentage fee applied to the approved project budget. These should be converted to fixed-price lump sums and capped as soon as the project brief and the service requirements are clearly defined (at latest, at the end of the first part of design stage 2, as described on page 3).

Fees for Stages 4 and 5 (Construction stage, Handover stage)

Fees for Stages 4 and 5 are based on the appropriate part of the contract percentage fee applied to the approved project budget (plus additional fees for client-approved extra works under the construction contract, excluding approved price variation increases where these arise). The fees for these stages should have been converted to fixed-price lump sums and capped at latest at the end of the design stage (as above) with the only additions being extra fees for client-approved additional works under the contract.

Continued on next page

7: Fee Agreements and Payment Arrangements, Continued

Examining and checking price variation claims

Where a public works contract lasts for more than 36 months, the contractor is entitled to recover increases caused by inflation in the costs of labour and materials purchased after the 36th month on that contract. This is referred to as recovery of price variation. Consultancy services for examining, checking and agreeing price variation claims, where such services are required, should be procured on a competitive basis, either by way of:

- A separate competition which envisages an independent expert being engaged to do the work;
- or –
- As part of a larger service requirement put out to tender as a package which envisages the successful tenderer doing the work.

Where the services are included in a larger requirement and tendered as a package, it should be a requirement that tenderers show in their tenders a separate lump sum fixed price for this work along with details of how it was made up, based on the estimated number of hours and hourly rates.

Interim payments

Where a fixed-price lump-sum payment is agreed for Stage 1 and where a percentage fee has been agreed and capped for Stages 2 and 3, interim progress payments are permissible at the end of each sub-division – provided the service for those stages has been satisfactorily completed. Interim progress payments for the construction and handover stages may be made by agreement provided the service for those portions of the supervision work has been satisfactorily completed.

Milestone payments for each milestone during the pre-construction stage of a project should only be paid if these are linked to satisfactory completion of service. A proportion of the milestone payment for the construction and handover stages (Stages 4 and 5) can be paid provided the same proportion of the service for the supervision work has been satisfactorily completed.

Note: See Appendix B of this document for a worked example of a model fee payment mechanism.

8: Fee Adjustments

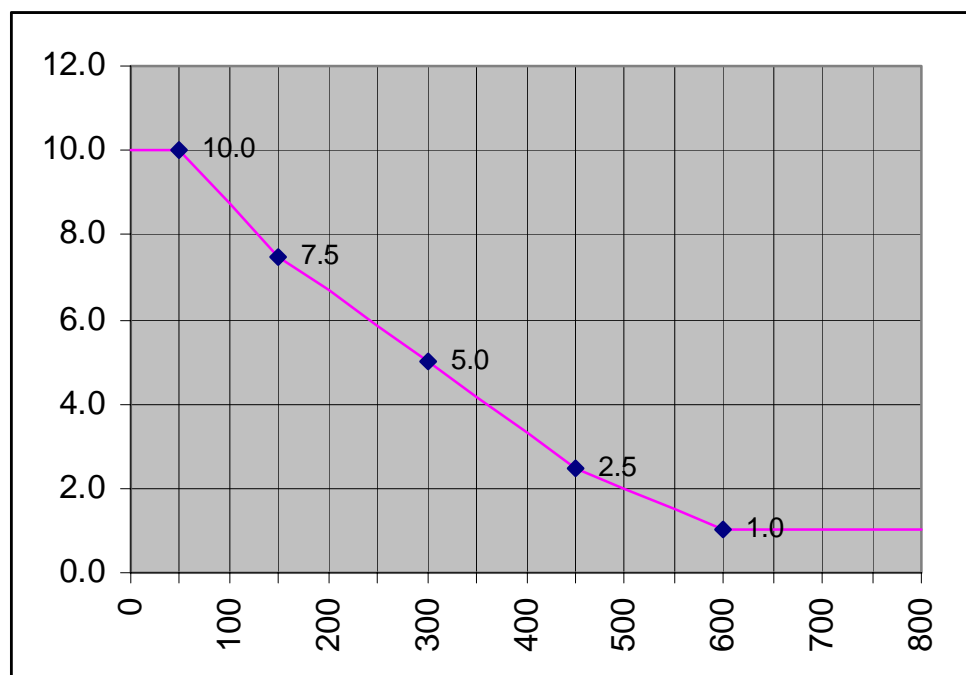
Calculating fee adjustments

If the approved construction tender price (unadjusted) deviates from the approved pre-tender budget price, the fees payable to consultants may be reduced, as follows:

- In the case of **percentage fees** capped (at latest at the end of the first part of design stage 2, page 3), the **revised** design stage fee is calculated and capped; lower than budgeted construction costs are reflected in the design fees, but higher than budgeted ones are not.
- In the case of **fixed-price fees**, the fee payable to the consultant should be reduced if the approved construction contract tender price deviates from the approved pre-tender budget price by more than a fixed percentage or amount. This percentage or amount varies with the size of the project:

For projects with budgeted construction costs of the deviation beyond which reduced fees apply is ...
Up to 50m	10% (fixed)
50m to 150m	10% to 7.5% (on a sliding scale)
150m to 450m	7.5% to 2.5% (on sliding scale)
450m to 600m	2.5% to 1% (on sliding scale)
Above 600m	1% (fixed)

Intermediate values can be determined by reference to the following chart.



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8: Fee Adjustments, Continued

Calculating fee adjustments (continued)

Where the approved construction contract tender price deviates from the approved pre-tender budget by more than the percentage/amount shown above, the consultant's fee for the Design Stage (see page 3) is reduced by the percentage that is in excess of the allowed percentage deviation.

Examples

- On a project valued at 50m, the approved tender price is 12% **higher** than the pre-tender budget: consultant's fees may be reduced by 2% (i.e. 12 – 10).
- On a project valued at 300m, the approved tender price is 12% **lower** than the pre-tender budget: consultant's fees may be reduced by 7% (i.e. 12 – 5).

Note: The approved project pre-tender estimate should be current i.e. calculated or refreshed not later than a month prior to tenders being sought. The pre-tender estimate should be based on pricing the final tender documents before issue to tenderers. Where there are Bills of Quantities, these should be priced by the consultant.

Applying fee adjustments

The fee adjustment mechanism should be applied only to the consultant(s) at fault. See the examples below.

- *Example 1:* If the **Quantity Surveyor** is negligent, then only the Quantity Surveyor's fees may be reduced using the fee adjustment mechanism.
 - *Example 2:* The **Architect**, unknown to the Quantity Surveyor, fails to include vital design/specification information in the tender documents. The Quantity Surveyor prices the Bill of Quantities based on the flawed documents, and the client approves a budget based on this. If the error is discovered during the tendering period and revised material issued to tenderers, and as a result the lowest recommended tender price is outside the margin of tolerance acceptable to the client, then the Architect is at fault and it is the Architect's fees that may be reduced using the fee adjustment mechanism. If the error is discovered during the construction stage, no extra fees will be paid; however, the work will have to be done and the Employer will have to pay the contractor for the work. (Note that this scenario represents serious shortcomings on the part of the Consultant(s), and this should be recorded for future reference.)
 - *Example 3:* A consultant **Engineer** obtains tenders for specialist mechanical and electrical works on behalf of the client after completion of the pre-tender estimate, but before return of main contract tenders, and the recommended tender for specialist works is passed to the tenderers for the main construction contract, with the requirement that it be included as part of the overall tender for the project. If the main contractor's tender price deviates from the pre-tender budget by more than the client's tolerance margin, and this deviation is due to a deviation of the cost of the specialist works, the Engineer is at fault, and it is the Engineer's fees that may be reduced using the fee adjustment mechanism.
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8: Fee Adjustments, Continued

Waiver of fee adjustments

If there is a genuine, reasonable and justifiable case why the lowest valid tender received is outside the margin of tolerance stated in the fee agreement, a contracting authority may waive the application of the fee adjustments.

If a tender is received that is significantly less than the pre-tender estimate, and the relevant Design Team member(s):

- Recommend acceptance of it; and
- State that it is exceptionally low; and
- Simultaneously submit a valid reasoned argument supporting their contention; and
- Ask that the fee adjustment not be applied,

then, if the client's in-house professional staff or other advisory staff agree that the tender is exceptionally low and bona fide, the client should waive the fee adjustment.

An exceptionally low tender price might be submitted, for example, if a tenderer mistakenly does not price a significant risk or part of the work, or prices it very low. The fee adjustment can be waived if:

- The tender price lies outside the margin of tolerance set by the client;
 - Supporting correspondence from the tenderer confirms that the risk has been priced low or not at all;
 - The tenderer agrees to stand over the tender; and
 - The Design Team's demonstrates that its calculation of what the risk should have cost accounts for the difference between the estimate and the tender price.
-

Recouping fees

If it is necessary to recoup fees, this should be done from monies due or to become due to the consultants under the contract in question or, where insufficient monies are due, from any other contract the consultant has with the contracting authority, or they may be recoverable as a debt from the consultant.

Additional payments to the contractor

If additional payments due to the contractor arise during the construction stage (in addition to the construction contract sum) for reasons for which the contracting authority is not responsible, these extra costs shall not lead to additional fee entitlements to the consultant.

Continued on next page

8: Fee Adjustments, Continued

Construction inflation

Where the cost of a project increases (due to construction inflation) from the commencement of Stage 2, there shall be no change in lump-sum fixed-price or in capped percentage fees payable to consultants.

In other words, inflation-driven increases in construction costs shall not trigger corresponding or retrospective increases in design fees.

Service adjustments

A service adjustment is a change initiated by the contracting authority in the level of service or the scope of works that it requires *after* the appointment of the consultants and after approval of the project scope.

Such adjustments usually require changes to be made in the level of fees to be paid to consultants. The sections below outline how such changes are to be handled for both reduced payments and increased payments.

Reduced payments

How reduced payment adjustments are made depends on whether the service adjustment occurs at design stage or at construction stage.

Service adjustment occurs at Design stage

Where a lump-sum fixed-price fee is agreed at appointment and the provision of reduced services has been requested, the fee for such reduced services is calculated by adjusting the lump-sum figure on a proportionate basis to reflect the work completed and by reference to the appropriate milestones. New payment milestones are then set for the remaining work up to and including contract award stage.

Where a percentage fee has been agreed at appointment, the percentage rate should be applied to the reduced value of the project, even where the fee has been capped, and revised values, or, in the case of a capped fee, revised caps should be established for the remaining work up to and including contract award (Stage 3).

Service adjustment occurs at Construction stage

Where a lump sum fixed price fee is agreed at appointment it should be adjusted on a proportionate basis to reflect the work completed by reference to the appropriate milestone. A new milestone payment based on the agreed revised figure should be set for the remainder of the construction and handover stages.

Where there is a contract percentage fee, the percentage rate should be applied to the reduced value of the project and revised caps should be established for the remainder of the construction and handover stages.

Continued on next page

8: Fee Adjustments, Continued

Increased payments

Where a capped percentage or a lump-sum fixed-price fee has been agreed at appointment and the provision of extra services has been approved, the fee for such services should be recalculated as follows.

Lump-sum payments

Pay the lesser of:

- The tendered lump-sum fee adjusted proportionately;
– or –
- The actual additional costs (based on tendered hourly / daily rates) incurred by the consultant.

New milestone payments based on the agreed revised figure should be established for those subdivisions of the stage that have yet to be completed – these can be Design stage subdivisions or Construction and Handover stages depending on the point at which the service adjustments are made.

Percentage fee payments

The percentage rate should be applied to the increased value of the project where the additional work has been approved, and revised caps should be established for the remainder of the stage to be completed – this can be the Design, Construction or Handover stage, depending on the point at which the service adjustments are made.

Appendix A: Determining the Most Economically Advantageous Tender

Introduction

In public service contracts where the criterion is the most economically advantageous tender, an appropriate mechanism should be used to evaluate quality and price. In restricted and negotiated procedures, there is a pre-qualification stage and a tender evaluation stage; in an open procedure, there is a qualification assessment before tenders are evaluated.

The balance between quality and price will vary depending on the type and complexity of the project. The mechanism in the guidance document covers all types of public sector projects. It is flexible enough to meet the need of any particular circumstance and deals with quality and price in an objective way.

Preliminaries

Before embarking on an evaluation, the contracting authority should establish the following:

- **Award criteria**, such as: (**Note:** this list is not exhaustive.)
 - Methodology for delivering the service for this project;
 - Level and break-down of resources for the project (This can be requested only if it has not been sought at the pre-qualification stage.);
 - Project team organisation (This can be requested only if it has not been sought at the pre-qualification stage.);
 - Technical merit of approach to delivering the services;
 - Credibility of the particular programme and cost control model proposed for the project;
 - Firm's approach to health and safety for this project;
 - Price.
 - **Maximum marks and percentages for award criteria:** the relative importance of each award criterion should be established by giving it a maximum mark and percentage so that the sum of all percentages equals 100. The maximum marks and percentages are the benchmark against which all tenderers will be evaluated. They should be decided and recorded in the contract notice or tender documents before a call for a qualification competition;
 - **Quality thresholds:** these are the minimum level of percentages in the quality evaluation exercise necessary for a bid to be considered further. These thresholds should be set before the call for a qualification competition (more details below);
 - **Quality/price ratio:** the quality/price ratio appropriate to the type of project under consideration should be determined. The ratio should be decided and officially recorded before a call for competition (more details below);
 - **Award mechanism:** a structured approach to the evaluation of bids for both quality and price; and
 - **Bid basis:** choosing the most economically advantageous tender criteria.
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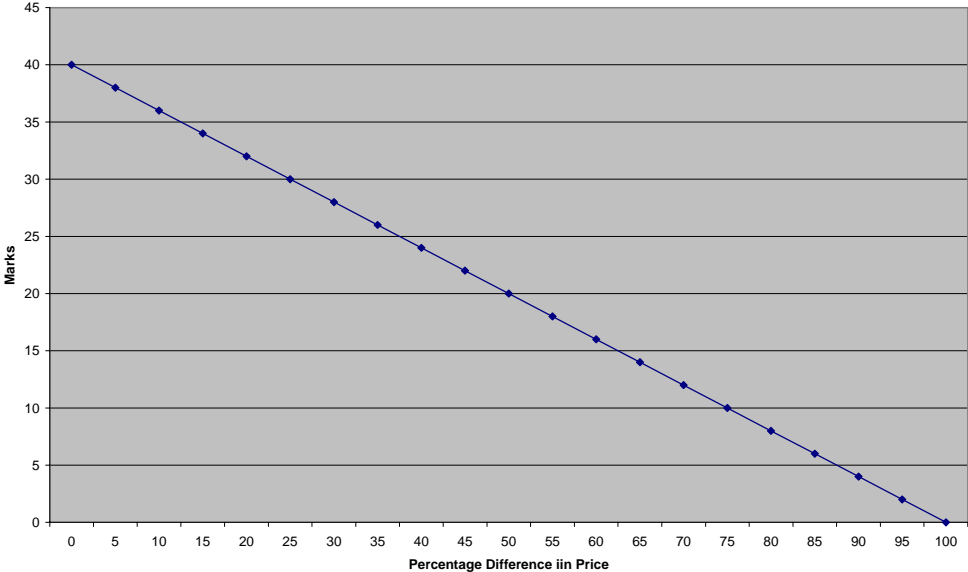
Appendix A: Determining the Most Economically Advantageous Tender, Continued

Price scoring

Maximum marks for price should be awarded to the lowest bona fide tender. Other tenders are then scored by deducting one percent of total marks for price for each percentage point difference between the lowest price and the tender price.

This is the **only approved** formulae to be used.

The chart below illustrates how total marks are influenced using this method of price scoring (assuming that the price criterion is allocated 40 marks).



Award Process

The following is a summary of the various steps involved in the award process:

Step	Action
1	Draw up tender list.
2	Prepare instruction to tenderers; decide on the appropriate balance between price and quality and include this in the tender documents.
3	Invite tenders.
4	Evaluate tenders for quality and price and compute results.
5	Notify successful candidate; issue contracts; debrief.

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Appendix A: Determining the Most Economically Advantageous Tender, Continued

Quality Threshold

To establish the minimum quality threshold, a contracting authority should set the overall quality threshold and the threshold for each criterion prior to inviting firms to tender for the service. The figures should be in the range 0 – 100, and recorded on file with the date noted. Once chosen, the thresholds must not be changed, as they set the minimum standard that must be met or exceeded by all tenderers wishing to have the price part of their tender evaluated – see model award mechanism, below.

Quality / Price Ratio

An assessment panel should be established to determine the quality/price ratio appropriate to the complexity of the project. The mechanism developed for the selection and award processes should ensure that the tenderer providing best value for money is appointed. It is essential that the quality/price assessments are established very early on in the process and in any event before tenders are invited. If this is not possible, it must be completed not later than the latest date set for receipt of tenders, so that the ratio is not influenced by subjective decisions during the tender evaluation process.

The weighting of quality against price can vary significantly between projects depending on how complex, imaginative and flexible their delivery needs to be. The following sets out the range within which quality and price can fluctuate:

- **Price** from as low as 20% to as high as 80%
- **Quality** from as low as 20% to as high as 80%

Note: The Quality/Price Ratio is project-specific, and once decided is not subject to change for different Design Team members on the same project.

Range of Quality / Price Ratios

Indicative range of quality/price ratios for various categories of projects are as follows:

Category of project	Ratio	
	Quality	Price
Feasibility report and investigations	80	20
Innovative and imaginative design projects; Major conservation and restoration projects	80	20
Most construction projects	70	30
Repeat* and straightforward projects	40	60
Straightforward repairs and maintenance projects	20	80

* An example of a repeat project would be a standard school building design built in several locations. The initial design may be in a higher category, but subsequent implementations would be in the lower category.

Appendix A: Determining the Most Economically Advantageous Tender, Continued

Assessment of Tenders

Tender information relating to both quality and price must be simultaneously available to the assessors at the beginning of the tender assessment exercise.

Quality should be marked and the total marks for quality should then be merged with the marks for price using the quality/price ratio mechanism, resulting in the establishment of the offer which represents the most economically advantageous tender. A worked example of this model is illustrated on the following pages.

Note that the evaluation is based on the actual proposal for the project, including the particular project team proposed (provided they have not already been assessed at pre-qualification stage). Evaluation of the firm should already have been carried out at pre-qualification stage.

Time spent on careful evaluation during the award processes will pay dividends during delivery of the service.

Exceptionally low tender

Where an exceptionally low tender price is received, it should be fully investigated and only if it is found to be bona fide and acceptable should it be allowed into the price evaluation part of the procedure. In the case of tenders covered by EU Directives, exceptionally low tenders should be investigated following the procedures set out in those Directives.

Tender Evaluation Panel

A tender evaluation panel should be set up at a very early stage, and certainly no later than the latest date set for receipt of tenders.

It should be responsible for the following:

- Setting up the quality/price mechanism;
- Ensuring that the request for tender (RFT) document issued is so structured as to elicit appropriate responses to which the mechanism can be applied; and
- Applying the mechanism to all bona fide tenders returned.

The tender evaluation panel should consist of personnel who are able to establish an informed view on the issues before them. In the best interest of transparency and openness, the tender evaluation panel should be formally constituted. For construction projects over 5m (excluding VAT), the formally constituted panel should have at least one impartial outside member from a public body.

This procedure may be adopted for contracts of lower value if a contracting authority so desires, particularly for prestigious or complex projects. For ethical reasons, members from professional bodies who act in a consultancy capacity for commercial gain should not be appointed to panels. If a contracting authority deems it necessary to have different personnel on the qualitative assessment panel and the tender assessment panel it may do so, provided the requirement is officially recorded.

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Appendix A: Determining the Most Economically Advantageous Tender, Continued

Model Award Mechanism

The example below shows how the quality/price mechanism is used during the evaluation of tenders.

MODEL AWARD MECHANISM EXAMPLE								
QUALITY TO PRICE RATIO	70% : 30%							
Maximum Quality Marks (70% x 10)	700						Maximum Price Marks (30% x 10)	300
Minimum Quality Threshold for each Quality Criterion	40%						Minimum Overall Quality Threshold	50%
FIRST STAGE - QUALITY <i>Worked Example of Quality Assessment of Tender</i>								
QUALITY SCORES			Consultant Firm					
NOTE: Each quality criterion carries a separate maximum score	Max. Quality Marks	% of Total Quality Marks	A	B	C	D	E	
1. Firm's Management Systems (100)	80	11.40%						
(a) Firm's Management Systems	40	5.70%	30	19	35	30	35	
(b) Firm's Risk management procedures	40	5.70%	30	18	30	35	25	
2. Project Delivery(100):	160	22.80%						
(a) Understanding of the service contract brief	80	11.40%	55	30	47	60	60	
(b) Detailed statement of how services will be delivered on time	80	11.40%	38	32	60	55	40	
3. Workload & Resources	110	15.70%						
(a) Staff Resources committed to Project incl backup resources	70	10.00%	55	28	60	25	30	
(b) Workload of Project staff	40	5.70%	38	17	35	25	18	
4. Technical Ability of Project Staff (200):	250	35.70%						
(a) Qualification & experience & ability of Project Staff	120	17.10%	80	52	95	45	75	
(b) Project Staff's H&S training, knowledge & experience	60	8.60%	35	25	50	23	50	
(c) Ability to innovate (e.g. on projects of similar size & nature)	40	5.70%	35	18	35	30	25	
(d) Project Staff's communication skills	30	4.30%	30	20	25	25	20	
5. Approach to Health & Safety (50):	100	14.30%						
(a) Firm's Systems & procedures for safety in design	50	7.10%	35	25	40	35	50	
(b) Methodology for hazard identification & risk control	50	7.10%	30	20	45	35	35	
Total Quality Marks	700	100%	491	304	557	423	463	
Is Total over Minimum Overall Quality Threshold of (350) and each criterion above 40% of available marks?			✓	✗	✓	✗	✓	
SECOND STAGE - PRICE <i>Worked Example of Price Assessment of Tender</i>								
PRICE SCORES			Consultant Firm					
(One % deducted for each % difference)	Max Marks		A	B	C	D	E	
LUMP SUM or PERCENTAGE FEE			€150,000	DNQ	€141,000	DNQ	€115,000	
% difference from lowest Price (Lowest Fee = 100%)	0%		-13%	N/A	-23%	N/A	0%	
Total Price Marks								
(Max marks/difference % * max marks/100))	300		260.9	N/A	232.2	N/A	300	
THIRD STAGE - QUALITY AND PRICE <i>Worked Example of Quality/Price Mechanism</i>								
QUALITY AND PRICE SCORES			Consultant Firm					
	Max Marks		A	B	C	D	E	
Total Quality Marks	700		491	DNQ	557	DNQ	463	
Total Price Marks	300		260.9	N/A	232.2	N/A	300	
Total Quality and Price Marks	1000		751.9	DNQ	789.2	DNQ	763	

Appendix B: Worked Example of Model Fee Payment Mechanism

Introduction

This example is for a construction project on a green field site, with a building budget of 30.27m (26.67m plus VAT), and an agreed fee of 5.5% for design services on the VAT-exclusive capital cost of the project. This example illustrates how the fee would be calculated for each capped stage of a project, as set out in Chapter 7.

Pre-Contract		
Stage	Fee agreed	Worked Example
i) Feasibility Study /Preliminary Report/Development Plan	Lump-sum, fixed-price	A tender cost of 25,000 for a report/study as a lump-sum fixed-price (see paragraph 4.2[i]). If the study/report becomes part of an ongoing commission, even though separate contracts may have been entered into, the fee for the report/study should be subsumed into the general fee for the project. Net amount payable for stage i = 25,000 plus VAT @ 21% = 30,250
ii) Design Stage		
Subdivision ii.a. Outline sketch scheme; Design proposal	20% of fee (cumulative)	5.5% of 26.67m x 20%, less Stage 1 fees where this is part of an ongoing commission. = 293,370 – 25,000 = 268,370 +VAT @ 21% = 324,728 Net amount payable for subdivision (ii.a)
Subdivision ii.b. Developed sketch scheme	35% of fee (cumulative) <i>Fees are capped at the end of subdivision ii.b</i>	5.5% of 26.67m x 35%, less amount paid to date. = 513,398 – 293,370 = 220,028 +VAT @ 21% = 266,234 Net amount payable for subdivision (ii.b)
Subdivision ii.c Tender Documents (Detail design, specifications, bill of quantities, latest approved cost estimate)	70% of fee (cumulative)	5.5% of 26.67m x 70%, less amount paid to date. = 1,026,795 – 513,398 = 513,398 +VAT @ 21% = 621,211 Net amount payable for subdivision (ii.c)

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Appendix A: Determining the Most Economically Advantageous Tender, Continued

Scenario: At the end of this stage, a delay of 12 months occurs, and over that period, construction inflation is 8%.

The revised estimate, allowing for this inflation, is 28.8 million (excluding VAT).

The gross fee of 1,026,795 paid for stages i, ii.a, ii.b and ii.c is not adjusted for inflation, which, if permitted, would amount to an additional fee of

$$1,026,795 - ((28,800,000 \times 70\%) \times 5.5\%)$$

$$= 82,005 \text{ plus VAT @ 21\%}$$

$$= 99,225 \text{ (Net, not paid)}$$

Stage	Fee agreed	Worked Example
iii) Tender Action/ Evaluation/Award Stage Issue tender documents; examine tenders received; make recommendations; appoint Contractor.	75% of fee (cumulative) <i>Fees capped at the end of Stage iii.</i> Note: Where tenders deviate from approved pre-tender budget by more than 10%, see page 27 ff.	Approved revised cost estimate of 28.8 million 5.5% of 26.67m x 70% = 1,026,795 Plus 5.5% of 28.8 m x 5% = 79,200 Less 1,026,795 paid to date = 79,200 + VAT @ 21% = 95,832 Net amount payable for Stage iii. ex VAT.

Scenario: The lowest most suitable tender comes in at 34.76 million. As this is more than the approved pre-tender estimate of 28.8 million, fees are not payable on the increase. Moreover, as the tender deviates from the budget by more than 10%, a deduction is to be made from the Stage ii fee. The result is a revised Stage ii fee, calculated as below:

$$\text{Original stage ii fee: } 5.5\% \times 26.67\text{m} \times 70\%$$

$$= 1,026,795$$

The deviation from the approved pre-tender budget is 20.7%. The percentage in excess of 10% is 10.7%. The Stage ii fee is thus reduced by:

$$1,026,795 \times 10.7\%$$

$$= 109,867$$

$$\text{Revised fee} = 1,026,795 - 109,867$$

$$= 916,928 \text{ plus VAT @ 21\%}$$

$$= 1,109,483$$

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Appendix A: Determining the Most Economically Advantageous Tender, Continued

Contract		
<p>iv) Construction Stage Contract administration and supervision during construction</p>	<p>20% of fee on adjusted contract price (approved)</p>	<p>Final account agreed with Contractor excluding price variation is 36.51 million (34.76m + 1.75m – includes 1m unapproved extras). Fee payable for this stage is calculated as follows: $5.5\% \times (34.76\text{m} + 0.75\text{m for approved extras}) \times 20\%$ = 390,610 + 21% VAT = 472,638 Net amount payable for Stage iv. (Fees <i>not</i> payable on 1m = $5.5\% \times 1\text{m}$ = 55,000 + VAT = 66,550.)</p>
<p>v) Handover Stage Documentation preparation and hand-over, including advice on use of documentation</p>	<p>5% of fee on adjusted contract price (approved)</p>	<p>$5.5\% \times (34.76\text{m} + 0.75\text{m}) \times 5\%$ = 97,653 + VAT @ 21% = 118,160 Net amount payable for Stage v.</p>

Appendix C: Model Statistical Report Form

Introduction Each Sanctioning Authority is required to submit annually to the Department of Finance statistical information on the operation of these procedural arrangements in the Sponsoring Agencies under their aegis. The information required is in summary form as below:

	Number of Contracts					Total (cols 2 to 5)
	... where reduced fees were paid (1)	... awarded under restricted procedure, lump sum (2)	... awarded under restricted procedure, percentage (3)	... awarded under competitive negotiated procedure (4)	... awarded under non-competitive negotiated procedure (5)	
Contracts for fees of 10,000 or less						
Architects						
Quantity Surveyors						
Civil & Structural Engineers						
Building Services Engineers						
Other construction consultants						
Contracts for fees between 10,000 and 150,000						
Architects						
Quantity Surveyors						
Civil & Structural Engineers						
Building Services Engineers						
Other construction consultants						
Contracts for fees over 150,000						
Architects						
Quantity Surveyors						
Civil & Structural Engineers						
Building Services Engineers						
Other construction consultants						

Appendix D: Glossary

Affordable budget/pre-tender budget

An approved, realistic cost estimate for a construction project set no later than one month before tenders are sought, to use as a base for assessing tender responses.

Client

A **contracting authority** who is engaged in commissioning construction projects and who requires the services of a **consultant** to provide services such as:

- Surveys
- Feasibility study
- Preliminary report
- Development plan
- Design
- Audit design
- Cost control
- Advice on statutory requirements
- Advice on fire prevention requirements
- Project management
- Administration of contract
- Supervision of contract.

Note: The foregoing list is not an exhaustive list of services which a client may seek under these procedural arrangements. – see category 12 in Annex XVII of Directive 2004/17/EC and Annex II of Directive 2004/18/EC

Client-approved documentation

Project documents which have been examined by the **contracting authority**, found acceptable, and signed off by them as meeting their requirements.

Competitive fee

A fee that has been tendered by a consultancy firm in an open or restricted tender competition and which represents good value for money.

Contracting authority

A government department or office, or a body under the aegis of such a department or office, including local authorities and other relevant bodies, that provide public services through the procurement of public works and construction-related services (see Department of Finance circular 33/06, issued 27 October 2006).

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Appendix D: Glossary, Continued

Construction contract services

The consultancy services provided after an award of a main construction contract through to final completion, approval of final account and issue of final certificate.

Design team

Members of a multi-discipline team engaged to work in close cooperation with each other on a construction project, and including two or more of the core construction professional disciplines:

- Architecture
- Civil Engineering
- Structural Engineering
- Mechanical and Electrical Building Services Engineering
- Quantity Surveying

A **contracting authority** employing a design team should, in order to ensure effective design and execution of a project, employ only **consultants** who are capable of working together as a team.

Employer

See *Sponsoring Agency* below.

Feasibility study

An initial or outline study to ascertain the overall viability of the project or options prior to commencing major studies and cost commitments.

Feasibility study/ preliminary report/ development plan

The output from consultancy service provided for a survey and/or at inception stage of design through to start of outline sketch scheme or equivalent (for building contracts) or to the start of the design stage for engineering contracts.

Independent scrutiny

The engagement of a skilled professional advisor acquired from in-house resources, from a parent Department, from the wider public service or from the private sector to assess the veracity of estimates for construction works put forward by design consultants.

Milestone payments

Payments made when pre-defined elements of a project have been satisfactorily completed.

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Appendix D: Glossary, Continued

Pre-construction contract services	The consultancy services provided following approval of feasibility study/preliminary report/development plan through to approval of award of a construction contract (i.e. combined design stage and tender action/evaluation/award stage).
Price variation	The increase or decrease in cost of labour, materials and fuel/power due to inflation or deflation which may be recoverable under a construction contract.
Principal consultant	A key member of the core construction professional disciplines engaged on a project and allocated the task of coordinating the functioning of the Design Team .
Progress payment	An installment paid on account for work satisfactorily carried out based on an assessment of the extent of the work completed rather than on the achievement of a specific target.
Project	The construction of a physical asset, or the repair, upgrading or replacement of elements of an existing asset, to meet a contracting authority's requirements.
Public service contract	A contract for pecuniary interest which is concluded in writing between a contracting authority and a consultant engaged to provide a service on a public or publicly funded construction project in the public or utilities sectors.
Quality threshold	The overall minimum safe level of quality, measured through weighted scoring, that is required from a consultant organisation to fulfill its role on the project adequately.
Restricted procedure	A methodology used to obtain competitive tenders from consultancy firms that have met the eligibility criteria permitting them to participate in a particular tender competition.
Sanctioning authority	The body (typically, the Government Department or Local Authority) that is responsible for approving a project, within specified parameters of cost, time and standards.

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Appendix D: Glossary, Continued

Scoping contract A contract with a specialist advisor engaged to assist a **contracting authority** to clearly identify and define its output requirements (specification).

Service contract brief A **client's** brief defining the standard, quality and extent of design services required. The **client's** requirements must be set out in adequate detail in the form of output specifications, including a programme for the delivery of the service.

Service provider Any natural or legal person, including a public body, who offers design consultancy services to **clients**.

Sponsoring agency The body – which may be a Government Department, Local Authority, health agency, or other State body or agency – that either has or is responding to the requirement for the project. The sponsoring agency has the overall responsibility for proper planning and management of the project, and for seeking the approval of the **Sanctioning authority** for the original project proposal and for any material change subsequently introduced. When contracts are signed with consultants and contractors, the sponsoring agency is known as the **contracting authority** or the **employer**.

Sub-consultant A professional advisor who is involved only on the periphery of the core services being provided, and is retained by one of the appointed Consultants.

Third-party verification An assessment by an independent person (Principal Officer or equivalent) in a Department/parent Department, who is sufficiently removed from the project in question and who is competent as a credible third-party with sufficient knowledge of public procurement rules, to check that the procedure adopted is correct. In all cases the assessment by the third-party verifier must be certified on file to ensure transparency.
