

Employer Instructions

Letter of Acceptance

Introduction

Once a Letter of Acceptance is issued¹ to the successful tenderer, a binding contract is created with that tenderer and the particular procurement procedure² is brought to a close. If the value of a contract is above the EU threshold the rules in Article 35(4) of Directive 2004/18/EC, as implemented into Irish law by Regulation 41(1) of SI No 329 of 2006 (regarding the publication of an award notice in the OJEU within 48 days of issue of Letter of Acceptance) apply. If the contract value is below the EU threshold there is no requirement to publish an award notice.

Up to contract award

Automatic suspension

For contracts above the EU threshold, the standstill period referred to in Regulation 5(4) of SI No 130 of 2010 applies and a contract cannot be concluded until the expiry of that period. The Letter of Acceptance should therefore not be issued until after the standstill period has expired as, otherwise, the contract may be found to be ineffective. Furthermore, a contract cannot be concluded if, prior to conclusion of the contract, an unsuccessful candidate or tenderer applies to the Court for a review of the Employer's decision about the award of the contract. Where such an application is made, the Employer is automatically prohibited from concluding the contract until either (i) the Court determines the matter; (ii) the Court gives the contracting authority leave to lift the suspension; or (iii) the case is discontinued. Under Regulation 8(4) of SI No 130 of 2010, the unsuccessful candidate or tenderer must notify the contracting authority in writing, in advance of initiating proceedings, of (i) the alleged infringement (ii) its intention to make a Court application and (iii) the matters that, in its opinion, constitute the infringement.

Applicant's notice of intent

Where a candidate or tenderer has served a notice of its intention to make a Court application, the Employer will only know if the intent has been carried through when a copy of the originating motion arrives, which may be some time after the standstill period has expired. Where the Employer has received a notice of intent but not a copy of the originating motion and is deciding on how to proceed it should check with the Central Office of the High Court, before creating the contract, to find out if the originating motion has been lodged.

Continued on the next page

¹ Please note that this only applies to PW-CF1-5 and that in the case of PW-CF6 the Tender Acceptance on the back of the Form of Tender (FTS6) should be used.

² The open; restricted; competitive dialogue or the negotiated procedure

Letter of Acceptance Continued

Ineffectiveness Where the Employer has made an award during the standstill period, or has allowed the period to elapse but has then proceeded with an award despite the making of an application to Court by a candidate or tenderer prior to the conclusion of the contract, the contract so formed may be found to be ineffective. The Employer's liability to the party awarded the contract is set out in Forms of Tender FTS 1 to FTS 5 for contracts PW-CF1 to PW-CF5 which state "*We agree that if any contract formed by acceptance of this Tender is determined void, voidable, unenforceable, or ineffective, any damages for which you may be liable will not exceed the amount that would have been payable under clause 12.6 of the conditions of the contract on termination under clause 12.5 of the Conditions of Contract.*"

Documents that form the contract All the documents that form the contract are to be listed in the Letter of Acceptance when issued. These are:

1. Letter of Acceptance

See Model Form MF 1.4.

2. The Agreement

One of the Agreements for contracts PW-CF1 to PW-CF5. The signing and sealing (if required) of the Agreement normally takes place after the Letter of Acceptance is issued and the execution should be in accordance with Particulars to section 10.5 of ITTW1 and ITTW2.

3. The Conditions

One of the following documents:

- PW-CF1 Public Works Contract for Building Work Designed by the Employer
- PW-CF2 Public Works Contract for Civil Engineering Work Designed by the Employer
- PW-CF3 Public Works Contract for Building Work Contractor Design
- PW-CF4 Public Works Contract for Civil Engineering Work Contractor Design
- PW-CF5 Public Works Contract for Minor Building and Civil Engineering Work Designed by the Employer.

4. The Form of Tender and Schedule

One of FTS 1 to FTS 5 documents, fully completed by Employer and successful tenderer. If the Particulars in ITTW1 or ITTW2 stated that the Agreement is to be sealed, then the Particulars to section 5.14 of ITTW1 or 5.12 of ITTW2 should also state that the Form of Tender is to be sealed at the time of submission. The Form of Tender (sealed if required), together with the completed Schedule (Parts 1 and 2), should be attached to the Letter of

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Letter of Acceptance Continued

Documents that form the contract continued

Acceptance. Part 1 should have been filled in by the Employer (i.e. details of the Works Requirements, details of the Pricing Document and, where relevant, details of the Novated Design Documents) at the time when the tender documents were issued. Part 2 of the Schedule should have been filled in by the successful tenderer and included as part of their tender submission

5. The Works Requirements

The Works Requirements should be comprehensively detailed in Part 1B of the Schedule prior to issue to tender. A typical list of Works Requirements that could be identified in Part 1B can be found at Appendix F of guidance note *Public Works GN 1.5*. The Works Requirements documentation can be identified by means of title, date and unique number if this is appropriate.

6. The Pricing Document

The Pricing Document should be identified in Part 1B of the Schedule prior to issue to tender. The content of a Pricing Document is prescribed in section 2.6.3 of guidance note *Public Works Contracts GN 1.5*. **The priced version of this document included as part of the tender submission with the tender is the contract document.** The Pricing Document can be identified by means of title, date and unique number if this is appropriate.

7. The Works Proposals

The Works Proposals required to be submitted by the tenderer should be as called for in Part 1B of the Schedule – these detail how the tenderer proposes to carry out the works using headings provided by the Employer. The Works Proposals should identify the tenderer's specialists where they have been prequalified with the tenderer. If the Employer named specialists in the Works Requirements then the tenderer should name the specialists selected from the panel(s) that it proposes to use or confirm that one from the panel will be used. If the tenderer was allowed to choose specialists then the names of those proposed and acceptable to the Employer, should be included. The Works Proposals submitted with the tender should also include a detailed programme in accordance with Clause 4.9.1 (PW-CF1 –PW-CF5). For more details on what might be included in the Works Proposals see section 1.1.1 of guidance note *Public Works Contract GN 1.5*. The Works Proposals can be identified by means of title, date and unique number if this is appropriate.

8. Any Novated Design Documents

Design work carried out by the Employer's design consultants where design consultants are being novated to the successful tenderer in a design and build context. For more details see section 2.2. of guidance note *Procurement Process for Works Contractors GN 2.3*. The Novated Design Documents can be identified by means of title, date and unique number if this is appropriate.

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Letter of Acceptance Continued

**Documents
that form
contract
continued**

9. Post tender Clarifications

The extracts from the minutes of any pre-award clarification meeting that have a contractual significance should be stated in the Letter of Acceptance. Care needs to be taken to ensure that matters irrelevant to the Contract are not included. For more details see section 4.2 of guidance note *Procurement Process for Works Contractors GN 2.3*.

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