

Client¹ Instructions

Letter of Acceptance

Introduction

Once a Letter of Acceptance is issued to the successful consultant, a binding contract is created and the particular procurement procedure² is brought to a close. If the value of a contract awarded 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 in the OJEU.

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 this period. The Letter of Acceptance should therefore not be issued until after the standstill period has expired otherwise the contract may be declared to be ineffective, which means that there was no contract in the first place. 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 Client's decision about the award of the contract. Where such an application is made, the Client is automatically prohibited from concluding the contract until:

- (i) the Court determines the matter;
- (ii) the Court gives the Client 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 Client in writing, in advance of initiating proceedings:

- (i) of the alleged infringement;
 - (ii) of its intention to make a Court application, and
 - (iii) the matter in its opinion constitutes the infringement.
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Applicant's notice of intent

Where a candidate or tenderer has served a notice of its intention to make an application to the Court, the Client will only know if such an application has been made when it receives a notice from the applicant that it has made the application (in accordance with Regulation 5(2) of SI No 420 of 2010). This notice should be sent immediately after the Originating Notice of Motion has been lodged with the Central Office of the High Court. A copy of the Originating Notice of Motion should be served on the Client as soon as practicable after the application has been made. If a Client does not receive the relevant notice it may mean that the applicant is not proceeding with the request for a review, however in order to be certain the Client should, before proceeding, check with the Central Office of the High Court to see if an Originating Notice of Motion has been lodged.

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¹ Contracting Authority

² An open or restricted procedure

Letter of Acceptance, Continued

Applicant's notice of intent, Continued

Failure of an applicant to serve the appropriate notice in accordance with Regulation 5(2) may result in Court deciding to throw out the application

Ineffectiveness

Where the Client has made an award during the standstill period, or has proceeded with an award after the standstill period despite a candidate or tenderer having made an application to Court for a review, the contract so formed may be found to be ineffective. If this is the case the Client's liability to the party awarded the contract is set out in Form of Tender FTS9 or FTS10 for the Conditions of Engagement COE-1 and COE-2 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 14.29 of the Conditions of Engagement on termination under clause 14.9 of the Conditions.*"

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 2.2.

2. The Agreement

The Agreement is an integral part of the Conditions of Engagement and should be signed and sealed (if required). This normally takes place after the Letter of Acceptance is issued. The execution of the Agreement should be in accordance with section 5.12 of ITTS1(a), ITTS1(b), ITTS2(a) and ITTS2(b) and the *Particulars* to the ITT.

3. The Standard Conditions of Engagement

The Standard Conditions of Engagement is to be one of the following documents:

- COE-1 Standard Conditions of Engagement for Consultancy Services (Technical)
- COE-2 Standard Conditions of Engagement for Archeological Services.

4. The Form of Tender and Schedule

The Form of Tender and Schedule is either FTS9 or FTS10, fully completed by the Client and the successful tenderer. If the *Particulars* in ITTS1(a), ITTS1(b), ITTS2(a) or ITTW2(b) state that the Agreement is to be sealed, then the *Particulars* to section 5.12 of ITTS1(a), ITTS1(b), ITTS2(a) or ITTW2(b) 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 completed Schedule Parts A and B, should be attached to the Letter of Acceptance. Schedule Part A (other than identity of Consultant) and part of Part B should have been filled in by Client prior to issue as part of the tender documents.

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Letter of Acceptance Continued

**Documents that
form the
contract**
Continued

The identity of the Consultant in Schedule Part A and remaining part of Schedule Part B should have been filled in by the successful tenderer and included as part of its tender submission

5. The Brief

The Brief identified under 2.7 Schedule A prior to issue to tender. The Brief should be a clear, comprehensive and inclusive statement of the Client's requirements. The Brief documentation can be identified in Schedule A by reference to title, date and unique number if this is considered necessary.

6. The Pricing Schedule

The Pricing Schedule should be identified under 2.7 Schedule A. It should include a detailed breakdown of the tender price submitted. The Pricing Document can be identified in Schedule A by reference to title, date and unique number if this is appropriate.

7. The Service Requirements

The services required should be clearly set out in detail in Schedule Part B under *CONSULTANT'S STAGE SERVICES* and *MANAGEMENT SERVICES* before the Form of Tender and Schedule are issued to tenderers.

8. Declarations and other tender information

If there is a need for a Consultant to provide certain declarations or Parent Company Guarantees etc which should be included in the Contract these should be referred to here.

9. Any content of other documents identified

If there is any Consultant's document that requires to be included in the Contract it should be referred to here.

10. Warranty Agreements

If there are any Sub-Consultant Warranty Agreements to be included in the Contract they should be referred to here.

8. 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.

9. Professional Indemnity Insurance Certificate

A fully complete Model Form MF 2.1 signed by an approved Broker or Insurance Underwriter should be included as part of the Contract.

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