

Employer Instructions

Letter to Unsuccessful Tenders (MF1.2a) – Procurement Above EU Threshold

Introduction

The content of the letter to unsuccessful tenderers will depend on whether the contract being awarded is above or below the EU threshold, and also whether or not it is excluded from the rules in the Directives. The Directives referred to are Directive 2004/18/EC, as implemented into Irish law by SI No 329 of 2006, and Directive 2007/66/EC, as implemented into Irish law by SI No 130 of 2010. If the rules apply, the notification will have to be in accordance with Regulation 49(1)–(2) of SI No 329 of 2006 and Regulations 5 and 6 of SI No 130 of 2010.

Notice

When the tender evaluation in relation to a procurement governed by the rules in the Directives is complete, whether on the basis of ‘the most economically advantageous’ or ‘lowest price’ mechanisms, the result should be conveyed in a letter to all unsuccessful tenderers that have not been definitively excluded from the process and to any candidate that has not already been provided with information about the rejection of its application¹

Standstill Letter

Regulations 5 and 6 of SI No 130 of 2010 require the Employer to give notification to tenderers and candidates concerned of the decision to award (or not award) the contract or the framework agreement. This notification (or “standstill letter”) should contain:

- the exact standstill period;
- a summary of the reasons for the rejection of a tender: in the case of a tenderer that has made an admissible tender (i.e. a tender that qualifies for evaluation under the rules of the competition), this is provided by giving the characteristics and relevant advantages of the successful tender, relative to the tender receiving the letter (or where relevant the reasons for non-equivalence on technical specifications); and
- the name of the successful tenderer or the parties to the framework agreement.

In giving the information as to the reasons, the standstill letter should disclose the marks given to the unsuccessful tenderer and the successful tenderer against each award criterion (including sub-criteria).

Model letter MF 1.2(a) includes all elements cited in Regulation 6 (but see further below).

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¹ Excluded candidates in a restricted procedure should be provided with the reasons for the rejection of their application as soon as possible after the pre-qualification phase, so that they are no longer considered “candidates concerned” at the time of issue of the standstill notice.

Letter to Unsuccessful Tenders (MF1.2a) Continued

Notice continued

There may be occasions when ‘*a summary of the reasons*’, provided by setting out the marks awarded to the unsuccessful tenderer and successful tenderer, is not sufficient, and a more detailed narrative has to be provided (see below). It is important that sufficient information is given to the disappointed participant so that it is placed in a position to decide whether or not it can, or should, seek to review the award.

Where it is decided that giving the marks only is insufficient to satisfy this requirement, the standstill letter can be amended to include a written narrative setting out further detail on the reasons for rejection of the tender (which may include further detail on the characteristics and relative advantages of the successful tenderer).

While Regulation 49(3) of SI 329 of 2006 has been revoked, Article 41(2) of Directive 2004/18/EC still contains a requirement to specifically inform any unsuccessful candidate or tenderer ‘*of the reasons for the rejection*’ of its application or tender or to inform any tenderer that ‘*has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.*’ The information has to be given within 15 days of a written request from the disappointed candidate or tenderer. The obligation contained in Article 41(2) is arguably broader than that contained in Regulation 6 of SI No 130 of 2010 as Regulation 6 refers to a ‘*summary of the reasons*’ whereas Article 41(2) does not limit the reasons to a summary. Accordingly, the standstill letter should disclose the full reasons in order to avoid a requirement to provide further reasons upon written request from a disappointed candidate or tenderer. Depending on the circumstances, the information in model letter MF1.2(a) parts 4 and 5 may be adequate and could in theory meet the requirements in Article 41(2) of Directive 2004/18/EC, as well as satisfying Regulation 6 of SI No 130 of 2010, but it may be necessary on occasions to provide a more detailed narrative to avoid having to give additional information following receipt of a written request under Article 41(2).

Standstill period

If the contract is above threshold, the Employer is generally required to apply a standstill period following notification of the contract award decision to unsuccessful tenderers, during which the contract cannot be concluded. In accordance with Regulation 6(2)(b) of SI No 130 of 2010 there are two standstill periods referred to in the model letter MF 1.2(a) i.e.:

- 14 calendar days if the standstill letter is sent electronically; or
- 16 calendar days if the standstill letter is sent by any other means

The Regulations require that “at least” the standstill period referred to above be given.

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Letter to Unsuccessful Tenders (MF1.2a) Continued

Notice Continued

There are a number of issues to watch in regard to the standstill period to avoid invalidating the required notice process, in particular a failure to give sufficient reasons for the decision (the standstill period may not start until sufficient reasons are given, even if the standstill letter has issued).

Brackets

Square brackets throughout the letter should be removed together with text and new text inserted where instructed.

Letter to Successful Tenderer

In keeping with the requirements of Regulation 5(3) of SI No 130 of 2010 that *‘the standstill period for a contract begins on the day after the day on which each tenderer concerned is sent a notice’* the letter to the successful tenderer should therefore issue on the same date as the letter to the unsuccessful tenderers.

Debriefing meeting

Where the standstill notice contains all the information necessary to meet the requirements of Regulations 5 and 6 of SI 130 of 2010 and the Employer considers that the unsuccessful tenderer has sufficient information to decide whether or not it can, or should, seek to review the award, authorities may take the view that there is no additional information to be given at a debrief and that no debrief should be offered. If, in particular circumstances, it is considered appropriate to hold a debrief meeting, it should be before or on the same day that the ‘standstill’ letter is issued.

Contract Award Suspension

If the contract is above threshold, the Employer cannot conclude the contract during the applicable standstill period. If an unsuccessful candidate or tenderer applies to the Court prior to conclusion of the contract, the Employer is automatically prohibited from concluding the contract until (i) the Court determines the matter; (ii) the Court gives the contracting authority leave to lift the suspension; or (iii) the case is discontinued. 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 matter that in its opinion constitutes the infringement.

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