

## **Employer Instructions**

### **Letter to Successful Tender (MF1.2d) – Procurement Above EU Threshold**

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#### **Introduction**

The content of the letter to the successful tenderer 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. Where the contract is above the EU threshold and is not excluded from the rules in the Directives then the notification will have to be in accordance with Regulation 5 (3) of SI No 130 of 2010.

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#### **EU rules**

When the tender evaluation in relation to a procurement that is governed by the rules in the Directive is complete, whether on the basis of the ‘most economically advantageous’ or the ‘lowest price’ mechanisms, the result should be conveyed in a letter to the successful tenderer informing it of the result of the competition. The letter should be headed ‘Subject to Contract/Contract Denied’ and it should clearly state that it is not a Letter of Acceptance and that the Employer has not accepted the tender. The letter will normally indicate that the Employer’s intention to award the contract to the tenderer is conditional<sup>1</sup> on certain obligations being fulfilled by the apparently successful tenderer before a contract is awarded (eg the provisions of bonds, insurances, tax compliance certificates, Departmental approval, etc.). Furthermore, the letter should state the standstill period applicable to the contract and when it is intended to issue the Letter of Acceptance, subject to there being no legal challenge and the obligations stated being complied with. Where the ‘most economically advantageous’ criterion has been used the letter should also state the marks given for each award criterion so as to assist the successful tenderer in improving its performance for future competitions. Model letter MF1.2d incorporates all of the requirements set out above and should be used.

#### ***Standstill Period***

In keeping with the requirements of Regulation 5(3) of SI No130 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.

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<sup>1</sup> This should relate to checking that certain contract requirements can be put in place and that such requirements have been clearly identified in the tender documents. If substantive discussions take place in regard to these requirements after the issue of letter there is a real possibility that the procurement process would be invalidated.

## Letter to Successful Tender (MF1.2d) – Procurement Above EU Threshold *Continued*

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### EU rules *continued*

#### *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 matters that in its opinion constitutes the infringement.

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