

Chapter 2: Managing the Pre-Contract Phase

Introduction

Overview

This chapter covers procurement and related issues to be considered by the Employer in preparing the tender documents. The issues will vary depending on the procurement strategy and contract type adopted by the Employer. The strategy in one instance may be that the Employer designs the works and a contractor constructs it using an ‘Employer-Designed Contract’ (or ‘Traditional Contract’), or in another instance a contractor may design and construct the works using a ‘Contractor-Designed Contract’ (or ‘Design-and-Build Contract’).

While detailed guidance on conducting the award process is beyond the scope of this guidance note, there are aspects of the procurement and award process that can have an effect on the risk allocation and final form of the public works contract. These matters need to be understood and addressed during the pre-contract phase.

The Employer should be familiar with the detailed guidance on conducting the procurement and award process as set out in the relevant documents:

- *Procurement Strategy and Contract Type;*
- *Procurement Guidance;*
- *Suitability Assessment of Works Contractors;*
- *Tender Process.*

Continued on next page

Introduction, Continued

In this chapter This chapter contains the following sections:

Section	See Page
2.1 Suitability Assessment and Procurement of Specialists Deals with suitability assessment of contractors and with the various options in the procurement of specialists.	35
2.2 Pre-Tender Reports Describes the reports to be considered prior to and during the preparation of the tender invitation.	44
2.3 Bonds and Guarantees Explains the options the Contract provides regarding bonds and guarantees.	51
2.4 Insurance Provisions Outlines the Contract requirements for insurance on the project.	58
2.5 Risk Management Explains how to define and allocate risks, and how to set up the conditions and limits within which we allow changes to the Contract Sum.	66
2.6 Preparing to Invite Tenders Summarises what the Employer has to do before publishing the Invitation to Tender	77
2.7 Evaluating Tenders Deals with considerations and calculations the Employer has to make during the evaluation of the tender documents in relation to rates and prices.	85

Section 2.1 Suitability Assessment and Procurement of Specialists

Overview

Introduction This section deals the suitability assessment of contractors and also with the various options open to employers in the procurement of specialists.

Purpose Decisions taken in this area of procurement must be reflected in the Invitation to Tender and subsequently detailed in the Contract itself.

In this section This section deals with the following topics:

Topic	See Page
2.1.1 Suitability Assessment of Contractors Outlines the procedure of suitability assessment for main contractors	35
2.1.2 Procurement of Specialists Details the options and procedures used for the procurement of specialists	36

2.1.1 Suitability Assessment

Suitability Assessment procedure

The suitability assessment procedure involves inviting applicants (in an open or restricted procedure) to submit information about themselves (and their specialist subcontractors) in the form of a questionnaire. The Employer should then use this information to determine which applicants (under a restricted procedure) or which tenderers (under an open procedure) meet the suitability standards and which do not.

Under the EU rules the route taken for a restricted procedure is for the Employer to publish a Contract Notice in the OJEU and, when all suitable applicants have been selected in advance, to hold a tender competition at a later stage inviting only those applicants. An open procedure differs from this in that any suitability submission is combined with the tender submission and the suitability selection takes place along with tender evaluation. In both cases once an award is made and an Award Notice is published in the OJEU, the procedure ends.

Substitution

In the case of a restricted procedure, if a contractor who has passed the suitability test with a named specialist subcontractor proposes to replace that specialist with another at any time after the suitability assessment is complete, such a substitution must first be approved by the Employer, based on the initial suitability criteria.

2.1.2 Procurement of Specialists

Introduction This section relates to specialists as designated under the Contract. These are more commonly used on building projects than on civil engineering works.

Employers should note that Prime Cost Sums, formerly used in relation to the procurement of specialists, are no longer permitted in any of the current forms of contract. A Prime Cost Sum was a sum provided for work or services to be executed by a nominated subcontractor or for materials or goods to be obtained from a nominated supplier. Specialist works must now be covered in sufficient detail to allow the Contractor to price them in their tender submission as no Prime Cost Sums can be included under the new contracts.

Before inviting tenders, the Employer may decide to require the Contractor to use specialists for any element of the Works (including design of the project). The contract requires that tenderers must confirm that specialists identified in the tender documents or in their tender works proposals to provide goods, products or materials or to do specialist works are those that will be engaged if the tenderer is awarded the Contract. Specialists to be employed to do specialist work are those that relate to particular areas of work identified by the Employer in Part 1F of the Schedule.

Procurement options There are particular areas of work where input from approved competent specialists is required so that an Employer is confident that appropriate standards of quality and workmanship can be achieved in relation to that work. It is a matter for the Employer to identify the areas of work that require specialist input. Such areas should be identified in the Works Requirements.

It is important in the selection of specialists not to compromise the principle of single point responsibility resting with the main Contractor. The new forms of contract have been developed on the basis of retaining this principle. As a result a number of options which fulfill this objective and are open to the Employer have been identified. Some of these involve Employer input only while others involve Employer and Contractor input, or just Contractor input. The options are outlined below and dealt with in more detail beginning on page 38.

Contractor Input Only

1. Specialists are named by the Contractor in the Works Proposals.

Employer Input Only

2. Specialists are named by the Employer in the Works Requirements under the exemption rule of the EU Directive 2004/18/EC and SI No 329 of 2006 (no separate tender competition is required).
3. Specialists are named by the Employer in the Works Requirements for projects under the EU threshold (no separate tender competition is required).
4. Specialists (other than those covered by option 2) are named by the Employer in the Works Requirements for projects over the EC threshold (separate tender competition).

Continued on next page

2.1.2 Procurement of Specialists, Continued

Procurement options (continued)

5. Specialists named by the Employer in the Works Requirements that are to be novated to the Contractor.
6. Specialist are employed by the Employer under a separate contract and are so identified by the Employer in the tender documents.

Contractor and Employer Input

7. Specialists are named by the Contractor in Works Proposals, in relation to options 2, 3 or 4 above, where the Employer has permitted alternative Specialists to be proposed by the Contractor.

All the options involve specialists being employed by the Contractor, except for option 6 above. Option 1 should be the norm for Contractor-specified specialists, and option 3 for Employer-specified specialists on projects whose value is below the EU threshold. The other options should be used only in exceptional circumstances. It is, however, possible for a combination of the options to be used on a project. Appendix K (page 234) gives an illustration of this. The seven options are described in greater detail beginning on page 38.

Catering for Specialists' Needs

Employers should consider the problems and difficulties associated with employer-named specialists and the precautions to be taken, without compromising on the principle of single point responsibility.

For example, firms in a specialist area may have special contractual terms and other needs, and the specialist tender documentation should adequately reflect these needs. However, such terms should not go so far as to include for direct payments from the Employer in any circumstance as this would compromise the principle of single point responsibility. It is important that the Employer should research such needs in advance of preparing the specialist tender documentation so that the tender competition is not spoiled with subsequent incomplete or qualified tenders.

The specialist tender and the main works tender should include the contract terms for which the specialist is asked to tender – otherwise, there could be a mismatch between the main works contract and the specialist contract.

What Needs to be Included in Main Works Tender

The main contract tender documents should inform tenderers that the pricing of specialist works by main works tenderers is to include for any special contractual terms the specialist is looking for or for any general or special attendance such as special scaffolding, special transport, storage, security, protection, insurance or any other requirements that may arise.

The specialist terms and conditions must be included in the Works Requirements for the main works tender.

Tendering Time for Main Works

It is important that the Employer allows sufficient time to tenderers for the main works so that they can price specialist works correctly.

Continued on next page

2.1.2 Procurement of Specialists, Continued

1. Specialists named by the Contractor

Open procedure

In an open procedure the Employer may require tenderers to name in their tender the specialists they propose for specific areas of specialist works, with at least one nomination for each piece of specialist work. Tenderers should include suitability assessment material specified by the Employer in the tender documents – as this will allow assessment of the specialists' suitability to determine if a tenderer goes forward to the tender evaluation stage.

The Invitation to Tender should make it clear that specialists named in works proposals for specific areas of specialist works will be evaluated to see if they meet the minimum qualification criteria. Only if the applicant passes this evaluation (meaning that at least one nomination for each piece of specialist work must pass) will the rest of a tender be evaluated.

Restricted procedure

In this type of restricted procedure the Employer states in the tender documents that tenderers for the main works must identify in their tender submissions those specialist contractors that were selected under a separate suitability assessment procedure along with the tenderer for the main works. If this route is taken, the following points should be noted:

- The tender documents should make it clear that tenderers must confirm in their tender proposals that the specified specialist work will be carried out by those specialists who were named and had passed the suitability assessment with the tenderer for the main works.
- The Employer's approval should be sought in advance if a tenderer proposes changing or adding a proposed specialist. Any changes should be assessed by the Employer (on the same criteria as the original suitability assessment submission) before tender submission – otherwise there is a risk of the tender being rejected.

Continued on next page

2.1.2 Procurement of Specialists, Continued

2. Specialists named by Employer – Exempt Rule

Under EU Directive 2004/18/EC and SI No 329 of 2006, specialist work can be exempt from the requirement to hold separate tender competitions. To qualify for such exemption, the following conditions apply:

- The value of the specialist work must not exceed €1m (excluding VAT); and
- The aggregate value of all such specialist areas must not exceed 20% of the total project costs (excluding VAT).

In such cases, the Employer must ensure that the principles of transparency and non-discrimination apply. Employers can list a firm or panels of firms capable of carrying out specialist works in the tender documents (as background information). Tenderers when submitting their tenders (Works Proposals) will be required to identify which of the firms listed in the tender documents they propose to use as subcontractors if they are awarded the contract.

3. Specialists named by the Employer – without a separate tender competition

Also under EU Directive 2004/18/EC and SI No 329 of 2006 where a project has a value less than €5,278,000 (excluding VAT)³, the Employer may name the specialists to be employed by a contractor to do specialist works, without holding a separate tender competition. However, even in this situation the specialists named by the Employer and included in tender documents should be chosen by a competitive process using objective, non-discriminatory and transparent suitability criteria – for example, via advertisement on the tenders website. In this case, there is no percentage limit to the value of the specialist work portion of the project.

Tenderers when submitting their tenders (Works Proposals) are required to identify which of those firms listed in the tender documents they propose to use as subcontractors if they are awarded the contract.

4. Specialists named by the Employer – separate tender competition

In exceptional circumstances, the Employer may conduct a separate competition for the selection of specialists (for example demolition, or restoration/conservation work). This option may be used only where a very high level of performance is considered essential.

Such a specialist should be selected before the Invitation to Tender documents for the main contract works are issued. The details of the named specialist, including their contract terms, tender price and other requirements, must be included in the tender documents (i.e. Works Requirements) for the main contract.

Continued on next page

³ This figure is applicable from 1st January 2006 to the 31st December 2007 at which time it will be reviewed in line with the EC review of the threshold value every two years.

2.1.2 Procurement of Specialists, Continued

4. Specialists named by the Employer – separate tender competition (continued)

This approach obliges tenderers for the main works to employ these specialist firms and to include all costs associated with specialist works in their tenders as if these costs were their own.

Note: Although the specialist in this case is named by the Employer, the competition for that specialist is not considered closed until a Contractor is awarded a contract – the award ends the competition.

An employer should carefully consider if the circumstances warrant that a list of all the tender prices of the specialists that participated in that competition should be disclosed in the main works tender documents without their names being disclosed.

5. Specialists novated to the Contractor

What is novation?

Novation is where the Contractor takes over the role and responsibilities of the Employer in relation to a contract that the Employer has with another party. This arises where an Employer enters into a contract with another party with the intention that at some time during that contract a main Contractor will replace the Employer through a novation arrangement.

The Contractor effectively takes over the contract that the Employer has with the other party by stepping into the Employer's shoes at the such time the Employer's rights and liabilities are extinguished. The novation agreement together with the original contract with the other party is all that is necessary – there is no need for a new separate contract between the main Contractor and the other party.

The procedure here is very similar to the Employer-named approach described above. Again, the Employer conducts a separate competition for the specialist works (for example, professional designers under a design-and-build contract) but then enters into a contract with the specialist.

Examples of novation

An example would be where the Employer appoints a specialist contractor for a specified area of work before the main contract is awarded. Here the Employer awards a contract for advance works to a Specialist on the basis that when a main contractor is appointed the Specialist will switch employers through a novation agreement and then work for the main contractor. The details of the specialist's contract must be included in the tender documents (i.e. the Works Requirements) for the main Contract with an expressed provision that the specialist is to be novated to the main Contractor. It is important in any novation that the initial contract for specialist works allows for its subsequent novation to the main Contractor.

Continued on next page

2.1.2 Procurement of Specialists, Continued

5. Specialists novated to the Contractor (continued)

Novation arrangements are also appropriate, for example, for contracts with long lead times for delivery of goods and materials in a traditional contract, or for design and other professional services in a design-and-build contract.

Timing of novation

Following a tender competition where tender documents expressly state that certain specialists are to be novated to the main contractor and when the main contract works are awarded, the specialist contract should be novated at the same time to the main Contractor, who is contractually obliged to accept it.

In relation to the novation of specialists with design responsibility in a design-and-build contract, the Employer conducts a separate competition for selection and appointment. The scope of the work tendered and awarded for the specialist works should run to Substantial Completion (where applicable).

6. Separate contract option

There may be cases where employers consider it preferable for specialists' works to be separated from the main works contract and carried out at the same time as the main works as part of a separate contract. In this case the specialist contractors that the Employer intends to use should be listed in the tender documents for the main Contract, the scope of their works should be clearly defined, and any requirements that the main Contractor is to provide should be stated.

Employers should be aware that interference by one contractor with another's work may be a compensation event.

7. Employer-named approach – allowing Contractor input

The Employer-named approach can include an added feature where the Contractor is permitted, in a tender submission, to propose alternative specialists to those listed by the Employer in the tender documents. This applies to procurement options 2, 3, and 4, but not where there is a novated specialist (option 5) or where the specialist continues to be contracted separately (option 6).

Alternative Named Specialists – Best Practice

In this case, it is necessary to make it clear in the tender documents that tenderers for the main works are allowed to put forward (in their Works Proposals/tender documents) suitable alternative specialists to those listed in the tender documents. This approach requires careful management, and best practice requires the following:

- The Employer must make it clear in the tender documents that tenderers have the option of proposing alternative specialists;
 - The suitability questionnaire used by the Employer for its named specialists must be included in the tender documents; and
-

Continued on next page

2.1.2 Procurement of Specialists, Continued

7. Employer-named approach – allowing Contractor input
(continued)

- The tenderer’s completed questionnaire and backup information must be submitted in a sealed envelope, marked ‘Suitability Assessment Material’. This should be separate to the financial and other data that makes up a tender proposal.

Then, when the evaluation of tenders is about to commence, the suitability of the alternative specialists can be first evaluated without sight of the rest of the tender submission. This will require instructions to be included in tender documents asking for the financial and other parts of a tender submission to be submitted in a separate envelope. The Suitability Assessment Material should be examined first before the tender bids are opened.

There are differences in the way that tenders using the different procurement options are dealt with:

Options 2 and 3	<p>In the case of options 2 and 3 if any of the specialists put forward by a tenderer do not satisfy the suitability criteria, the tender (main works) should be rejected as non-compliant.</p> <p>In this case, the tenderer is offering a price based on the alternative named specialist only – if that specialist does not meet the suitability criteria, the entire tender is deemed to be non-compliant.</p>
Option 4	<p>In the case of option 4, as a tender competition has been conducted by the Employer, and all details of the leading specialist’s tender (including pricing) and other information are included in the main works tender documentation, it is important that tenderers are informed a variant procurement option may be used and that they may propose alternatives to the Employer-named specialists. If this is not stated in the main works tender documents, it cannot be introduced subsequently.</p> <p>It should also be made clear to tenderers that they are to submit tenders on the basis of the specialists named in the tender documents but with a separate price (included in the tender proposal envelope) for their proposed alternative named specialist. In this case, if a specialist proposed by the tenderer does not satisfy the suitability criteria set by the Employer, the price tendered for that specialist is non-compliant and should be excluded from the tender evaluation. The rest of the tender, however, may be evaluated on its merits.</p>

Continued on next page

2.1.2 Procurement of Specialists, Continued

Collateral Warranties and Specialist Contractors

The Employer should state in the Works Requirement tender document for a design-and-build contract that collateral warranties will be required for all specialist work including design services. The tender documents should go on to say that the specialist categories of work in the successful tenderer's submission will be identified when designs are finalised before the contract is awarded. As a first step the Employer should include in the tender documents a standard list of specialist categories of work that are likely to arise in any design solution that a tenderer might produce together with a financial amount attached to each one.

The form of collateral warranty that is to be used should be Model Form 13. This form should be included in the Works Requirements tender document. Where design services are being novated, the standard required of the design specialists should be as outlined in the *Consultants Conditions of Engagement* which is 'to exercise the standard of skill, care and diligence reasonably to be expected of properly qualified persons providing.....services..... comparable in value, size, scope, complexity and quality to that required under the contract'. The standard for all other specialist areas of work should be of it being '....fit for its intended purpose as described in the Contract'.
