

Feedback

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The question

In giving feedback to losing bidders, what (1) must you include and (2) should you hold back, on the relative advantages of the winning bid?

Coverage

- What feedback must you provide?
- What are the exceptions?
- What is different for lower value contracts?
- What will change in 2024?
- The answer

What must you provide?

- Bidders in PCR and UCR regulated procurements have rights to feedback
- Which rules apply depend on
 - Type and value of contract
 - When feedback is requested; and
 - By whom

Current law

- **Public Contracts Regulations 2015 (PCR)**
- General right to feedback above threshold
- Regulation 55 PCR
- On:
 - Decisions about conclusion of contract award, framework/DPS
 - Abandonment etc of procedure
- “As soon as possible”

Current law – and exceptions

- **Public Contracts Regulations 2015 (PCR)**
- General right to feedback on request (reg 55 PCR)
- About reasons for not being shortlisted, invited to tender
- Within 15 days of written request
- Candidates and tenderers

- Can withhold in limited cases (reg 55(3) PCR) if would
 - (a) impede law enforcement [or] contrary to public interest;*
 - (b) would prejudice legitimate commercial interests of a bidder;*
 - (c) could prejudice fair competition between economic operators*

Standstill

- Award decision notices (reg 86 PCR)
- Above threshold contract award. Optional on framework call off
- Must provide:
 - award criteria
 - the reasons for the decision including “the characteristics and relative advantages of the successful tender”,
 - the score (if any) obtained by the winner and the recipient;
 - the name of the winners and
 - date on which standstill will end/CA will not award before

How far to go?

- Award decision notice is an artificial exercise of bid comparison
- Can be very hard if evaluator notes are vague or inaccurate
- Often rushed or based on the last one used
- Biggest source of complaint/challenge

- Themes from case law
 - “Relative advantages of winner” not relative disadvantages of loser
 - Enough to understand where bidder went wrong
 - “Sketchy” notice won’t start time running

How far to go?

- Only use what you have in front of you
- If not enough, go back to evaluators' notes
- Set out pass/fail tests clearly
- Refer back to marking scheme – why is this a 5?
- Beware of disclosing confidential information
- Don't skip criteria
- Make sure the numbers add up
- Check for consistency across all letters – bidders do compare!

Below threshold

- Where Chapter 2 doesn't apply
- PRA in Scotland prescribes requirements
- No general standstill requirement
- Transparency and equal treatment (reg 76 PCR)
- Bidders still want to know that they have lost
- Good practice to explain and flush out any grievances

Practical advice

- **Do**

- Give sufficient time/attention to ADNs
- Make sure evaluators have provided all information
- Get a colleague to check before sending
- Complete reg 84 PCR report as you go

- **Don't**

- Try to rewrite history /invent reasons
- Destroy evaluation notes or emails
- Run a debrief meeting without preparation and guidance
- Be afraid to ask for help

All change

- **Procurement Bill (not Scotland)**
- October 2024 go live and enabling regs/guidance soon
- Big changes to standstill
- Voluntary for light touch, framework call off etc

Assessment Summary to bidders



The answer

- Standstill letters cause the most procurement disputes
- A tricky exercise
- Comply but don't over comply
- Keep all records
- Approach debrief meetings with care
- New rules promise to lift burden – we shall see

440

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