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White Paper Procurement Conference 2022 Feedback - Transparency and Risk

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How do you balance transparency and risk when giving feedback to unsuccessful bidders at

(1) Contract Award, and

(2) Following requests for a further debrief?

What we will cover

- Current Procurement feedback rules under the 2015 Regulations
 - Position for feedback obligations for lower threshold contracts under the 2014 Act
 - Balancing Transparency and Risk
 - Time for change? The Draft Procurement Bill 2022
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Higher Threshold Contracts

Public Contract (Scotland) Regulations 2015

Regulation 85

*“a contracting authority must, by **notice in writing** as soon as possible after the decision has been made, inform all tenderers and candidates concerned of its decision to award the contract, conclude the framework agreement or establish a dynamic purchasing system.”*

Notice must include:

- Criteria for award
- Score obtained by economic operator receiving the notice
- Score obtained by economic operator who is awarded the contract

and, in the case of...

- Unsuccessful **tenderers**
 - o Summary of reasons why tenderer was unsuccessful
 - o Characteristics and advantages of the successful tenderer
 - Unsuccessful **candidates**
 - o Summary of reasons the candidate was unsuccessful
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Higher Threshold Contracts

- Should be provided as soon as reasonably practicable after decision to award has been made
 - Any candidate can request additional feedback
 - Statutory requirement to provide it within 15 days
 - Scottish Government Construction Procurement Handbook refers to this being of a more in depth nature
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Higher Threshold Contracts

- What can you withhold (Regulation 85(5))?
 - Information where release would:
 - Impede law enforcement or otherwise be contrary to the public interest
 - Prejudice the commercial interests of any person
 - Prejudice fair competition between economic operators
 - 15 day feedback should be in writing but may include a meeting.
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Lower threshold contracts

Procurement Reform (Scotland) Act 2014

(lower threshold)

- Section 32 – unsuccessful bidders need to be informed of the name of the successful bidder, the award criteria and the scores of the successful and unsuccessful bidder.
 - Section 33 – Requests for further information
 - within 30 days must provide written summary of reasons their tender was unsuccessful along with characteristics and relative advantages of successful tender.
 - Section 34 – Withholding information
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The aims of feedback

- Bidders have invested significant time and money in responding.
 - They will be keen to understand why they lost.
 - Assists in improvement of performance for future tenders.
 - Bidders can also provide feedback on the process to the Contracting Authority.
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The risks of feedback

- Bidders often frustrated if feedback is not useful.
 - Large majority of bidders will be interested in learning and improving for the future.
 - However, there will be some who are trying to identify any route to challenge.
 - It is therefore important to be prepared.
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Balancing Transparency and Risk – (1) Contract Award

- Important to ensure transparency throughout the process but critical to ensure evaluation is implemented in accordance with the procurement rules and the procurement documentation.
 - Make sure you are giving what is required under the Regulations.
 - Evaluation notes should provide useful information which should inform feedback letters.
 - Ensure where scoring in ranges it is clear how you achieve a score within the relevant range and why each bidder did so.
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Balancing Transparency and Risk – (2) Further Feedback

- Are you planning to respond in writing or hold a meeting?
 - If holding feedback meetings ensure that that the right team members are present (including procurement and technical/commercial team members).
 - Key to prepare thoroughly for Feedback meetings.
 - Only discuss that bidder's tender.
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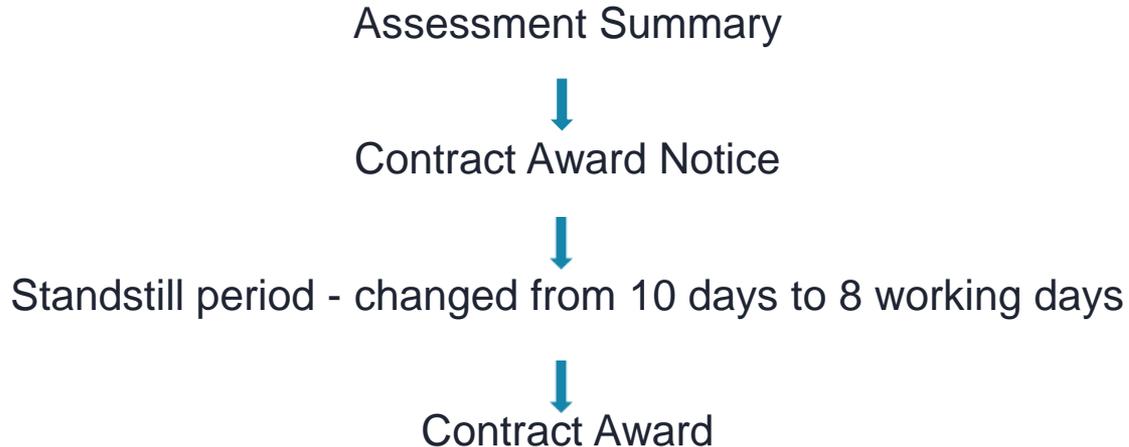
Balancing Transparency and Risk – (2) Further Feedback

- Scottish Government Guidance suggests requesting a list of questions from the bidder in advance of the feedback meeting - good tool to inform the agenda and pre-empt issues that may not be appropriate to discuss.
 - Be very careful of introducing any new information at feedback meetings and avoid any conflicting information.
 - Avoid adversarial approaches.
 - Maintain clear records at all stages.
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Balancing Transparency and Risk

What to do ✓	What not to do ✗
Keep written records / Audit trails	Do not destroy any records
Right people - evaluation teams	Revisit / change feedback
Open communication	Over-complicate the process
Give genuine and helpful feedback	Introduce new or conflicting information

Time for change? – Section 47 Draft Procurement Bill 2022



(England, Wales and Northern Ireland only)



Questions?
