

Department of Contracts  
Notre Dame Ravelin  
FLORIANA

To Permanent Secretaries  
Directors General  
Directors  
Heads of Public Sector Organisations

01 September 2020

## **ABNORMALLY LOW TENDERS**

The concept of an Abnormally Low Tender is generally recognised as referring to a priced offer which is deemed *prima facie* as economically unsustainable when compared to the Estimated Procurement Value. As a result, such a price raises concerns on the proper execution of the contract deliverables.

To this effect, it is crucial that Contracting Authorities conduct comprehensive financial research on the procurement to be undertaken and ascertain that the Estimated Procurement Value is construed on current market prices.

Moreover, Directives 2014/23/EU and 2014/25/EU regard a Tender Call Offer as ‘irregular’ when the Contracting Authority (through the Evaluation Committee) establishes it as an abnormally low submission.

In fact, it is to be noted that awarding an Abnormally Low Tender carries potentially high detrimental consequences to the Contracting Authority since it may entail considerable risks of contract default, avoidance of social, labour and environmental obligations as well as quality risks. Consequently, it is perceived that the outcome of such circumstances would result in additional costs and charges.

### **Applicability of an Abnormally Low Tender**

Further to Legal Notice 196 of 2020, which came into force on 15 May 2020, Regulation 243<sup>1</sup> of S.L. 601.03 and Regulation 174<sup>2</sup> of S.L. 601.05 (both of which relate to ‘Abnormally Low Tenders’) have now been amended and extended to cover a

---

<sup>1</sup> *Public Procurement Regulations S.L. 601.03*

<sup>2</sup> *Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations S.L. 601.05 (Utilities)*

wider array of tenders. This means that this concept is no longer just limited to above threshold procurement. Thus, the provisions of Abnormally Low Tenders are now applicable to procurement with an Estimated Value exceeding Euro10,000 excluding VAT.

For ease of reference, at Annex 1, the aforementioned regulations are being enclosed to this Contracts Circular.

In the eventuality that a bid is considered to be Abnormally Low, Contracting Authorities shall not automatically exclude it. To the contrary, at the appropriate stage of the Evaluation Process, Contracting Authorities (specifically Evaluation Committees) shall send a Clarification Request wherein the bidder/s shall be required to explain the price or costs proposed in their Tender Call Offer.

In line with the principles adopted when drafting Clarification / Rectification Requests (as applicable), it is important that the nature of any such request does not materially change the substance of the requirement or provide extra / new technical information leading to a change in the Technical Offer as submitted by the bidder. Moreover, a Clarification Request wherein the bidder is required to submit a 'yes or no answer' should be avoided.

The explanations provided by the bidder *may* relate to the following justifications, however, such a list is not exhaustive. In addition, Contracting Authorities shall not limit the scope of factors to which explanations may relate:

- Manufacturing Process or Construction Method
- Technical Solutions
- Exceptionally Favourable Conditions
- Originality
- Compliance with obligations of Environmental, Social and Labour Law
- Attainment of State Aid

Further to the above, if the bidder does not provide the Evaluation Committee with a plausible explanation and thus the evidence does not satisfactorily account for the low level of price or costs proposed, her / his offer may be rejected. Furthermore, prior to declaring a bid as being Abnormally Low in line with the applicable Procurement Regulations, all necessary verifications for that purpose shall be carried out, thus, ascertaining and substantiating the rejection decision. In such eventuality, the Evaluation Report shall include clear and watertight justifications recommending the rejection of the bid. On the other hand, if the Call for Tenders results in only

one (1) administratively and technically compliant bid which is deemed to be Abnormally Low, the Evaluation Report shall recommend the cancellation of the Procurement Procedure, whilst substantiating their decision accordingly.

### **Additional Information**

In order to assist and guide Contracting Authorities in the correct interpretation of an Abnormally Low Tender, the Department of Contracts has updated and reviewed Guidance Note #11 titled 'Abnormally Low Tenders'. In addition, in due course, a Clarification Request Template specifically in relation to this subject shall also be communicated.

Furthermore, Contracting Authorities should also review Guidance Note #2 titled 'Rectifications and Clarifications during Evaluation Stage' in order to be guided on the best practices of drafting Clarification / Rectification Requests.

All Contracting Authorities are reminded that active ePPS account holders (when logged in) may access Guidance Notes, grouped in a zipped folder, through the 'Resources' section of Government's e-Procurement platform ([Electronic Public Procurement System – ePPS](#)).

### **Contact**

Contracting Authorities are encouraged to submit any queries to their respective Ministry's Procurement Section or to their Ministerial Procurement Unit (MPU), as the case may be. In addition, Contracting Authorities may also submit any queries to the Department of Contracts' Customer Care service on [info.contracts@gov.mt](mailto:info.contracts@gov.mt) or +356 21220212.

Anthony Cachia  
Director General (Contracts)