CONSTRUCTION INDUSTRY COUNCIL

Building our future together

PROMOTING THE INCLUSION OF SMALLER PRACTICES IN THE MARKETS FOR PUBLIC CONTRACTS

Submission from the CIC to the Department of Finance

October 2009

Construction Industry Council

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by

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ACEI Association of Consulting Engineers of Ireland
BMF
Engineers Ireland
RIAI
The Society of Chartered Surveyors

Executive Summary

The need for the submission arises against a background of procurement practices which hinder the participation of smaller suppliers in the market for public contracts for professional construction services including:

- Inappropriate selection criteria
- Inappropriate contract award criteria
- Inappropriate quality v price ratio
- Inappropriate use of framework agreements
- Imposition of disproportionate contractual requirements

The impact of these practices over time will be that smaller suppliers, which have traditionally formed the backbone of the Irish professional services sector, will be denied the opportunity not alone to grow and develop their skills but to maintain their current levels. This will result in their exclusion from bigger and more complex public contracts both at home and abroad, to the detriment of the Irish services sector and to the benefit of larger international, multi-disciplinary practices which will lead to a lessening of competition and employment opportunities in Ireland, at what is a critical time for our economy.

The range and level of understanding in the application of public procurement practices is diverse amongst all stakeholders. The CIC recognises that it would be helpful to all in the process to initiate a series of joint seminars between the industry and the procurement agencies so that a shared appreciation of the effect of procurement practices can be achieved.

The CIC believe that the way forward is to work with our public sector partners to identify procurement practices which are efficient and represent value for money but which also promote the involvement of smaller suppliers in the market for public contracts.

The Construction Industry Council

The Construction Industry Council (CIC) was established in February 1991 with the objective of dealing with issues of common interest for the construction industry in relation to overall policy issues. Representing over 43,000 members, membership of the CIC includes:

- The Association of Consulting Engineers of Ireland (ACEI)
- The Building Materials Federation (BMF)
- The Construction Industry Federation (CIF)
- Engineers Ireland
- The Royal Institute of Architects in Ireland (RIAI)
- The Society of Chartered Surveyors (SCS)

Following an increasing number of concerns being raised by member bodies with particular problems being experienced by construction consultants in accessing work in the public sector due and the impact of the application of certain public procurement requirements, the CIC established a Task Force to review the issues of concern and set out proposals to put forward to the Department of Finance.

The Task Force engaged the assistance of Niav O'Higgins and Barbara Linehan from Arthur Cox Solicitors. The Task Force gratefully acknowledges their assistance in the preparation of this Paper.

Background

The need for this Paper arises from a number of recent changes in procurement practices which are resulting, either in the exclusion of smaller suppliers from the market for public contracts, or which discriminate against them, making their successful participation in that market more difficult. These practices, for the large part, run contrary to both national and European policy which promotes the inclusion of smaller suppliers in the market in order the make the most of their potential for job creation, growth and innovation. They also raise questions of compliance with European Law on Public Procurement and Competition.

The impact of these practices over time will be that smaller suppliers, which have traditionally formed the backbone of the Irish professional services sector, will be denied the opportunity to grow and develop their skills. This will result in their exclusion from bigger and more complex public contracts (current examples would include Metro North), both at home and abroad, to the detriment of the Irish services sector and to the benefit of larger international, multi-disciplinary practices. This will lead to a lessening of competition and employment opportunities in Ireland and will lead to stagnation at this critical time for our economy.

We understand that the motivation for introducing a number of the practices outlined in this Paper is to bring about the introduction of efficiencies and improved value for

money in public purchasing. We recognise and share these goals and the very proper concerns they reflect. However, we would simply make the point that the practices highlighted below *cannot* achieve these goals. By hindering the participation of smaller suppliers, such practices will lead, over time, to a weaker national supplier base which will result in less competition with a knock-on impact on value for money. Insofar as they raise issues of compliance with EU law, they also introduce an element of legal uncertainty which can only be costly and time consuming to resolve.

Our suggested way forward is to work with our public sector partners to identify procurement practices which are efficient and represent value for money but which also promote the involvement of smaller suppliers in the market for public contracts.

The rest of this paper sets out examples of the type of procurement practices which hinder the participation of smaller suppliers in the market for public contracts for professional construction services.

Selection requirements

We use the term "selection" in this paper to describe the stage of the procurement process where contracting authorities, select the candidates who will be invited to tender, negotiate or participate in dialogue or whose tenders will go on to be examined (under the open procedure), based on their qualifications for the contract.

In our experience, the selection process is increasingly developing into a real stumbling block for smaller suppliers wanting to tender for public contracts. While we appreciate that smaller suppliers may not have the resources required for certain contracts, we are coming across an increasing number of instances where smaller suppliers clearly had the resources to perform the contract but were excluded all the same. Typically, they were excluded because they did not meet the thresholds set in relation to turnover, resources, PI insurance and/or specific experience, although the thresholds set by the contracting authority did not appear to bear any relation to the requirements of the project in hand or the ability of the consultant to provide the services being sought.

Although the contracting authority may choose the selection criteria and determine the levels at which these are set, this must be done within the limits established by the Directive.

One such limit is the ***principle of proportionality***. The Directive specifies that "the extent of the [qualification] information required [regarding economic/financial standing and technical/professional ability] and the minimum levels of ability required for a specific contract must be related and proportionate to the subject-matter of the contract" (Article 44.2).

Another such limit is the ***principle of equal treatment / non-discrimination***.

The application of this principle means that contracting authorities are obliged to give each supplier which is objectively capable of performing a contract, an equal opportunity to participate in the procurement process and to win the contract. It would be a breach of this requirement, for example, to make participation difficult for smaller suppliers unless this was linked to the requirements of the contract to be performed.

In other words, in establishing selection thresholds, the contracting authorities should consider the requirements of the contract and set the thresholds with reference to those requirements and at a level to ensure that they can be met by all candidates *capable* of performing the contract. However, in our experience this is not happening. To give some recent examples:

- Inappropriate selection criteria. For example, in the procurement of design consultancy services for a series of national schools, the candidates were required to list relevant experience, with one candidate having his experience discounted on the grounds that it related to secondary rather than national schools, rather than projects of similar complexity;

- Inappropriate selection requirements. For example, the requirement to have "FAS Quality Assurance Certification", "Investors in People" or similar;

- Thresholds set at too high a level (for issues such as turnover, PI insurance, experience, human/other resources, qualification requirements) with a misunderstanding as to how levels of annual turnover of a practice, might, for example, relate to a number of different concurrent projects, at different stages.

The excessive resources expended by smaller enterprises in the Pre-Qualifying and Tendering for projects can be reduced as follows:-

Pre-Qualification Stage:-

- Pre-Qualification Questionnaires (PQQ's) should be consistent, proportionate to the size and complexity of the contract and structured in a way that enables all enterprises which have the required capacity and capability to complete.

- Reduce the number of questions within in the PQQ.

- Standardise PQQ's as far as possible.

Tender Stage:-

- Standardise the Award Criteria to reduce resources expended in compiling detailed submissions on the approach to the project. It is usual that Contracting Authorities will have differing Award Criteria requirements putting a huge burden on Tenderers.

Contract award criteria

As procurement law has developed, the European Court has emphasized that the qualifications of tenderers, i.e., whether are not they have the necessary resources for the contract at hand, should be assessed at the earlier selection stage of the procurement process. This assessment must be made with reference to their "technical and financial capability". Once this assessment of resources has been made, i.e., after selection and the issue of invitations to tender, then the contracting authority is no longer permitted to re-examine tenderers' qualifications. In effect, all tenderers start the award phase of the procurement process as equals, and the assessment of their tenders is based solely on the merits of those tenders.

It follows that any award criteria which gives an advantage to tenderers solely on the basis of their resources or qualifications, marking up, e.g., tenderers with (as stated previously) more experience, a bigger and/or better qualified workforce, more sophisticated technology, more financial backing etc, will not be acceptable.

This interpretation of the law can be understood with reference to the main aim of the EU's procurement rules which is to open markets and extend opportunities to all economic operators including smaller suppliers. The logic here is that allowing Contracting Authorities to mark-up tenderers simply on the basis of their qualifications would disadvantage smaller tenderers and newer entrants to the market, despite the fact that they were objectively qualified for the contract at hand, and work against the market-opening aim of the procurement rules.

We have seen a number of recent cases particularly involving the award of places on Frameworks, where criteria related to tenderers' qualifications have been inappropriately used as contract award criteria. Using criteria related to qualifications as award criteria is in clear contravention of the law as restated most recently by the European Court in its judgement in *Lianakis*[1].

Quality v Price

The ratio applied in award criteria of price and quality results, in almost all cases, with price becoming the determining factor, with factors such as experience, technical and professional ability being given disproportionally low marks. Conversely in assessing quality instead of a subjective assessment of an individual candidates ability high marks are awarded for membership of a quality accreditation organisation (ISO or similar). More recently environmental management accreditation even in small type projects is being used as a marking tool for quality.

Our experience indicates that abnormally low prices are winning all projects and that the application of Article 55 of the Public Procurement Directive are not being applied. Clients should be aware that, under current health and safety legislation a client must not arrange for a designer to prepare a design unless the client is reasonably satisfied

[1] *Lianakis AE & others v Dimos Alexandroupolis (2008) Case C-532/06 ("Lianakis")*

that the designer has allocated or will allocate adequate resources to enable the designer to comply with the health and safety obligations imposed on the Client under the new Safety Health & Welfare at Work (Construction) Regulations 2006. Many Clients may not be aware of this statutory duty and may in fact not be complying with this duty when awarding projects with excessively low fees, as such low fees must call into question the adequacy of the resources which will be employed to undertake the work.

Professional services are not commodity purchases that can be compared on price alone. Quality Design affects construction costs and it's also the biggest factor in long term costs of operation, maintenance and litigation. Furthermore, it would appear that quality is not being measured correctly, with only two out of eight items being considered (as per Article 53 of the Directive).

We would advocate the consideration of a previous suggestion from the GCCC to provide for an alternative formula where the proposed price scoring arrangement was an inverse percentage of the lowest price. For example if the price of the second lowest tenderer is twice that of the lowest the second lowest gets 50% of the available marks. We feel that this would provide a fairer assessment.

Use of Framework Agreements

We recognise the many efficiencies to be gained through the use of Frameworks and also the fact that they can be used to split what would otherwise be larger contracts, thus opening market opportunities to smaller suppliers. However, it has long been recognised by bodies, including the European Commission, that Frameworks potentially have significant exclusionary impacts, and for this reason must be used with some caution. These exclusionary effects can be exacerbated where:

- the contracting authority is an important source of work; and/or
- the Framework removes this source of work from the market for a significant length of time;
- failure to win a place on a Framework adversely affects suppliers' chances of being invited to tender for subsequent or related Frameworks as they are unable to get the relevant experience required (which will be the case where they cannot get relevant experience elsewhere).

It is because of these exclusionary effects that both the establishment and operation of Frameworks is tightly regulated by EU law.

We understand the pressure throughout the public sector to use Frameworks as a means of saving money and cutting down on procedural "red tape". Although this may be a legitimate goal, where this is done with no understanding of the impact of Frameworks on the market or of the detailed legal requirements surrounding their establishment and operation, this can result in Frameworks being used inappropriately and/or being set up and operated in contravention of the law.

To give some recent examples:

- Blatant confusion regarding the basis on which places on the Framework may be awarded. The Regulations are clear that this must be in accordance with Regulation 33(2) which provides that the parties to the framework agreement are to be determined by applying the award criteria set in accordance with Regulation 66;

- Tenders for call-offs being assessed against models which were not disclosed to tenderers in advance, raising questions as to whether sufficient information was supplied to tenderers in advance regarding the award criteria and methodology to comply with the requirement for "transparency";

- What would appear to be the appointment of an inappropriately large number of suppliers onto a Framework – for example, 14 were appointed in the case of one county council seeking engineering services for the period 2007-2010 and 16 were appointed on to a Department of Education Framework for Quantity Surveying.

- Vagueness regarding the scope and timing of contracts to be called off.

- Length of framework agreements

Requirement for Integrated Design Teams

It has become increasingly common for contracting authorities to require expressions of interest from "Integrated Design Teams", i.e., a single design team providing all the professional design services (e.g., architectural, engineering, surveying, etc), required for a particular project. This is a change from the traditional practice whereby the contracting authority procured each design consultant separately, entering into separate contracts with each consultant at the end of each procurement.

Although we recognise this approach has certain advantages from the perspective of contracting authorities, it is our experience that imposing this requirement hinders the participation of smaller practices, and distorts competition, for the following reasons:

- Large, often international, multi-disciplinary firms of consultants providing all of these services in-house have a distinct advantage in the procurement process over smaller single disciplinary firms;

- Where large firms do not have all of these services in-house, the growing use of this procurement route has led to the establishment of standing arrangements with other large firms with complementary disciplines, to tender for certain types of projects in specific sectors. It is almost impossible for smaller single disciplinary firms to break into these arrangements;

- From the Contracting Authority's perspective, it is difficult to ensure the "quality" of all members of an integrated design team. Although the overall qualifications of team members may be high, that fact might mask the weakness of some of the team members. Conversely, a high quality, smaller single disciplinary supplier with exactly the experience the contracting authority needs, might be swamped in an otherwise mediocre team, maybe the only one he could join, for the reasons outlined under the previous bullet.

The conclusion must be that this procurement route is being used inappropriately, without consideration of its impact on competition, and its outcome in terms of the quality of members of the successful team. We would like the opportunity to discuss with our public sector partners our concerns regarding this procurement route as well as alternative routes which could better meet their requirements.

Imposition of disproportionate contractual requirements

(1) Use of Fixed Price Lump Sum pricing

The requirement for consultants to tender for contracts on the basis of a fixed price lump sum is only appropriate where there is a clearly defined scope of services that the consultant is being asked to provide. In many instances, public bodies are seeking a commitment from consultants to perform an undefined scope of services for a fixed fee and without any indication of timescale or budget. This in effect means that tenderers are competing on their estimation of the project budget as well as the fee.

(2) Open-Ended Liability

The provision contained in the Standard Conditions of Engagement for Consultancy Services (Technical), imposing what is essentially open ended liability on consultants for direct and indirect losses that may be suffered by the client[2], creates real issues for consultants, particularly the smaller practices. This is particularly the case where the consultant appointments are to be novated to the Design and Build Contractor (with the same level of liability then owed to the Contractor) resulting in significant and unacceptable levels of exposure for consultants.

(3) Transfer of Copyright

In several recent cases, the contracting authority has required that the architect agree to the transfer of copyright in their designs. This in large part seems to flow from the option contained in the Standard Conditions of Engagement for Consultancy Services for use with public works contracts for contracting authorities to require the transfer of copyright on payment of a fee. This is different from a requirement to grant a licence of the underlying copyright in the documentation design or drawings to a client

[2] Clause 2.15-16: "The Consultant acknowledges that any breach by it of the Contract may cause financial losses to the Client not only directly but by liability to contractors, suppliers, other consultants, involved in the Project [so that consequently such losses may be included in compensation for which it is liable to the Client]"

for use in a particular project. The transfer of copyright will mean that the architect will be unable to use the results of his or her own research, innovation and design in subsequent projects - if they did, they could be sued by their earlier client for copyright infringement. Architects/Engineers are understandably concerned that the de facto compulsory transfer of copyright will bring about a situation in which they will be unable to use the results of their own work in subsequent projects.

An example comes from a recent procurement in which a county council was the contracting authority in respect of a housing regeneration scheme. The contract requirements read as follows: "[t]he Architect and the Firm agree to waive and do hereby waive all moral rights he or it has or may have in any copyright work in accordance with the Copyright and Related Rights Act 2000".

It seems that the contracting authority in question may have been simply using standardised tender documentation that included this requirement and did not have a sufficient appreciation of the potential consequences for the professional concerned.

In the vast majority of cases, it should be sufficient for the contracting authority to require the architect to grant the appropriate licence of the underlying copyright in the documentation design or drawings to the client for use in the particular project.

Education of stakeholders

It is evident from our experience that the range and level of understanding in the application of public procurement practices is diverse amongst all stakeholders. It would be helpful to all parties in the process to initiate a series of joint seminars between the industry and the procurement agencies so that a shared appreciation of the effect of procurement practices can be achieved.

Conclusion

The practices applied by a number of bodies procuring professional services within the public sector create real concerns for construction consultants, particularly the smaller practices, which are being excluded from participating in public sector works. As noted above, these practices, for the large part, run contrary to both national and European policy which promotes the inclusion of smaller suppliers in the market. They also raise questions of compliance with European Law on Public Procurement and Competition.

The Procurement Group would welcome the opportunity to discuss this with the Department of Finance.