

Public procurement requirements distorting competition 1/8/23

The public domain has recently contained information that highlights how the supplier's behaviour affects competition. On the other hand, distortion of competition by the customer is not something that receives a detailed assessment. When it comes to making requirements for public procurement, the customer has discretion, but he often defines his requirements in a way that restricts bids or bidders, which generally distorts competition. This article explores how the customer's behaviour can distort competition directly or indirectly by defining requirements or criteria in public procurement.

Requirements reducing the number of potential bidders

The Procurement Monitoring Office's digital tool where procurement statistics can be viewed shows that 83% of public procurement contracts had a single bid in 2022, so less than a fifth of all contracts involved competition. The small number of bids may be affected by a variety of factors, such as restrictive requirements made by customers.

For example, a certain invitation to tender required that the supplier should be registered in the same town where the customer is based. So a bidder who is based, say, less than two kilometres away from the town border is unable to submit his bid because he does not meet the customer's requirement, even though this is in fact a three-minute drive. In this case the customer has failed to provide an alternative for the location requirement, creating a situation where the number of bidders is reduced or restricted and consequently the customer receives a bid that might not be the most economically advantageous one.

It's important to note that the public procurement procedure's efficiency largely depends on competition. In this situation drawing up an invitation to tender with conditions that substantially restrict the number of potential bidders seriously threatens the principle of neutrality of competition. So both the customer and the potential bidder should carefully evaluate the implications of their behaviour.

Requirements and criteria for assessing them

Competition between bidders is potentially distorted and restricted not only by failure to provide alternatives for requirements where this is necessary but also by making requirements that do not fit the purpose of the procurement and do not have their assessment criteria stated or justified.

For example, a bidder experience requirement specifies a particular number of employees in the company to which the bidder has provided services. This requirement is based on the perceived significance of the project but those are subjective perceptions. For example, if there is an experience requirement where the project was prepared for a company with 100 employees, then if the company had 99 employees at that moment, wouldn't this be objectively treated as suitable experience? So, when making a requirement that defines a particular criterion, the customer should not only indicate an alternative but also specify assessment criteria giving a range for assessing the bidder's compliance with that requirement.

Similarly, to avoid creating unjustified advantages or favourable conditions for a particular bidder, an equivalent requirement that is included in assessment criteria should not be a formal one. Having an equivalent requirement would not merely imitate competition and could avoid the plague of single-bidder contracts.

The latest amendments to the Public Procurement Act effective from 1 January 2023 state that the customer must stop the procurement in the event of a single bid, unless this stoppage has been discussed with the suppliers or threatens public safety or health protection interests. Accordingly, the customer has an added interest in defining his requirements and assessment criteria in a way that yields more than one potential bid.

Requirements that do not fit the purpose of the procurement contract

Lacking an awareness of industry features may lead to requirements or criteria that are disproportionate to the subject matter of the contract. The number of requirements or criteria may then not be objective for the purpose of the contract and assessing those may not help achieve a good and timely performance. Thus, each requirement or criterion should be justified and purposeful.

Having said that, the customer is not required to reduce his requirements so that everyone could take part in the bidding,¹ yet we need to avoid unreasonable requirements deciding the outcome of the competition and giving advantages to a particular bidder.

One of the ways to mitigate risks is seeking advice from industry experts. This helps the customer not only to identify his desires but also to find out industry features that allow public procurement requirements to be defined more accurately, leading to improved and more competitive tendering.

Conclusion

Competition policy is currently focused on fighting collusion and cartels and ignores the behaviour of the public sector market players, who often put forward requirements or criteria restricting free competition between bidders in public procurement.

While the customer has discretion in making requirements for public procurement, we are aware of situations where the customer's requirements distort competition by giving advantages to a particular bidder. This leads to a relatively high percentage of single-bidder contracts.

If the bidder still sees any behaviour in how the customer defines requirements or criteria that is likely to distort competition, the bidder may ask the customer to explain or straighten those requirements. If the customer fails to cooperate and the bidder still sees restrictions, he may file a complaint with the Procurement Monitoring Office about potentially restrictive requirements and any other errors made in the procurement procedure. Also, section 14.1 of the Competition Act permits the bidder to seek advice on potential restrictive breaches from the Competition Council, which may challenge the customer's distortive behaviour in addition to the Procurement Monitoring Office's competence.

¹In its ruling SKA-922/2022 of 19 July 2022, the Supreme Court's Administrative Division states that the customer has no reason to exclude any criterion from the invitation to tender merely to ensure that no bidder has an advantage in the competition.