

Group Briefing

April 2016

Sub-Contractors – Freedom of Choice? Well, sort of...

ARTHUR COX - KEY CONTACTS



AARON BOYLE
PARTNER

+353 1 618 0568
aaron.boyle@arthurcox.com



ALMA KELLY
ASSOCIATE

+353 1 618 0569
alma.kelly@arthurcox.com

Recent developments in public procurement law and practice have an impact on how sub-contractors are selected and appointed on public projects and contracts. This note highlights some matters to be aware of when selecting sub-contractors.

CHANGES IN THE PUBLIC WORKS CONTRACTS

Direct Tendering to Specialist Works Contractors in Employer Designed Contracts

A procedure for the contracting authority to directly obtain tenders from specialist works sub-contractors, who will then be appointed by the main contractor (so called “**Reserved Specialists**”) has been introduced in the Employer-designed forms of Public Works Contracts: PW-CF1, PW-CF3 and PW-CF5.

The Office of Government Procurement Guidance Note (GN 2.3.3 Specialists and the Public Works Contracts) (the “**Guidance**”) contains a useful step by step guide to the new process. Some notable features are set out below.

- » The procurement processes (restricted procedures) for the main contractor and the Reserved Specialist(s) are conducted in parallel but will be staggered, with the main

contract procedure commencing first and the specialist contract procedure starting later.

- » Separate contract notices for the main contract and specialist contract(s) will be published.
- » The intention to use Reserved Specialists will be indicated from the outset in the contract notice and procurement documents to prospective candidates for the main works contract.
- » The contract notice for Reserved Specialists will indicate that the tender is for an element of a larger works contract and the successful specialist tenderer will ultimately be appointed as a sub-contractor to the main contractor.
- » There will be separate prequalification of main contract candidates and specialist candidates.
- » The tender stage (for both processes) will not commence until the final shortlists for the main contract candidates and specialist candidates are complete.
- » The procedures facilitate information exchange:
 - » The Suitability Assessment Questionnaire (SAQ) for the Reserved Specialist will

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

be included in the Works Requirements for the main contract to provide an indication of standards expected of the specialists.

- » The Works Requirements for the specialist works will be included in the main contract Works Requirements.
- » The tender documents for the Reserved Specialists will be issued to the main contract tenderers at the same time as to the specialist candidates.
- » Tendering specialists will be provided with information so as to understand the scale and extent of the main contract works and any constraints (statutory, legal, physical) together with the extent of general and special attendances which will be provided to the Reserved Specialist.
- » The main contract tenderers' programmes must identify the Reserved Specialist works.
- » The Pricing Document for the main contract tender will include a "Reserved Sum" for specialist work, for tender evaluation purposes only. The Reserved Sum will be replaced with the tender sum of the successful Reserved Specialist once that is known. Other pricing elements relating to the specialist works (general and special attendances, management and profit) will be tendered on an actual basis, with no adjustment to these items when the amounts for the Reserved Specialist become available (other than application of the tendered percentage for profit). The "notional tender sum" (with the adjustable Reserved Sum item) of each main contract tenderer is evaluated to identify the successful main contract tenderer.
- » The identity of the successful main contract tenderer and a copy of its programme will be provided to the specialist works tenderers, who then have 14 days to complete and submit their tenders.
- » After the successful tenderer for

the specialist works is identified, the Reserved Sum will be replaced with the tender sum of the Reserved Specialist and the tendered percentage for profit will be applied to that amount to arrive at a final contract sum for the main contract.

- » A pre-contract meeting will be arranged between both successful tenderers to clarify certain pre-contract matters (such as the starting date).
- » There will be a single award of contract by the contracting authority to the main contractor. The Reserved Specialist will be appointed as a sub-contractor by the main contractor.

Main Contractor's Responsibility for Reserved Specialists

The main contractor has responsibility for the performance of the Reserved Specialist. The main contractor must appoint a replacement specialist should the Reserved Specialist default and be terminated for breach. The replacement specialist must meet the standards applied by the contracting authority when appointing the initial Reserved Specialist (by reference to the specialist SAQ document included in the Works Requirements).

Novation of Specialists is still an option for Employer Designed Contracts

The (new) process of direct tendering of Reserved Specialists exists in addition to the existing process of novation, whereby a specialist's contract is transferred ("novated") to the main contractor from the contracting authority.

Approach to specialists under Design and Build Contracts

The Guidance also addresses where a contracting authority may require a level of control over the qualifications of specialists under a Design and Build (Contractor design) contract, and recognises the following methods:

- » The setting of appropriate pre-qualification criteria and standards

that must be met by the specialists proposed by the main contract applicants/tenderers;

- » The pre-qualification of panels from which the main contract tenderers may either select a specialist or propose an alternative of equivalent standing; or
- » Novation of named specialists (already appointed by the contracting) to the main contractor.

Domestic Sub-Contractors

Unless the procurement documents prescribe specific requirements for the pre-qualification or appointment of specialists, main contractors are free to choose their sub-contractor(s), provided the sub-contractor(s) meet any other applicable requirements of the procurement documents (such as the exclusion grounds discussed below).

INFLUENCE OF TECHNICAL SPECIFICATIONS ON THE CHOICE OF SUB-CONTRACTORS

The technical specifications (describing the requirements of the contracting authority) in a procurement process will influence and may limit the choice of sub-contractors.

The new Public Procurement Directive (Directive 2014/24/EU repealing Directive 2004/18/EC) recognises the importance of public procurement in delivering the environmental and social objectives of the European Union. To that end the new Directive permits contracting authorities, who wish to purchase works, supplies or services with specific environmental, social or other characteristics, to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label, provided certain rules are observed.

The rules relating to labels, as a means of specifying the requirements of a works, supply or service, are similar to those applying to the use of a reference, in a technical specification, to a specific make, source or process, which rules

carry over from the previous Directive 2004/18/EC into the new Directive.

The basic rules (Article 43), as they apply to labels, include that:

- » the label requirements must:
 - » be accessible to all interested parties/be established in an open and transparent procedure;
 - » be based on objectively verifiable and non-discriminatory criteria;
 - » be appropriate to define the characteristics of the works, supplies or services that are the subject matter of the contract.
- » Contracting authorities requiring a specific label must accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

The basic rules (Article 42), as they apply to a reference to a make, source, process, trademark or origin in a technical specification include that:

- » Unless justified by the subject matter of the contact, technical specifications must not make any such reference where the effect would be to favour or eliminate a participant or a product;
- » Such reference is permitted on an exceptional basis where a sufficiently precise and intelligible description of the subject-matter of the contract is not otherwise possible;
- » Such reference must be accompanied by the words “or equivalent”;
- » A contracting authority must accept an alternative product, process (etc.) to the one specified, where the tenderer proves that the solution proposed satisfies in an equivalent manner the requirements defined by the technical specifications.

FURTHER REACH OF THE NEW PUBLIC PROCUREMENT DIRECTIVE

More transparency in the sub-contracting chain

The new Public Procurement Directive gives contracting authorities the right, after the award of a contract, to require a main contractor to provide the name, contact details and legal representatives of its sub-contractors, any changes to that information during the course of the contract, and the same information for any new sub-contractors. This requirement automatically applies to works contracts and to services contracts at a facility under the direct oversight of the contracting authority. Contracting authorities may also extend the requirement to supply contracts, other services contracts, or to suppliers involved in works or services contracts and to sub-contractors of sub-contractors or further down the sub-contracting chain (Article 71(5)).

Exclusion grounds applicable to sub-contractors

The new Public Procurement Directive also recognises the importance of the observance by sub-contractors of applicable obligations in the fields of environmental, social and labour law. To that end, it introduces provisions requiring or enabling contracting authorities to verify that sub-contractors are not in any of the situations in which exclusion of economic operators would be warranted (under Article 57). It is not yet clear whether the Irish regulations implementing the new Public Procurement Directive will require or enable (making it optional for) contracting authorities to verify whether there are grounds for exclusion of sub-contractors pursuant to Article 57.

If the requirement is included in a procurement procedure and a proposed

sub-contractor has been found guilty of one of the “compulsory” exclusion grounds, then the contracting authority must require the tenderer to replace the sub-contractor if it to proceed in the procurement process. If one of the “non-compulsory” exclusion grounds applies to a proposed sub-contractor, a contracting authority may require the tenderer to replace the sub-contractor.

The list of “compulsory” and “non-compulsory” exclusion grounds has been expanded in the new Public Procurement Directive (for example compulsory grounds now includes non-payment of taxes and social security contributions and the non-compulsory grounds includes significant and persistent deficiencies in the performance of a substantive requirement under a prior public contract which led to early termination or other comparable sanctions).

Tenderers will need to ensure that any proposed sub-contractors make appropriate declarations and disclosures as to whether any of the exclusion grounds apply to them before proposing that sub-contractor as part of their response to a procurement procedure.

Possibility of direct payment to sub-contractors

The new Public Procurement Directive allows for a Member State to provide for direct payments from contracting authorities to sub-contractors either on request by a sub-contractor (Article 71(3)) or without the need for a request (Article 71(7)). Such measures (if adopted) must be set out in the procurement documents and may include appropriate mechanisms permitting the main contractor to object to undue payments. It remains to be seen whether Ireland will adopt this measure, in either form.

arthurcox.com

Dublin

+353 1 618 0000
dublin@arthurcox.com

Belfast

+44 28 9023 0007
belfast@arthurcox.com

London

+44 207 832 0200
london@arthurcox.com

New York

+1 212 782 3294
newyork@arthurcox.com

Silicon Valley

+1 650 943 2330
siliconvalley@arthurcox.com