

## Policy Paper on the evaluation of the proposed project team

### Background

1. Directive 2004/18 [Art. 44, 47, 48 and 53] and the relevant jurisprudence foresee that:
  - the objective of the selection process is to determine the candidates that are best qualified to undertake the procured contract, in the case of restricted procedures<sup>1</sup>; thus the selection stage considers information that reflects the capabilities of the candidates, ref. also the other selection criteria
  - the objective of the award process is to choose the most advantageous tender for the particular project; thus the award stage considers the quality of the (technical and economic) proposals for the project
  - the award criteria should be different from those applicable for selection.
2. Directive 2004/18 stipulates in particular that evidence of technical ability may include inter alia [Art. 48, 2.e] the *educational & professional qualifications of service provider and/or his managerial staff and in particular of the person(s) responsible for providing the services.*
3. DG Internal Market has the opinion that the CVs of the proposed project team should be evaluated in the selection stage, while DG External Aid foresees in “Practical Guide to Contract Procedures Compiled by the E.C. for E.C. External Actions” [E.C., 2006]<sup>2</sup> that the evaluation of the project team is carried out in the award phase. All other information that may be required from the candidates according to Art. 48 par. 2 clearly refers to capabilities rather than commitments for the particular project.

Moreover, the project team is currently evaluated in the award phase in most national procurement systems worldwide – even some in E.U. Member States - and all IFI procurement systems (ref. e.g. the Guidelines for Selection and Employment of consultants by World Bank Borrowers, May 2004)<sup>3</sup>.

4. Of relevance to this issue is also the provision that, according to Directive 2004/18 [Art. 44, par. 2], contracting authorities may require candidates to meet minimum capacity levels of economic and financial standing and/or technical/professional ability (to be evaluated in the selection stage).

### EFCA’s concerns and opinions

EFCA is concerned that the evaluation of the project team in the selection stage may not be appropriate for conceptual, practical and legal reasons.

#### (a) Conceptual considerations

1. EFCA considers that the experience of the senior engineers and architects who are generally responsible for the services relevant to the nature of the tendered project, i.e. who

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<sup>1</sup> or all candidates that are qualified to undertake the project, in the case of open procedures

<sup>2</sup> sections 2.4.12.1.4 for selection and 2.4.12.2 & 3.3.4 for award

<sup>3</sup> available on the internet; the selection phase is referred to in that guideline as shortlisting

bear the relevant managerial responsibilities for all projects, is indeed important for the assessment of the capabilities of the candidates, because the experience that the firm has acquired through the years may not necessarily represent the current experience of the staff of the firm; this would occur, for example, if the persons that carried the experience of past projects have left the firm or, conversely, if a firm of limited past experience has built up its capabilities by hiring experienced persons from other firms.

EFCA thus believes that the evaluation in the selection stage of the senior management staff, which is generally responsible for the provision of the services by the firm (i.e. for all projects relevant to the nature of the tendered one), is appropriate since this staff essentially personifies the experience of the firm.

2. EFCA considers that beyond those individuals who generally oversee the work, the proposed project team does not characterise the capabilities of the candidate, since it includes only part of the candidate's personnel (and, in case of large consulting firms, a very small part); rather, the project team represents resources allocated by the company to the project. In this sense the evaluation of the project team in the selection stage is not consistent with the letter and spirit of the Directive, as described in point 1 of the Background above.

Moreover, the technical proposal of the candidate is interrelated with the qualifications of the project team; in particular:

- the composition of the project team will depend on the activity breakdown of the project defined in the methodology
- the proposed time schedule is interrelated with the human resources allocated to the project, and
- the responsibilities of the members of the project team will depend on the composition of the team and the activity breakdown.

Thus the assessment of the project team should be made in conjunction with the technical proposal, i.e. at the award stage.

3. Finally, the effectiveness of the project team is one of the main indices of the expected quality of the services to be rendered<sup>4</sup>. Since there are not many ways in which the expected quality of services can be assessed, it is important for the objectivity of the evaluation process to retain this important criterion where applicable.

#### **(b) Practical considerations**

In the (most common) restricted procedure the submission of documents by the candidates takes place separately for the selection and the award phase. Typically, each stage requires some months of deliberations by the contracting authority and the signature of the contract itself some time as well; thus, the time that elapses from the submission of the documents by the

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<sup>4</sup> for services the objective of the procurement procedure is to assess the quality of services that the candidates *may be expected to deliver*; thus the experience of the project team may be a significant criterion for the quality of the services to be rendered by the candidate (which was recognised in the decision of the Belgian Conseil d'Etat of 25.9.2008 on case 186.508). Also the ECJ's Lianakis case does not preclude the evaluation at the award stage of the tender in respect of, *i.a.*, the calibre of the particular individuals proposed for the performance of the service.

candidates for the selection stage to the signature and commencement of the project is normally at least six months and may well be a year, especially if appeals on the contracting authorities' decisions are submitted by one or more candidates.

Thus for (most) cases where the restricted procedure is applied, the commitment of the project team by all candidates from the selection stage would bind all the project teams for the whole duration of the selection and award procedure – with only one candidate (the winner) actually having the chance to deploy them in the end.

The practical consequence of such a requirement would be:

- either that some or all of the candidates would be burdened with the cost of retaining the staff allocated to the project, a cost that would ultimately have to be passed to the contracting authorities and the public sector in general
- or that the candidates would actually allocate them to other projects and strive for their replacement in case of award of the project - which renders the evaluation process of the project team ultimately irrelevant; thus, commitment of staff from the selection stage may in fact provide an incentive for post-award replacement of staff.

Thus it is in the interest of all parties that the project team not be committed before the award stage.

### ***(c) Legal considerations***

Finally, EFCA is concerned that the provisions of Art. 48 par. 2e may not actually provide the legal basis for the assessment of the project team in the selection stage. In this respect it is noted that, the text of Art. 48, par. 2.e refers to:

- managerial staff, which is further qualified with the phrase “*in particular*” as that subset of the managerial staff which is responsible for providing the services, and
- the “*persons responsible for providing the services*”, not the “*persons that will be providing the services*”, thus distinguishing between the persons generally responsible for all projects of similar nature at management level on the one hand and the professionals that will actually perform the services under the responsibility of that management for the particular project.

Moreover, as supported by the associated jurisprudence, the directive is restrictive in the information that may be required from candidates for the assessment of suitability in the selection phase - precluding expansive interpretations of these requirements.

Thus, the provisions of the above article of the Directive limit the request for submission of qualifications to the senior/management staff generally responsible for the provision of the related services by the firm.

However, even if this article is interpreted as allowing the request by the contracting authority for qualifications of the project team at the selection stage, this request is optional; thus, the qualifications of the project team can always be requested by the contracting authority in the award stage, for the assessment of its effectiveness in relation to the quality of the services to be provided.

## EFCA's proposals

In the interest of a clear evaluation procedure, EFCA proposes that:

1. In the selection process the experience of the firms and the qualifications of senior/managerial staff of the firms generally responsible for the provision of the services relevant to the nature of the tendered project are assessed, in order to ensure that the candidates retain expertise consistent with their experience (and/or have supplemented it with experienced staff from other firms, pursuant to the provisions of Art. 48, par. 3).
2. If the contracting authority deems it appropriate to require candidates to meet minimum capacity levels of technical/professional ability pursuant to the provisions of Art. 44 par. 2, such levels should concern:
  - the experience of the firm and/or
  - the experience of the senior/managerial staff generally responsible for the provision of the relevant services by the firmSuch technical/professional abilities of the candidates will be evaluated in the selection stage.
3. The composition of the project team should best be freely determined by the candidates in their proposal, depending on the experience profiles of their staff, and its effectiveness assessed by the contracting authorities.
4. The effectiveness of the project teams should subsequently be assessed in the award stage when the quality of the service offered can validly be determined by the quality of the team in conjunction with the proposed methodology, time schedule and organisational structure for the provision of the services<sup>5</sup>. This is consistent with the interpretation of the provision of Art 48, par. 2e as referring for the selection phase only to the senior/managerial staff generally responsible for the provision of services.
5. In exceptional cases where contracting authorities deem it absolutely necessary to require in the invitation to tender certain qualifications from the project team, e.g. specific experience of the professional staff to be provided for technical assistance contracts:
  - the award criteria stated in the project invitation should include a threshold value for the effectiveness of the project team and
  - candidates failing to provide the said qualifications should be graded below this threshold value and disqualified in the award stage.

Thus, even in those cases, the project team should not be assessed in the selection stage.

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<sup>5</sup> If documentation has been requested on the qualifications of the managers in the selection stage and one or more of these managers is allocated to the particular project by the candidate at the proposal stage, their effectiveness as the proposed managers in the project team should be still be evaluated in the award phase.