



Tool: Checklist for protecting competition when managing the risks of very low tenders

Purpose of the Checklist

- To guide and support public procurement practitioners and policy makers to manage the risks of low tenders while promoting effective competition in public procurement that helps achieve better value for money.

Public Procurement
Principle: **Risk
Management, Integrity,
Access, Efficiency**

Procurement Stage:
Pre-tendering, Tendering

Audience: **Procuring Entity,
Policy Maker**

Description

Procurers may be concerned about the risks posed by bidders mistakenly underestimating their costs, or bidding strategically in order to win a contract and then later renegotiate a high price. They may therefore be suspicious that low bids are too good to be true. However, at the same time, procurers will not want to discourage genuine low bids. Therefore, when addressing the potential risks of very low tenders, procurers should take care to react in ways that do not reduce competition and the value achieved by the procurement (e.g. the quality and price). Policy makers may use the checklist to inspire legal reforms in this area.

Protecting competition when managing the risks of very low tenders

Procurers will sometimes be rightly concerned about the risk that:

- Some bidders might genuinely underestimate the costs they will actually incur in delivering the project, service, or goods.
- Some bidders may strategically and intentionally bid below their expected costs in order to win a contract, remove the procurer's alternative supplier options, and then use the resulting market power to renegotiate a higher price. Procurers will recognise however that the risk of opportunistic renegotiation applies whether the price is below the bidder's costs or not (that is to say, any competitive bid is subject to renegotiation risk).

Before seeking to reduce the risks of very low tenders, procurers should consider whether, given the specific type of product or service that they are procuring, the risks are likely to be significant.

- If, for example, when a winning bidder seeks to renegotiate after being awarded the contract, a replacement contractor can quickly and seamlessly step in and take on the

contract, then very low tenders would not pose a risk. Any problem with the contractor could be solved at little additional cost (particularly if the original award specified a runner-up). This might be expected to be the case for example in the procurement of standardised goods or services.

- **In contrast, if a replacement contractor cannot quickly and seamlessly step in and take on the contract, for example in large infrastructure projects or if continuity-of-service is a key requirement then a solution would be required.**

If very low tenders do not pose significant risks, automatic exclusions would harm competition and should therefore never apply.

If very low tenders pose significant risks, then procurers should address these by taking actions that minimise the impact on competition and maximise the value that the procurement achieves. Below we provide a checklist of ways to address these risks while protecting competition. For the avoidance of doubt procurers should also ensure that their actions are consistent with the applicable procurement law.

A.1 To address the risks of very low tenders, without taking actions that may reduce competition, at the pre-tendering stage the procurer:

- Should provide all potential bidders with clear tender documentation, including all the relevant information that is available on the product or service that is being procured in order to help them to make the most realistic cost estimates they can.
- Should make sure that the time allotted for suppliers to respond is proportionate to the size and complexity of the procurement. This is particularly important in technically complex projects where it may take time to develop more accurate cost estimates.
- Should use assessment criteria that focus not only on price, but which might include quality, deliverability, value or other factors that matter to the procurer and which bidders might reduce in order to be able to offer a very low price.
- Should require that the winning bidder take pre-emptive steps to internalise the risk that its costs turn out higher than expected. For example, this could include taking out professional liability or project insurance as well as providing a performance bond that pays out to the procurer in the event that the contractor cannot ensure that the project is delivered on the originally agreed terms.
- Should set out in detail in the tender documentation that renegotiation will only be considered where the information that was originally provided by the procurer proves to be inaccurate (incorrect or incomplete), or when clearly specified conditions are satisfied (e.g. an increase in the price of specific inputs which could not be predicted by the bidder). Furthermore, the applicable procurement law may set out conditions which have to be fulfilled for renegotiation to be permitted.
- Should include in the contract sanctions for any bidder that pulls out or fails to deliver the terms of its contract, unless the information that was originally provided by the procurer proved to be inaccurate (incorrect or incomplete). These sanctions could include financial penalties, temporary debarment of firms or individuals, or initiating legal actions for damages claims by the contracting authority against the contractor. In the large majority of cases in which sanctions are a sufficient deterrent, and suppliers deliver at the conditions at which the tender was adjudicated, no extra action may be necessary. Any sanctions would need to be consistent with the applicable procurement law.

- Should set out in the tender documentation that if it suspects that a firm has strategically bid below its average variable cost, it will refer the case to the Competition Authority, which is able and may decide to assess whether the action is problematic under the relevant standards.
 - Should consider, in high value projects, creating whistle-blower rewards for reporting evidence that a firm bid at a price that it intended to renegotiate at a later date, especially if accompanied by evidence of corrupt agreements with procurement officials.
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A.2 To address the risks of very low tenders without taking actions that may reduce the value that the procurement can achieve, at the tendering stage the procurer:

- Should assess all bids against its evaluation criteria, which might include the quality or deliverability of the bid, and should not automatically exclude a bid on the basis of its low price. Doing so would, for example, risk excluding new entrants that make loss-leading bids to obtain a foothold in a market.
 - Should check the cost assumptions of the winning bid to make sure it is deliverable, whether it is a very low bid or not. Any checks that are carried out need to be proportionate to the procurement in question to avoid creating unnecessary costs and delays in the bidding process.
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Further Resources

Albano (2017), "[Competition in Public Procurement Markets](#)"

OECD (2015), "[Competition and the use of tenders and auctions](#)"

OECD (2009), "[Guidelines for Fighting Bid Rigging](#)" (available in 15 languages)