

Disclosure of Budgets in the Course of Procurement

When is it appropriate?



Guidelines

1 Introduction

This guidance addresses the issue of whether or not budgets should be disclosed in the early stages of a procurement exercise. There is no simple “yes/no” answer to the question, as any decision on whether to disclose or not will depend on a number of factors. As it is impossible to cover all procurement possibilities, each case will have to be judged on its own merits. These guidelines discuss the key points, which should be considered before deciding how to proceed.

Disclosure of the budget *should not* be used as an excuse for poor market knowledge, lack of a tight specification or evaluation framework.

2 May I disclose or not?

2.1 What does the Law say?

There are number of legal issues to consider before deciding whether or not to disclose a budget:

- There may be a good case for obtaining an exemption for budget disclosure requests received under the Freedom of Information Act using the commercial prejudice exemption. Public bodies are exempted from releasing information if it is likely to prejudice the commercial interests of any person. (A person may be an individual, a company, the public authority itself or any other legal entity.)
- Any disclosure of budget information to one bidder will usually require disclosure to all bidders. This is in accordance with the EU principles of non-discrimination, equal treatment and transparency.
- Be aware that disclosure of budget information to short-listed bidders at a late stage of a procurement exercise may, in certain circumstances, be unfair to bidders that already have been eliminated.
- There is a common misconception that advertising an opportunity in OJEU prohibits the disclosure of budgets. However, there is a section where budget information can be entered on the OJEU form and several government organisations have already made use of this. This is a good way of ensuring that all potential bidders have access to the same information at the same time.

Please obtain legal advice before any decision to disclose budget information either during a live procurement or in response to a request for information.

3 When disclosure may not be appropriate

One argument against budget disclosure is that suppliers could submit bids close to the budget price, when more cost-effective and/or innovative solutions might otherwise have been proposed. The option of providing an indicative price or price band may help to ensure better value for money (see section 5).

3.1 It may be unnecessary or counter-productive to reveal budgets when:

- There is already a robust cost-estimating methodology for a project or programme (or its constituent parts). In this case, a cost estimate can be produced, against which bids can be assessed without the need to disclose an actual budget.
- The specification for the subject of the procurement is clearly defined and there is good pricing information.
- There is flexibility in the budget, with the possibility of extending this for outstanding solutions.
- There are significant fears of collusion between suppliers, and concern over control of this. If collusion is seen to be a major risk, bid evaluation methods need to be well defined and rigorously implemented. Collusion can occur in any market, but there is a greater risk in those that are small or immature. See also, OFT's guidance on “Cartels and the Competition Act 1998”. Available: <http://www.of.gov.uk/NR/rdonlyres/4BF964E6-BD83-4D1D-ADDA-8598FA8FE070/0/oft435.pdf>

4 When budget disclosure may be appropriate

Disclosure of budgets, along with a clear set of selection criteria or desired outcomes, might allow suppliers to self-deselect if they think the procurement is beyond their abilities, or if they think they cannot compete. If the budget is inadequate, bidders can also signal this in writing, or by just not showing interest and the client can then take remedial action to address this. Conversely, if the budget information is withheld, bidders may not understand the value of the procurement and hence submit unrealistic bids. This leads to unproductive time spent reviewing bids by the procurer and wasted bid costs and time for the bidder.

4.1 Budget disclosure could be considered under the following circumstances:

- When the procurement budget is fixed, and there is no scope for increasing it (see Highways Agency case study).
- When the amount of funds allocated to a procurement exercise is publicly available information (as in the case of some grant-funded NDPBs for whom the EU procurement rules may still apply); however, clear evaluation criteria are required to ensure value for money.
- Where the procurement is commodity based (i.e. how many items can we get for a fixed amount?) and the content and quality of the required items is fully defined (but also consider e-auctions for this kind of procurement, as a way of achieving better value for money).
- Where the outcomes or specification are not fully defined. For example, in the case of research funding, where a series of topics have been identified, it is often advantageous to disclose the overall amount of funds available for each topic, and invite expressions of interest, asking for more focussed proposals for research projects under each topic heading and an estimate of cost/anticipated number of man-days work. This approach allows the procurer to pick and choose the most appropriate proposals before refining the specifications and putting these out to tender.
- Where there is a strong degree of competition, disclosing the budget can actually help suppliers to focus on producing the most competitive solution for the money available.
- Where the client has established a policy of openness with its supply base and has processes in place to ensure that the risks associated with disclosure are adequately mitigated.

Consider use of early contractor dialogue and indicative prices - see section 5.

4.2 Case Studies

4.2a Case Study - Highways Agency - Early Contractor Involvement

As the Highways Agency operates in both the new build and road maintenance markets, they have specialist knowledge of how much a scheme will cost to build. Highways Agency will regularly reveal the overall budget of a road scheme, but in evaluating bidders, the cost of the scheme is not part of the evaluation criteria.

When the Department for Transport hands down a brief to the Agency to deliver a project, it comes with a budget, which cannot be altered, unless it is agreed that the scope of the brief has to be changed. The budget includes all costs, including risk allowances, for the project, but excluding direct Highways Agency staff costs. This budget figure, less a small percentage to cover overall programme risks, is disclosed to the tenderers. This figure then forms the basis of various bonuses in the contract. Essentially, if the contractor can deliver the project for less than the disclosed budget, the contractor and the Agency share in the saving.

As the budget is revealed, cost therefore does not form part of the tender evaluation criteria. Tender evaluation uses a risk-based approach whereby the tenderers must explain, with evidence, how they will deal with all the risks, which may prevent the Employer from meeting all the objectives of the project. The tender submission forms the basis of the Quality Plan, which is continually measured against Key Performance Indicators. Performance measurement with continual improvement targets, measuring performance, learning the lessons and delivering continual improvement are vital to the achievement of best value.

5 Early contractor involvement and indicative pricing

If the purpose of revealing a budget to bidders is to test whether available funding matches potential solutions, consider whether this could be achieved through other, less risky, means. These include undertaking early supplier engagement, market sounding or concept viability exercises. Early involvement of a representative group of suppliers can be used to seek their views on what solutions are available and what the expected costs will be. This information will inform the development of the specification, helps to identify whether or not the budget is realistic and if not, what action needs to be taken to resolve this.

In many cases, particularly if innovative solutions are required, giving an indication of cost is a good way of focusing bids. It is also possible to indicate value by advertising the opportunity to bid within a price band, as the following case study illustrates. Overall organisational spend and forward strategy should be taken into account when determining suitable value bands.

5a Case Study - MOD - Value Banding

The MoD spends around £11 billion each year on a wide variety of goods and services to equip the Armed Forces. The MoD routinely provides clear information on its future requirements and the timetables for them. For "non-warlike" procurements with a value above the relevant threshold, MoD's requirements are published in the Official Journal of the European Union (OJEU). "Warlike" requirements in excess of £500K (or £250K in the case of clothing, textiles and consultancy requirements) are published in the MoD Defence Contracts Bulletin.

The MoD Contracts Bulletin contains details of prime and sub-contract opportunities arising from the MoD's larger value requirements. It is published fortnightly and is available on subscription (£210 p.a.) and contains Possible Future Purchases, Tenders Invited, Contracts Awarded and Sub-Contract Opportunities sections. Recent enhancements to the Bulletin will mean that from early February 2005, MoD's 'non-warlike' OJEU requirements will be advertised in the Bulletin as well as in the OJEU.

The MOD does not usually publish the budget for procurements, however, they have broken their opportunities down into various value bands and they publish this information in the notices. With the introduction of FOI they are looking at proactively publishing more information on the value of contracts.

6 Summary

There is no simple answer to the question of whether to disclose budget or not. No specific requirement exists under EU or other regulations, so a decision to disclose needs to be made based on the type of procurement, where this fits into an overarching procurement strategy, the goals that the contracting authority hopes to achieve by revealing the budget as well as the availability, accuracy and type of budget.

The aim of any procurement should be to ensure that the budget available is consistent with the expected costs of a suitable solution that demonstrates value for money. A good way of developing a sound cost estimate for a procurement is through a strong understanding of the market and solutions available. This can be achieved through early engagement with a representative group of suppliers to that market, through the development of cost estimating methodologies, and through knowledge of prior procurements of a similar nature. Through these activities, a more detailed specification can be developed and a realistic budget agreed. This process could negate the need to reveal the budget to the market.

There are a number of risks associated with disclosing a budget, especially in small markets where there is a greater risk of collusion. If properly managed, however, disclosure of budgets can help to stimulate competition (especially in more mature markets where collusion is less of a risk). Disclosure of budgets, along with details of the specification and/or desired outcomes could also help suppliers to make an informed decision on whether or not to bid, saving both parties time and money. If used as part of a supplier management strategy, being open about the budget for procurements can demonstrate trust between the client and its suppliers and help to build strong, long-lasting relationships.

For further information, contact the OGC Service Desk on 0845 000 4999. Email: servicedesk@ogc.gsi.gov.uk

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