

## **EUROPEAN CRITERIA APPLIED TO THE ASSESSMENT OF WORKS TENDERS (proposal)**

### **1. WORKS TENDER ASSESSMENT CRITERIA PROVIDED FOR IN EU DIRECTIVES**

#### **1.1. Introduction**

European Union's two key directives related to public procurement have seen recent amendments. These include the following:

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (Official Journal of the European Union L 94 of 28 March 2014, page 65), hereinafter referred to as the "2014/24/EU classic directive";
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (Official Journal Of the European Union L 94 of 28 March 2014, page 243), hereinafter referred to as the "2014/25/EU sectoral directive".

The deadline by which the provisions of the aforementioned directives need to be implemented in the EU Member States expires, pursuant to Art. 90(1) of the 2014/24/EU classic directive and Art. 106(1) of the 2014/25/EU sectoral directive, on 18 April 2016. The implementation covers both statutory provisions, as well as secondary and administrative legislation required to fully abide by the aforementioned directives. So, not much time is left until the deadline expires, and some of the directives' provisions require that further details be specified in secondary legislation. A document on the European criteria applied to the assessment of works tenders may comprise a part of such legislation.

The 2014/24/EU classic directive is concerned with public procurement in the area of construction work, supplies or services (Art. 1(2)). The 2014/24/EU sectoral directive is also concerned with public procurement in the area of construction work, supplies or services (Art. 1(2)), but by entities operating in the water, energy, transport and postal services sectors (Art. 8-14).

The present paper proposes certain tender assessment criteria that may be applied to public procurement procedures concerned with construction works. Hence, it is valid for both directives referred to above. The criteria specified herein may be also used while awarding contracts for supplies or services.

## **1.2. Description of tender assessment criteria pursuant to the 2014/24/EU classic directive and the 2014/25/EU sectoral directive**

The contract award criteria are laid down under Art. 67 of the 2014/24/EU classic directive and Art. 82 of the 2014/25/EU sectoral directive. Due to the fact that the wording of both articles is identical (with the only differences between them stemming from translation), it has to be stressed that both directives adopt the same tender assessment approach. **As the 2014/24/EU classic directive and the 2014/25/EU sectoral directive adopt an identical approach to the tender assessment criteria, the following part of the present study will make references to the 2014/24/EU classic directive only.**

The present chapter states the provisions of Art. 67 “Contract award criteria”, without any author’s comments. The wording has been edited to eliminate provisions that are not of any significance for the assessment of the criteria, and the locations from which text has been removed are marked with the (...) symbol.

1. (...) contracting authorities shall base the award of public contracts on the most economically advantageous tender.
2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.

Such criteria may comprise, for instance:

- a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- b) organization, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

## **2. ASSUMPTIONS MADE WHILE FORMULATING WORKS TENDER ASSESSMENT CRITERIA**

### **2.1. Assumptions stemming from the provisions of the 2014/24/EU classic directive**

#### **2.1.1. Criteria as a finite set**

Pursuant to the provision of Art. 67(4) “award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority”. In order for the contracting authority not to enjoy an unrestricted freedom of choice, the tender assessment criteria shall constitute a final set.

### **2.1.2. Unambiguousness of criteria**

Pursuant to Art. 67(4) the criteria “shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the bidders to be effectively verified in order to assess how well the tenders meet the award criteria”. In order to enable effective verification of the information provided by the bidders, the tender assessment criteria need to be unambiguous.

### **2.1.3. Life cycle taken into consideration while determining the criteria**

Pursuant to Art. 67(2), the most economically advantageous tender is identified by the contracting authority “using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 68”.

Pursuant to Art. 68(1), life-cycle costing covers the following:

- a) costs, borne by the contracting authority or other users, such as:
  - costs of performance (relating to acquisition),
  - costs of use, such as consumption of energy and other resources,
  - maintenance costs,
  - end of life costs, such as collection and recycling costs;
- b) costs imputed to environmental externalities - the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

Life-cycle costing may be relied upon while estimating the cost of performance of contract and the costs of operation of the subject of contract. The costs of operation, which are, to a much higher degree than the costs of performance, an estimate only, may include the costs of use, maintenance and decommissioning, recycling included.

### **2.1.4. Criteria weighting**

Pursuant to Art. 67(5) “The contracting authority shall specify, in the procurement documents, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender (...). Those weightings may be expressed by providing for a range with an appropriate maximum spread”.

So, a weighting should be assigned to each of the tender assessment criteria.

## **2.2. Author’s assumptions**

### **2.2.1. Criteria weighting expressed in points**

In order for the quality-related criteria to be readily comparable, they should be expressed with the use of numbers. A point-based assessment is the easiest way to assess the tenders. The most advantageous tender is the one that has been awarded the highest number of points. It has been assumed that a given tender may be awarded 100 points maximum.

### **2.2.2. Division of criteria into groups**

The tender assessment criteria have been divided into two groups based on the contracting authority’s obligations:

- 1) criteria in which the contracting authority defines a level of fulfillment of a given criterion,

2) criteria in which it is not the contracting authority but the bidder who defines a level of fulfillment of a given criterion.

As far as the first group is concerned, points are awarded to the bidder if his tender allows the contract to be performed despite the fact that the level of criteria fulfillment is different than the one defined by the contracting authority. The number of points received in relation to a given criterion is proportional to the difference between the level of the bidder's fulfillment of a given criterion, and the level defined by the contracting authority. There are 6 such criteria. They have been numbered, in the present paper, as criteria 1 through 6.

As far as the second group of criteria is concerned, points are awarded to the bidder depending on the level of fulfillment of a given criterion, compared to the highest level achieved by all bidders seeking the award of the same contract. The number of points received in relation to a given criterion is proportional to the difference between the level of the bidder's fulfillment of a given criterion, and the highest level achieved by the bidders. There are 7 such criteria. They have been numbered, in the present paper, as criteria 7 through 13.

### **2.2.3. Equal treatment of the cost of performance and cost of operation**

The directive's provisions prove that the cost of operation that has to be taken into consideration needs to be treated in a special manner (Art. 67(2)) "using a cost-effectiveness approach, such as life-cycle costing". Due to the current trend based on which excessive importance is attached to the cost of performance of the subject of the contract, and due to the current trend of attaching excessive importance to the cost of operation of the subject of the contract, it seems that the same weight should be attached to both of the aforementioned criteria.

## **3. PROPOSAL OF UNIFIED EUROPEAN CRITERIA FOR ASSESSING WORKS TENDERS**

### **3.1. Cost of performance of the subject of contract**

This criterion depicts the potential financial and organizational abilities of the bidder - the higher the costs of the subject of the contract and the longer its performance period, the greater financial and organizational ability of the bidder has to be. This criterion encompasses the EU's criterion of performance of the subject of contract, but also its technical merit, aesthetic and functional characteristics, accessibility and design for all users.

Pursuant to Art. 5(1) "The calculation of the estimated value of a procurement shall be based on the total amount payable, net of VAT, as estimated by the contracting authority". Pursuant to Art. 67(2) "The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only. Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts". Pursuant to Art. 69(3) "Contracting authorities shall reject the tender, where they have established that the tender is abnormally low".

*Tender assessment procedure based on criterion No. 1*

The contracting authority defines the highest estimated cost of performance of the subject of the contract. The cost of performance of the subject of the contract, as defined by the bidder, may be lower than the highest estimated cost by 20% at the most. Any cost that is by more than 20% lower than the highest estimated cost is deemed to be abnormally low. The difference between the highest cost of performance of the contract and the lowest cost defined by the bidder is worth 15 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.2. Cost of operation of the subject of contract**

This criterion combines the EU's criterion related to the cost of operation with other factors, such as: quality, social and environmental considerations, commerce and its conditions, after-sales service, technical assistance and delivery terms.

Pursuant to Art. 67(3) "Award criteria shall be considered to be linked to the subject-matter of the public contract (...) at any stage of their life cycle". Pursuant to Art. 68(1), the life-cycle costing includes, inter alia, costs of operation, maintenance and decommissioning, including recycling. It has been adopted, for the purpose of the present paper, that the aforementioned costs comprise the cost of operation.

#### *Tender assessment procedure based on criterion No. 2*

The contracting authority defines the highest estimated cost of operating the subject of the contract over its life cycle (without the cost of performance of the subject of the contract)... The difference between the highest cost of operation of the subject of the contract and the lowest cost defined by the bidder is worth 15 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.3. Independent performance of the subject of contract**

This criterion defines the level of independence of the bidder while performing the subject of the contract - the higher the level of independence, the greater the probability of proper coordination while performing the contract. By performing the majority of construction works on his own, the economic operator has real influence on proper performance of the contract. This criterion encompasses the EU-defined right to demand that specific tasks be performed by the economic operator himself.

Pursuant to Art. 63(2) "In the case of works contracts (...) contracting authorities may require that certain critical tasks be performed directly by the bidder himself". In accordance with Annex XII, a certain percentage value of the contract may be identified that economic operator intends to subcontract.

#### *Tender assessment procedure based on criterion No. 3*

The contracting authority identifies the lowest percentage share of the subject of the contract that has to be performed by the tendered himself, with the said share not being lower than 50%. The difference between the highest percentage share defined by the bidder and the lowest percentage share is worth 10 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.4. Number of references confirming completion of similar contracts**

This criterion is a proof of the bidder's experience in performing similar contracts. Pursuant to Art. 58(4) "Contracting authorities may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past". Pursuant to Annex XII, the technical ability of the economic operators is proven by "a list of the works carried out over at the most the past five years, accompanied by certificates of satisfactory execution and outcome". This criterion encompasses the EU criterion of experience.

#### *Tender assessment procedure based on criterion No. 4*

References should relate to the period of 5 years preceding the tender announcement date. As far as this criterion is concerned, a distinction should be made based on the country of origin of the references - EU country in which the tender has been announced, another EU Member State or a country from outside the EU. Such a manner of assessing the number of references takes into consideration the knowledge of the European reality, including the legal, technical, economic and organizational requirements that apply in the specific EU Member State.

The contracting authority determines the lowest number of references accepted - not fewer than 2. The number of references provided by the tendered may equal, at the most, twice the lowest number of references required. The difference between the highest number of references offered by a bidder and the number of references required by the contracting authority is worth 10 points. The remaining bidders are awarded the number of points that is worked out proportionally.

For comparison purposes, the number of references is worked out as a product of the number of references and a specific factor that equals:

- a) 1.0 if a given contract was completed in the EU country in which the current tender has been announced;
- b) 0.5 if a given contract was completed in another EU Member State or in a third country being a party to the WTO's Government Procurement Agreement (GPA) or other international agreements;
- c) 0.25 if a given contract was completed in a country other than those listed under clauses a) and b).

### **3.5. Duration of performance of the subject of contract**

This criterion defines the bidder's potential - the shorter the contract performance period, the quicker the subject of contract will be available for use, and the lower the social costs resulting from the burden related to the performance of the contract will be. This criterion encompasses the EU criterion concerned with the contract performance period and social considerations.

#### *Tender assessment procedure based on criterion No. 5*

The contracting authority defines the longest permissible contract performance period. The contract performance period defined by the bidder may at the most by 20% shorter than the longest permissible period. The difference between the longest contract performance period and the shortest period defined by the bidder is worth 10 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.6. Warranty term covering the subject of contract**

This criterion proves the quality of the subject of the contract - the longer the warranty period, the higher the probability of the subject of the contract being of proper quality. This criterion encompasses, to the highest degree, the EU criterion of quality.

#### *Tender assessment procedure based on criterion No. 6*

The contracting authority defines the shortest warranty period covering the completed subject of the contract. The warranty period defined by the bidder may be at the most twice as long as the shortest permissible warranty period. The difference between the longest warranty period defined by the bidder and the shortest permissible period is worth 5 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.7. Bidder's equipment-related potential**

This criterion evidences the bidder's equipment-related potential available in the territory of the country in which the tender has been announced. The higher the number of pieces of equipment that may be taken advantage of while performing the contract, the higher the probability of such equipment being used for performing the contract. The newer the equipment, the higher the probability of its correct operation while performing the subject of the contract. More technically advanced machinery and equipment should enable better performance of the subject of the contract, e.g. instead of using pre-finished products, if specific equipment is available, monolithic elements may be created on site. Pursuant to the provisions of Annex XII, the technical ability of economic operators should be evidenced by "a statement of the tools, plant or technical equipment available (...) for carrying out the contract". This criterion encompasses the EU criterion of technical potential.

#### *Tender assessment procedure based on criterion No. 7*

The contracting authority identifies the equipment units required to perform the subject of the contract, which will be compared at the tender assessment stage. The bidder who has, at his disposal, the highest number of relevant equipment units is awarded 5 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.8. Innovation-oriented approach of the bidder**

This criterion proves the bidder's innovation-oriented approach. Pursuant to Art. 70 "Contracting authorities may lay down special conditions relating to the performance of a contract (...). Those conditions may include economic, innovation-related considerations".

#### *Tender assessment procedure based on criterion No. 8*

The contracting authority defines the scope of patents obtained by the bidders over the course of five years preceding the tender announcement, or patents that the bidder was taking advantage over that same period of time. The bidder who presents the highest number of patents confirmed by submission of the front page of the patent document, is awarded 5 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.9. Professional qualifications of the bidder's staff**

This criterion evidences the bidder's personnel-related potential available in the territory of the country in which the tender has been announced. The higher the number of personnel holding relevant professional qualifications and capable of participating in the performance of the contract, the higher the probability of them being involved in the performance of the contract. This criterion encompasses the EU criterion of qualifications.

Pursuant to Art. 19(1), in the case of public works contracts, "relevant professional qualifications of the staff to be responsible for the performance of the contract in question" may be required. Pursuant to Art. 58(1) "In procurement procedures for services, in so far as economic operators have to possess a particular authorization or to be members of a particular organization in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorization or membership".

#### *Tender assessment procedure based on criterion No. 9*

The contracting authority identifies the professional qualifications required to perform the subject of the contract, which will be compared at the tender assessment stage. The bidder who employs the highest number of persons holding relevant professional qualifications is awarded 5 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.10. Professional experience of the bidder's staff**

This criterion evidences the experience of the personnel employed by the bidder in the territory of the country in which the tender has been announced. The higher the number of personnel with relevant experience, capable of participating in the performance of the contract, the higher the probability of them being involved in the performance of the contract. This criterion encompasses the EU criterion of professional experience.

Pursuant to Art. 58(4) "With regard to technical and professional ability, contracting authorities may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard".

#### *Tender assessment procedure based on criterion No. 10*

The contracting authority identifies the professional experience required to perform the subject of the contract, which will be compared at the tender assessment stage. The bidder who employs the highest number of persons with relevant professional experience is awarded 5 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.11. Working conditions at the bidder's**

This criterion proves that the bidder attaches importance to the working conditions his company offers. The higher the number of personnel hired based on an employment contract, capable of participating in the performance of the contract, the higher the probability of them being involved in the performance of the contract. This criterion encompasses the EU criterion of abiding by the provisions of social and labor law.

Pursuant to Art. 18(2) "Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of (...) social and labor law provisions". Pursuant to Art. 70 "Contracting authorities may lay down special conditions relating to the performance of a contract (...). Those conditions may include (...) employment-related considerations".

#### *Tender assessment procedure based on criterion No. 11*

The bidder whose ration of employees hired based on employment contract to all employees is the highest, is awarded 5 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.12. Development of the bidder's staff**

Criterion evidencing the care that the company attaches to the development of its staff. Young persons should participate in the performance of the contract, who will be able to gain professional experience thanks to their involvement in the project. The higher the number of young people performing the contract, the better development of the bidder's staff. Pursuant to Art. 70, contracting authorities may lay down special conditions relating to the performance of the contract. Those conditions may include economic, innovation-related considerations. This criterion encompasses the EU criterion of technical potential and qualifications.

#### *Tender assessment procedure based on criterion No. 12*

The bidder who employs, based on employment contracts, the highest number of persons who are under 35 years of age, is awarded 5 points. The remaining bidders are awarded the number of points that is worked out proportionally.

### **3.13. Occupational activation of the disabled at the bidder's**

Criterion evidencing the care that the company attaches to professional activation of the disabled. Disabled persons should also participate in the performance of the contract, as they will be able to gain professional experience thanks to their involvement in the project. The higher the number of the disabled performing the contract, the better their professional activation. This criterion encompasses the EU's social criterion.

#### *Tender assessment procedure based on criterion No. 13*

The bidder who employs, based on employment contracts, the highest number of disabled persons, is awarded 5 points. The remaining bidders are awarded the number of points that is worked out proportionally.

#### 4. LIST OF WORKS TENDER ASSESSMENT CRITERIA

Table 1 presents the criteria applied to the assessment of works tenders, along with their weights

**Table 1 List of works tender assessment criteria and their weights**

No.	Tender assessment criteria	Weight
		[points]
1	Cost of performance of the subject of contract	15
2	Cost of operation of the subject of contract	15
3	Independent performance of the subject of contract	10
4	Number of references confirming completion of similar contracts	10
5	Duration of performance of the subject of contract	10
6	Warranty term covering the subject of contract	5
7	Bidder's equipment-related potential	5
8	Innovation-oriented approach of the bidder	5
9	Professional qualifications of the bidder's staff	5
10	Professional experience of the bidder's staff	5
11	Working conditions at the bidder's	5
12	Development of the bidder's staff	5
13	Occupational activation of the disabled at the bidder's	5
Total:		100

#### 5. Summary

The present paper is a Polish attempt to define uniform works tender assessment criteria to be applied in all European Union Member States. The 13 criteria presented above enable each tender to be assessed in an unambiguous manner, and enable to select the tender that is most advantageous from the economic and the technical point of view. Adoption of the works tender assessment criteria and their weights presented above makes the selection of a specific tender undisputable. The method proposed herein offers also a better guarantee that the contract performed will be characterized by higher quality, as the tender assessment criteria applied currently boil down, in practice, to attaching excessive importance to the lowest contract price.

Introduction of unified tender assessment criteria throughout Europe will result in increased quality of the contracts performed, real competition between bidders from all EU Member States, and, in consequence, in more rational spending of public funding in Europe.