



ABNORMALLY LOW TENDER (ALT) PRICES UNDER WORKS CONTRACTS

Graeme Clark, Senior Procurement Specialist
European Bank for Reconstruction and Development

Tuesday, 15 October 2013

This issue has, in a number of cases, had a major impact on the successful implementation of Bank financed projects in the public sector across a number of sectors and frequently results in:

- a) The creation of an adversarial relationship between the Employer and the Contractor (and its sub-contractors);
- b) A significant number of variations orders and contractor claims which can be very burdensome for our clients and their consultants to review and process (and the Bank);
- c) Cost and time overruns (as a result of the above);
- d) Slow disbursement of loan proceeds (increasing the cost of the loan to the Borrower);
- e) Costly referral of issues to the Dispute Adjudication Board (DAB);
- f) Termination of contracts, in some cases resulting in costly and time consuming arbitration; and,
- g) Last but not least, delays in the procurement (particularly, tender evaluation) process;

Current Provisions in EBRD Standard Tender Document for Works



European Bank
for Reconstruction and Development

- If a tender is substantially responsive to the commercial and technical requirements of the tender document, and, is qualified to perform the contract, the EBRD's Standard Tender Document for Works contains no provision(s) that would permit the rejection of a tender solely on the basis of an ALT.
- ITT 31 – Tender Adjustments, sub-clause 31.2, of the Bank's Standard Tender Document for Works states:

“If in the opinion of the Employer the Tender which results in the lowest Evaluated Tender Price, is seriously unbalanced or front loaded or substantially below the Employer's estimates, the Employer may require the tenderer to produce detailed price analyses for any or all items of the Bill of Quantities, to demonstrate the internal consistency of those prices with the methods and schedule proposed. After evaluation of the price analyses, taking into consideration the schedule of estimated Contract payments, the Employer may require that the amount of the performance security be increased at the expense of the tenderer to a level sufficient to protect the Employer against financial loss in the event of default of the successful tenderer under the Contract”.

Issues surrounding the current provisions

Once an abnormally low tender price is identified, a major issue becomes calculating the amount of performance security (PS) “to a level sufficient to protect the Employer against financial loss in the event of default of the successful tenderer under the Contract”.

Three examples:

1. Whatever the offered tender price, the amount of PS is increased to an amount which represents 10% of the Employer’s original cost estimate;
2. The amount of the PS is increased by an amount representing the perceived shortfall/insufficiency in the tender price plus the normal 10%;
3. The amount of PS is increased by an amount which represents all potential costs associated with the perceived risks involved in accepting the abnormally low priced tender (i.e. all of above plus additionally the costs of potential litigation, loss of economic benefits, retendering, loan commitment fees, etc) .

However, most clients would prefer to have the option not to accept such a tender in the first place.

1. What is an abnormally low tender price (ALT) - is there a legally sound common definition acceptable to all interested stakeholders?
2. Under which, if any, circumstances should a tender with a demonstrable ALT be rejected?
3. If an ALT is not rejected, how should any justifiable increase in the level of performance security be calculated?
4. Should a Contractor be permitted to walk away from an ALT without recourse?
5. Does it make a difference if a financially sound Contractor knowingly submits an ALT for strategic purposes?
6. Is an ALT strategy a legitimate practice?
7. Does the issue of financial soundness potentially offer a partial solution?
8. Would placing restrictions on sub-contracting potentially offer a partial solution?
9. Does EBRD need to consider the introduction of alternative tender evaluation criteria for major works contracts (i.e. “risk-based” criteria, merit point systems)?
10. If the Bank introduced new procedures to address the ALT issue would this encourage more contractors to participate in Bank financed tenders or conversely would this act to discourage contractors?

In conclusion... the options

1. Accept that the Bank's current methodologies and procedures are adequate to deal with the ALT issue (or perhaps require minor modification and clarification);
2. Develop a procedure and mechanism which may result in the rejection on an ALT under defined circumstances; or
3. If above is unacceptable, develop an appropriate procedure to address the ALT through the tender evaluation process

What do you think?