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ABNORMALLY LOW TENDERS

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POLICY CONTEXT

Over the past years, the issue of Abnormally Low Tender (ALT) prices under works contracts, and the associated issues surrounding this subject, has become a major issue for the Multilateral Development Banks (MDBs) and their Borrowers under public sector projects. The effects of this issue are, to one extent or another, now being experienced by most MDBs. Whereas in many of the MDBs' countries of operation, the national procurement procedures and legislation contain provisions that permit the rejection of ALTs under a range of conditions, currently, neither the MDBs' standard tender documentation nor their respective procurement policies and rules covering public sector transactions permit clients to reject ALTs under Bank-financed contracts. As a consequence of clients' increasingly negative experiences of ALTs, MDBs are coming under increasing pressure from clients to permit the rejection of ALTs under procurement exercises which are subject to its procurement policies/rules. In an attempt to address this issue, the MDBs have agreed that a special MDB Working Group, coordinated by the EBRD, be tasked with the identification of potential solutions to this issue.

EIC POSITION

EIC welcomes the MDB initiative since European international contractors are exposed to ALTs in all world regions where MDBs are providing finance to infrastructure projects. EIC supports the MDB's approach that, if the lowest tender price transpires to be substantially below the second price ranked tender, the MDB procurement rules should oblige its Borrowers to investigate such a low bid and reject it, in case it is proven to be an ALT. In this context, EIC agrees with the MDB's assumption that all tender prices are normally distributed, and that the reasonable boundary for the ALT risk zone can be considered to be equal to the mean minus the standard deviation. Hence, all tenders below this threshold should be checked on ALT risk, when they are considered for a contract award. Reversely, EIC calls on the MDBs to abandon the current option for Borrowers to increase the Performance Security in case of a suspected ALT, once a reliable and practical mechanism to deal with an ALT is in place.



STATUS QUO

Subsequent to the setting-up of the MDB Working Group, the EBRD consulted EIC in October 2014 and invited its feedback with regard to the practicability of defining and rejecting an ALT. When observing that there is currently no commonly acceptable definition of what constitutes an ALT or a framework to detect such tenders in practice, EIC summarised its **position on ALT in a specific Position Paper in February 2015 which was largely endorsed by CICA and FIDIC** (with minor qualifications) and then submitted to the MDBs for review.

Following the initial discussion between EIC and the EBRD in December 2014, the MDB Working Group identified a mathematical approach, the “**standard deviation**” methodology, to identify tenders with a high risk of ALT, based on the tender prices quoted, with an aim to investigate such tenders further in line with the methodology proposed by EBRD. Based on the assumption that a **normal distribution of tender prices** can be derived from the fact that any price offer for a works contract is a function of the materials, machinery and labour used, as well as the overheads and profit, MDBs and Borrowers expect that, with a given quality of the permanent works, the cost of materials have minimal divergence between the tenderers. This should be especially the case in re-measurement contracts, implemented in accordance with the available design, and in a situation of competitive pricing, where the profit margins tend to vary little between different tenderers. Following a face-to-face discussion with the EBRD, EIC has given its general consent to such arithmetic and objective approach.

In July 2015, the World Bank Board of Executive Director approved the **New Procurement Framework**, which, for the first time, introduces the **possibility to reject ALT subject to the observation of the necessary safeguards**. The new World Bank rules ask its Borrowers, which determine to make use of such possibility, to disclose the respective procedure in the bidding documents and to give a bidder having submitted a potential ALT the opportunity during bid evaluation to justify its ALT for the Borrower’s analysis. For contracts subject to prior review the treatment of ALT will be subject to Bank’s “no objection”.

WHAT’S NEXT?

The EBRD will continue its work on drafting a Sample ALT Clarification procedure with a respective Guidance Note and will seek further EIC feedback subsequently. The World Bank will start to implement the New Procurement Framework in 2016.

DID YOU KNOW ...

In Northern Ireland, a Procurement Advice Note entitled “Construction Works Procurement: Abnormally Low Tenders” states that ALTs should be identified on the basis of the “adjusted average”. The adjusted average is calculated ignoring the highest tendered price. There is a requirement that a tender price must not be below the adjusted average boundary (which is 85% of the adjusted average price). As there may be occasions where the application of the adjusted average would differentiate between tenders that are closely priced, procuring entities are required to include a safety element, referred to as “the proximity margin”, based on the proximity to the lowest qualifying price, to avoid this occurrence.