



## DOES EUROPE NEED A SPECIFIC PREQUALIFICATION SYSTEM FOR HIGHWAY PROJECTS ? НУЖДАЕ ЛИ СЕ ЕВРОПА ОТ СПЕЦИФИЧНА ПРЕКВАЛИФИКАЦИОННА СИСТЕМА ОТНОСНО ПРОЕКТИРАНЕТО НА МАГИСТРАЛИ ?

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## НУЖДАЕ ЛИ СЕ ЕВРОПА ОТ СПЕЦИФИЧНА ПРЕКВАЛИФИКАЦИОННА СИСТЕМА ОТНОСНО ПРОЕКТИРАНЕТО НА МАГИСТРАЛИ ?

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### Резюме

Решението, взето на 24 май 2013 г., в скорошно съдебно дело в Северна Ирландия [Northern Irish Waste Services Ltd v Northern Ireland Water Ltd & Ors (2013)], противоречи на Решението на Гръцкия съд по друг подобен случай [Lianakis AE v Alexandroupolis (Eur-Lex, 2008)]. Това предизвика дискусия относно причинените неудобства по отношение на етапи в договорните отношения - преквалификация и качество/ цена съгласно европейските финансови ограничения в Директивата на ЕС 2004/18. Тъй като това е третото в Северна Ирландия съдебно дело, което променя европейското законодателство, настоящата статия разглежда възможностите пред индустрията, относно качествената оценката на заявените оферти. Главните проекти, в тази категория, надхвърлят средното ниво на европейския праг. Настоящият основен анализ е на въпросници за преквалификация от четири различни държавни ведомства, базирани на двустепенен въпросник от Limesurvey<sup>TM</sup>. Първият етап изследва отговорите от всички центрове за възлагане на обществени поръчки в Северна Ирландия, а на втория етап - реакциите от икономическите структури, които финализират преквалификационните въпросници. Резултатите от анализа на оценката за качеството чрез преквалификация, показват, че макар и да осигурява растеж на приходите, среща затруднения от страна на Европейската система именно на фазата за преквалификация.

**Ключови думи:** правителствена поръчка, строителна поръчка, Европейско законодателство, преквалификационна практика.

## DOES EUROPE NEED A SPECIFIC PREQUALIFICATION SYSTEM FOR HIGHWAY PROJECTS ?

Robert Eadie <sup>1</sup>

### Abstract

The decision reached on 24th May 2013 in the recent court case in Northern Ireland [Northern Irish Waste Services Ltd v Northern Ireland Water Ltd & Ors (2013)] contradicted the findings of a Greek court case [Lianakis AE v Alexandroupolis (Eur-Lex, 2008)] and has caused industry confusion in regard to the prequalification and quality/price stages of contracts over the European Financial limit, awarded under EU Directive 2004/18. As this is the third Northern Ireland court case that has changed European law this paper examines industry perceptions on the way forward in assessing the quality aspect of tenders. Most highways projects are in this category as they are above the European threshold. The paper carried out a desk based analysis on prequalification questionnaires from four different government departments, followed by a Limesurvey<sup>TM</sup> questionnaire in two stages. The first investigated responses from all centres of Procurement Expertise in Northern Ireland and the second gained responses from economic operators who complete prequalification questionnaires. Findings from an analysis of the way forward in assessing quality through prequalification indicates that although it provides value-for-money there is

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resistance to a European wide system but support for a highways specific system at the prequalification phase.

**Keywords:** Government Procurement, Civil Engineering Procurement, European Legislation, Prequalification practices

## 1. INTRODUCTION

Procurement of construction services and works has the potential to deliver financial benefits in addition to efficiency and effectiveness. The traditional tender process does not take quality into consideration but involves a single stage process, where tender documentation is released for economic operators to price (Griffith et al., 2003). Until a change in policy in 2002 (CPDNI, 2012), on UK government projects submission occurred of the ‘tender’ or price, through a bill of quantities, activity schedule or with a lump-sum figure for the works, and the lowest bid or price was awarded the tender (Brook, 2004). However, just because the economic operator submits the lowest price does not necessarily mean that they are the best organization to carry out the work.

The philosophy of assessing quality and price was first linked to John Ruskin (1819-1900) in the Washington Post in 1913. He is attributed with the following quotation “*It is unwise to pay too much, but it’s worse to pay too little. When you pay too little, you sometimes lose everything because the thing you bought was incapable of doing the thing you bought it to do. The common law of business balance prohibits paying a little and getting a lot – it can’t be done.*” (Bergeron and Lacinski, 2000 Pp. 66). This philosophy led Ramsey et al. (2009) to conclude that the economic operator with the lowest priced bid may not have the capacity, experience or expertise to produce a product to a comparable standard as an economic operator with a higher price.

### 1.1. EUROPEAN CONTRACT PROCEDURES

As a result, the European Union in the European Directive 2004/18 (Eur-Lex, 2004) Article 53 incorporated quality into the assessment procedure using the term ‘Most Economically Advantageous Tender’ (MEAT). The Public Contracts Regulations (TSO, 2006) bring the European Directive 2004/18 (Eur-Lex, 2004) into UK law. The MEAT can be applied to all four of the procedures under the Public Contracts Regulations 2006 (TSO, 2006) amended 2009 (TSO, 2009) and 2011 (TSO, 2011). These are the Open Procedure Clause 15, The Restricted Procedure Clause 16, The Negotiated Procedure Clause 17 and The Competitive Dialogue Procedure Clause 18 (TSO, 2006). Contracts above the European Financial Thresholds (OJEC, 2014) must be advertised Europe-wide through the Official Journal of the European Union. These financial limits change every two years and were last updated on 1<sup>st</sup> January 2014. However, three times the European processes have been challenged in Northern Ireland Courts which have changed the application of these European procedures.

The three court cases are ‘Henry Bros Ltd. Vs Department of Education’ (CourtsNI, 2007), ‘McLaughlin and Harvey Vs Department of Finance and Personnel (CourtsNI, 2008)’, and ‘Northern Irish Waste Services Ltd v Northern Ireland Water Ltd & Ors’ (CourtsNI, 2013). The first two court cases resulted in the procurement process being set aside by the courts but in the third case the courts upheld the decision to award. The first related to the price element of the award process, the second related to award criteria and the final case related to measuring similar quality criteria at prequalification and award stages.

On 13th March 2007, the Department of Education (DOE) advertised a Framework Agreement as part of the ‘Northern Ireland Schools Modernisation Programme’. The framework was for School

design and construction with an estimated total cost in the region of £550–£650 million (CourtsNI, 2007). Prequalification Questionnaires (PQQs) were submitted to Central Procurement Directorate (CPD) for assessment and marking. After marking, the highest eight would have been awarded allocation on the framework agreement. Part of the assessment was based on the ‘fee percentage’ proposed by each economic operator. The ‘fee percentage’ is defined as “the percentage to cover costs not listed in the schedule of cost components” (Pavia, 2002). Henry Brothers (Magherafelt) Ltd. successfully argued CPD had not asked for adequate pricing information to allow determination of the most economically advantageous offer. The court’s decision was that using the fee percentage alone did not comply with the regulations (CourtsNI, 2007) and was not consistent with transparency, equal treatment of tenderers and the development of effective competition.

McLaughlin and Harvey also successfully challenged the Department of Finance and Personnel over the manner that the PQQ was assessed and marked (Craven and Olsen-Welsh, 2008). McLaughlin and Harvey argued that under the requirement for transparency in public procurement that award criteria and weightings should be disclosed. CourtsNI (2008) in the decision concluded that the bidders should know all the elements or sub elements which could affect their preparation of the bid. From then on, the criteria, sub-criteria and weighting of each element need to be published beforehand.

The third case, Northern Irish Waste Services Ltd v Northern Ireland Water Ltd & Ors (CourtsNI, 2013), was not under the Public Contracts Regulations 2006 but under the Utilities Contracts Regulations. A Greek court case, Lianakis AE v Alexandroupolis (Eur-Lex, 2008) had set a standard for assessment of quality under European Directive 2004/18 (Eur-Lex, 2004). Quality at Prequalification stage was called selection criteria and determined to have to look back whereas quality at second stage was called award criteria and needed to look forward. Selection criteria at Prequalification stage deal with issues that “the bidder” can deliver whereas award criteria at second stage deal with “the bid on the contract in hand”. The Lianakis AE v Alexandroupolis (Eur-Lex, 2008) determined that there must be a distinction between the two. The distinction became blurred in the Northern Irish Waste Services Ltd v Northern Ireland Water Ltd & Ors (CourtsNI, 2013). This Northern Ireland case decided that there had been no incorrect use of the criterion in relation to experience and resources, even though they had been used at the second stage to determine that the organisations could complete the job as part of the determination of the most economically advantageous tender.

## 1.2. EUROPEAN WIDE PREQUALIFICATION SYSTEM

The background to the Northern Ireland case decided in May 2013 lies in a consultation that the European Union conducted in 2011. EU (2011) acknowledges that the procedural tools of the Utilities Directive differ substantially from those of Directive 2004/18. They have a greater procedural flexibility and already included a qualification system (EU, 2011). EU (2011) further support prequalification systems for “*technically exacting works, supplies or services which involve such a lengthy procedure in order for economic operators to qualify*”. As civil engineering and construction activities fall under this definition it was suggested that it would be advantageous to both client and supplier to use one prequalification process for a number of individual procurement procedures, rather than repeating it for each procurement scheme. EU (2011) suggested a European pre-qualification system. However, little research has been conducted into the systems desirability or functionality.

## 1.3. PREQUALIFICATION AND HIGHWAYS PROJECTS

One of the arguments against a Europe wide pre-qualification system is that the buyer or client

should be able to look at historical evidence of similar work related to the proposed scheme. Eadie et al (2012) showed for general construction that the formulation of the ‘project specific questions’ are vital to the PQQ selecting the economic operators best suited for the project. This paper examines this from a highways perspective.

## **2. RESEARCH METHOD**

The research employed three distinct stages. Initially a desk study compared four prequalification questionnaires from UK Government Centres of Procurement Expertise (COPE). This was followed by two structured online questionnaires disseminated through Limesurvey™ software. The first of the questionnaires gathered the views of all government departments (COPEs) in Northern Ireland responsible for procurement. These are Central Procurement Directorate, Procurement and Logistics Services (previously Central Services Agency), NI Water, DHSSPS Health Estates, NI Housing Executive, Education and Library boards, Roads Service and Translink (DFP, 2013). Three key personnel responsible for procurement were contacted and sent the questionnaire. Fifteen completed responses were received with at least one response from each COPE equating to a 62.5% response rate. Rubin, and Babbie (2009) deem this “very good”. The second questionnaire gathered the views of the economic operators who had experience of Prequalification questionnaires since they were first introduced. CPDNI (2004, pp.6) indicated that there were 85,000 small to medium sized enterprises in Northern Ireland during 2002 to 2003. However, they show only 180 had submitted expressions of interest and won public procurement projects over the European Financial Threshold during that period. The maximum population size for organisations who have been involved in the prequalification process since it was introduced is therefore 180. According to Isaac and Michael, (1981) and Smith, (1983) for a 0.10% precision level for validity and reliability, acceptable for perception based surveys is 65. Sixty two responses (62) were received. This was deemed acceptable as Northern Ireland Construction has just returned to growth in the third quarter of 2013 after 66 months of falling workloads since the first quarter of 2008 (RICS, 2013). Major construction organisations such as Pattons and Mivan ceased to trade during this time. Therefore the number of organisations still in existence that would have initially been involved in the tender process at prequalification stage would also have fallen. Telephone contact was used for both surveys to identify the personnel within the construction companies, sift and pre-notify. The Limesurvey™ token based survey management which collected the IP addresses of the respondents ensured only responses from the sample were collected and stored in the on-line MySQL™ database.

## **3. FINDINGS ON PREQUALIFICATION SYSTEMS**

### **3.1. THE CURRENT NORTHERN IRELAND PREQUALIFICATION SYSTEM**

The PQQ’s investigated by this study were all for contracts above the European threshold. Each PQQ contained the following sections- General Information, Economic and Financial Standing and compliance with EU/UK Procurement, Health and Safety and Minimum Standards for Professional/Technical Ability. Two types of question were asked. These were Pass/Fail and Qualitative questions. The Pass/Fail questions were in two groups. The first Pass/Fail questions were to ascertain proof of suitability under the criteria for rejection of candidates found in Regulation 23 of the Public Contracts Regulations. (TSO, 2006; TSO, 2009; TSO, 2011). As specific obligations are required these questions remained similar in all four PQQ documents. A further Pass/Fail section related to Health and Safety issues. This content differed depending on the type of project. Substantial similarities existed relating to standards compliance, policy and responsibilities.

However, when it came to issues like training of operatives, hazard elimination and qualifications the criteria to Pass/Fail differed depending on the contract type. The qualitative questions were project specific for the various project PQQ's examined and varied. The findings suggest that a Europe-wide system could be employed for the Pass/Fail questions but that a further PQQ would need to be employed to address project specific issues. The feedback received on a Europe-wide system supports this suggesting that while benefits may be accrued in relation to corruption and impartiality of such a system, the additional bureaucracy of employing such a system may not add value for money.

### 3.2. A EUROPEAN WIDE PREQUALIFICATION SYSTEM

The Government department personnel who responded were negative regarding a Europe wide prequalification system with only a single response positive towards a Europe wide system (6.67%), 5 remained neutral (33.33%) and 9 were negative (60.00%). A follow up question asked for respondents to provide the reasoning behind their choice. The reasons can be summarised into three categories. The first is that different standards, quality systems and codes eg National Annexes for Eurocodes in construction still apply. This means that in each country has different goals to achieve through the Prequalification questionnaire prohibiting a “one-size-fits-all” prequalification system. The second category relates to the need to tailor prequalification questionnaires for the specific project as the types of project differ greatly for example a road and a technology department for a school. Respondents considered that the questionnaire would need to be so generic to cover all eventualities that it would be rendered useless. They considered that the buyer should be allowed to choose how to assess what he wishes to purchase. The third category was that it depends on uniform trading conditions across boundaries. Most would acknowledge that Europe is not homogeneous enough to consider this as yet.

From an Economic Operator perspective a Europe wide system polarised opinion with 18 being positive (29.50%), 42 opposing the system (68.85%) and only 1 remaining neutral (1.65%). From the follow-up qualitative question the reasons above were also mentioned this time from the perspective of the supplier being able to showcase certain criteria with examples and qualifications recognised only in certain jurisdictions such as Health and Safety, Environmental and Quality Assurance, various Management Systems and training for qualifications. Unless these qualifications and recognition of them are provided Europe wide it was deemed too difficult to implement a system which assessed each in practice. In this context a further respondent stated *the bureaucracy associated with this would be huge and not necessarily deliver any benefit*. Those supporting a Europe wide system suggested that in the same way those contracts over the financial threshold were advertised Europe wide through the Official Journal of the European Union that a system should be put in place linked to this to allow Economic Operators to prequalify therefore bringing standardisation across all countries.

### 3.3. A SPECIFIC PREQUALIFICATION SYSTEM FOR HIGHWAY CONTRACTS

The fourth section of the Prequalification questionnaire relates to qualitative questions which address project specific issues. Two departments deal with highway issues. Roads Service deals with the provision and maintenance of Roads and Translink deal with the transport issues. Four responses were received three from Roads Service and one from Translink. The research found that the Roads COPE had *developed a hybrid approach which is aligned with our contracting base*. Three of the four responses considered that a Highways specific PQQ delivered value for money (VFM). The fourth stated that it is not a requirement in providing VFM. All four stated that it was necessary to determine suitability on a job specific basis and considered that it did not stifle innovation as it

looked at historical information.

On the economic operator side, the majority considered that the PQQ document could be adapted for highways schemes with standard questions and layout (47, 77.05%). This was suggested as the qualitative feedback suggests that this is the easiest for them as they do not have to repeat information. Some suggested that a standard layout would be enough (6, 9.84%) and others wanted standard questions (2, 3.28%). Five respondents (8.20%) considered that it is already project specific as Part D has project specific questions and one organisation declined to answer. A clear disconnect can be seen between the buyer and supplier. Standardised format and questions can only be used for similar size and types of schemes so it is evident that the buyer wants to prove VFM in ensuring that only the best organisations progress to the second stage whereas the suppliers want the least bureaucratic and easiest solution. However, the least bureaucratic and easiest solution removes the benefits that the client wishes to achieve from a pre-qualification system.

#### 4. CONCLUSIONS

The courts in Northern Ireland have been used to challenge and change European procurement procedures on three occasions. This study investigates the assessment of quality for contracts above the European threshold in Northern Ireland to examine the way forward to reduce the amount of litigation. The study examined and found that a Europe-wide system could be employed for the current Pass/Fail questions used in Northern Ireland but that a further PQQ would need to be employed to address project specific issues. The study indicates that a Europe-wide system would provide benefits in relation to corruption and impartiality but suggests that there is little support - 60% buyer side and 68% supplier side reject such as system - due to the increased bureaucracy and the lack of ability to determine suitability on a job specific basis. The study discovered a clear disconnect between the buyer and supplier side in relation to a standardised PQQ for highways projects. Value for Money is uppermost priority from the buyer side, creating the desire for a bespoke PQQ to ensure that only the best organisations progress to the second stage, whereas the suppliers want the least bureaucratic and easiest solution. This research shows that a prequalification system needs to fulfil the buyer side requirements but that it will get most support if it is as standard and easy to use as possible. Further work needs to be carried out to determine standardised questions for different types and sizes of highway projects. These also need to be tested for fitness for purpose.

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