



KURDISTAN REGIONAL GOVERNMENT

Ministry of Planning

Explanatory Note on Alternative Bids

June 2016

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First- Introduction

For the purpose of this note, the term “alternative bid” is used to refer to the case in which a bidder intentionally submits a bid substantially at variance with the requirements set forth in the bidding documents, with respect to essential technical or contractual aspects, and indicates that the bid is intended to be an alternative to the bidding documents requirements.

An alternative bid, as defined in the preceding paragraph, may be distinguished from the case in which a bidder submits more than one bid even though the bidding documents do not solicit or permit alternative bids, thus violating the one-bid-per-bidder rule. Along the same lines, the notion of an alternative bid as defined here may also be distinguished from the case of submission of a bid which contains material deviations from the requirements in the bidding documents and is therefore deemed not substantially responsive.

However, in practice, and depending upon the degree of clarity with which the bidding documents are formulated, there is the risk of some uncertainty as regards the relationship between the notion of alternative bids, on the one hand, and, on the other hand, concepts such as the one-bid-per-bidder rule, and substantial responsiveness of bids. It is therefore imperative that the bidding documents, in accordance with Public Procurement Regulation No 2 of 2016, be clear as to the treatment of alternative bids.

Second- Disclosure

In accordance with Public Procurement Regulation No 2 of 2016, a fundamental rule governing the question of alternative bids is that the bidding documents should disclose whether alternative bids are being solicited or are permitted and, if so, the manner in which any alternative bids that are submitted would be evaluated. Absent an indication in the bidding documents as to whether the procuring entity is soliciting or permitting alternative bids, the procuring entity may not accept an alternative bid for contract award.

In that vein, it should be made clear that submission by a bidder of an alternative bid (i.e., a bid substantially at variance with the requirements in the bidding documents, or an additional bid) where alternative bids have not been requested in the bidding documents should result in a rejection of a bid as substantially non-responsive or, in the case of an additional bid, rejection of both bids in accordance with the one-bid-per-bidder rule.

When the procuring entity is soliciting or permitting alternative bids, the bidding documents should make it clear that the alternatives proposed should be functionally equivalent to what is specified in the bidding documents¹. The bidding documents should also specify the aspects with respect to which possible alternatives are being sought.

Another key message to be conveyed to bidders in the bidding documents when the procuring entity is soliciting or permitting alternative bids is that a bidder submitting an alternative bid must provide the procuring entity with all the information that it will need in order to be able to evaluate the alternative bid.

Disclosure requirements are addressed further in section (Fifth), below.

Third- Determining whether to solicit or permit alternative bids

Factors that may be relevant to the decision of the procuring entity as to whether to solicit or permit alternative bids include:

- whether it is likely that less costly and/or more effective alternative technical solutions may be available from potential bidders than the technical solutions called for in the bidding documents (e.g., when funding limits may be a constraint);
- whether different bidders may have comparative advantages with respect to key technical aspects;
- the possibility that alternative bids might provide better solutions from the standpoint of sustainability objectives.

Examples of such technical aspects in the case on construction contracts include the following²:

- pile foundations [proprietary methods (technical methods for foundation construction that would involve methodology belonging to or controlled by that bidder) and different material]

¹ The bidding documents should be clear as to whether alternative bids are being solicited or permitted and, if so, how alternative bids would be treated (e.g., whether the bidder submitting an alternative bid would also have to submit a bid conforming to the requirements in the bidding documents). If the bidding documents are silent on alternative bids, the procuring entity shall not consider any alternatives received. If alternative bids were requested in the BDs, the procuring authority shall not reject the bid from a bidder that does not submit an alternative bid

² The below examples are drawn from the Asian Development Bank's *User's Guide to Procurement of Works* (2014), p. 82 (<http://www.adb.org/sites/default/files/institutional-document/32831/sbd-works-users-guide.pdf>).

- bridge foundations (open well, caissons, piles, etc.)
- columns, beams, decking (reinforced concrete, prestressed concrete, steel, etc.)
- proprietary methods for post-tensioning concrete
- lining of canals
- pipeline materials, coating, jointing
- road surfacing (asphalt, concrete, etc.)
- transmission tower design and erection
- street lighting
- offshore foundations
- offshore trestle spans

Fourth- Other possible approaches to consider

Choice of procurement method

It should be noted that in complex procurement transactions, a procuring entity seeking the opportunity to consider alternative solutions from the bidding community prior to finalizing the bidding documents has the possibility, in accordance with Public Procurement Regulation No 2 of 2016, of utilizing the two-stage tendering method.

Choice of contracting approach

Depending upon the degree of complexity of the project, consideration may be given, in lieu of soliciting alternative bids, to opt for a turnkey or design-and-build contracting approach. Such contracting approaches offer additional flexibility allowing suppliers and contractors to be innovative as to the approaches that they utilize to achieve the required performance outputs.

Formulation of technical specifications

It is important to bear in mind that, in accordance with Public Procurement Regulation No 2 of 2016, the procuring entity should, to the greatest extent feasible and appropriate, formulate technical descriptions of its requirements in terms of the required output or performance, rather than in terms of specific designs. To the extent that such an approach is applied, the potential role of alternative bids may be diminished.

Presentation of procurement in alternate possible packages

In particular when the limited availability of funds is leading the procuring entity to consider soliciting or permitting alternative bids (in the hope of possibly identifying less costly solutions to its needs), consideration may be given to presenting the procurement in the bidding documents in alternate

possible packages of varied scope. Such an approach may enable the procurement to proceed on the basis of a more limited scope if necessary to stay within budget and to avoid rebidding if it turns out that the acquisition in its full scope (i.e., the prices received for the full scope) would exceed available funds. Any such approach should be clearly indicated in the bidding documents, including the scope of the base bid, and the scope of each alternate. Depending upon how such an approach is structured and defined in the bidding documents, alternates could be additive to or deductive from the scope of the base bid.

Fifth- Submission requirements

When alternative bids are solicited or permitted, the bidding documents should require an alternative bid to be clearly labeled as an alternative bid.

The bidding documents should clearly enumerate the information and documentation to be provided by a bidder submitting an alternative bid in order to enable the procuring entity to evaluate that bid (in terms of designs and drawings, functional characteristics and technical specifications, price breakdown, methodology, etc.).

Also to be specified in the bidding documents are any formal requirements as to submission of alternative bids (in particular, whether, if bidders are required in any case to submit a compliant bid, an alternative bid should be submitted in a separate envelop, in which case it should be clearly labeled as an alternative bid, or whether the alternative bid should be combined with and submitted in the same envelop as the compliant bid, though still subject to clear labeling as an alternative bid).

If alternative bids are solicited or permitted, and the submission of bids is subject to a bid guarantee requirement, or a requirement that bidders sign a bid-securing declaration, alternative bids must be subject to any such security requirements applicable in the proceeding. This should be made clear in the bidding documents.

Sixth- Treatment of alternative bids

As noted above, the bidding documents should indicate whether the procuring entity is soliciting or permitting the submission of bids. If that is indeed the case, the bidding documents must indicate the manner in which any alternative bids submitted in the proceeding would be treated.

One possible approach, well known in international practice, is to require that a bidder wishing to submit an alternative bid, must in any case also submit a tender compliant with the specifications set forth in the bidding documents.

A further possible elaboration of such an approach is that the procuring entity would only evaluate and consider award to an alternative bid if the alternative bid was submitted by the bidder that has submitted a bid compliant with the bidding documents and that compliant bid had been determined to be the best-ranked bid.

An alternative approach that in some cases might be deemed appropriate is to allow bidders to submit an alternative bid either in addition to or in place of a bid compliant with the specifications set forth in the bidding documents.

Opening of alternative bids is subject to the bid opening procedures set forth in Public Procurement Regulation No 2 of 2016, including the reading out of the key information about such bids in accordance with the standard bid opening procedures.