

Code of Procedure for Selective Tendering for Design and Build

National Joint Consultative Committee for Building
in collaboration with:

The Scottish Joint Consultative Committee and
The Joint Consultative Committee for Building,
Northern Ireland

Addendum

The NJCC issued an Addendum sheet to this Code, effective from March 1996, to:

- take account of the Construction (Design and Management) Regulations 1994;
- extend the application of the Code to Scotland.

This reprint:

- incorporates the above Addendum;
- updates certain contract references;
- makes some minor corrections.

Published for the NJCC by RIBA Publications,
Construction House, 56–64 Leonard Street, London EC2A 4LT

© NJCC 1996

Revised reprint July 1999

Printed in Great Britain

7.99 C B A

CONTENTS	Page		Page
1.0 Foreword	1		Appendices
2.0 Employer's Agent and consultants	2	A	Preliminary Enquiry for Invitation to Tender 11
3.0 Design responsibilities	3	B	Formal Invitation to Tender 13
4.0 Form of contract	3	C	Form of Tender for Completion and Submission by the Contractor for Two Stage or Single Stage Procedure 14
5.0 Employer's Requirements	4		
6.0 Selection of tenderers	4		
7.0 Preliminary Enquiry	5		
8.0 The tender documents	6		
9.0 Time for tendering	6		
10.0 Assessing and adjusting tenders	7		

If a construction project is to be carried out successfully under design and build procedures, whatever the extent of the discretion which the employer gives to the contractor, the following are prerequisites:

	Section
● The employer should appoint an appropriately experienced and qualified agent and necessary professional consultants.	2
● Design responsibilities should be clearly defined without duplication.	3
● A standard form of contract should be used unamended.	4
● The intentions and wishes of the employer should be clearly formulated by the time tenders are invited and set out in the Employer's Requirements upon which the Contractor's Proposals will depend.	5
● Great care and attention should be paid to the procedure for the selection of contractors to be invited to tender.	6
● The information contained in the preliminary enquiry to prospective tenderers should be as full and as clear as possible.	7
● The conditions of tendering should be absolutely clear so that all tenders are submitted on the same basis.	8
● Adequate time should be given to selected tenderers to prepare their proposals.	9
● Tenders should be assessed and (if necessary) adjusted strictly in accordance with the terms of the formal invitation to tender.	10

1.0 FOREWORD

1.1 Scope

This Code has been prepared for all those commissioning building works who seek a procurement method that combines the design and construction responsibilities under a single contract and where the likely total construction cost of the finished building is identified at the conclusion of the tendering process.

1.2 Definitions

The term 'employer' is used throughout this document to include the building client or procurer and anyone appointed as the Employer's Agent.

The term 'tender' is used throughout this document to cover the whole of the Contractor's Proposals including design, price and the Contract Sum Analysis.

1.3 Limitations

This Code assumes that the employer wishes the finished building to be well designed in all respects and that in selecting tenderers the employer will require that they include a strong design resource. Nonetheless, depending on the nature of the project, the design content that is delegated to the contractor may vary greatly. Hence the recommendations in the Code cannot be as specific as those in other Codes published by the NJCC.

Very careful consideration needs to be given to whether design and build is appropriate, having regard to the novelty and/or complexity of the design requirements. This method of building procurement may also create difficulties if the employer is not clear on his requirements or may wish to make significant changes after design work has been completed. Advice on selecting the appropriate Standard Form of

Building Contract is given in the Joint Contracts Tribunal (JCT) Practice Note 20. Useful broadly based advice is also contained in Chapter 3 of the Latham Report 'Constructing the Team'. Employers not experienced in building procurement should seek expert advice before selecting design and building methods.

The NJCC strongly deprecates the practice of using design and build tender procedures where the employer is only seeking a "cover price" or is unlikely to proceed with building works.

Where a project has progressed beyond the detail design stage (RIBA Plan of Work stage D), the design information may be too restrictive for benefit to be gained by using design and build procedures and another form of building procurement may be appropriate.

Design and build methods may not be suitable where negotiations with planning authorities or others are likely to be protracted; for example, building in conservation areas.

1.4 General

- .1 This Code is complementary to other NJCC publications.
- .2 Consequent upon entry into the European Union, tenders for public sector construction contracts above a specified value must be invited and contracts awarded in accordance with EC Directive 71/305/EEC (as amended by Directive 89/440/EEC), implemented in the UK by The Public Works Contracts Regulations 1991 SI 91/2680. In these instances, the provisions of this Code will be qualified by the supplementary tendering procedures specified in the Regulations. Public contracting authorities within the meaning of the Regulations are responsible for ensuring that their tender and award procedures for works contracts comply with the provisions of the Regulations or subsequent legislation (see NJCC Procedure Note 19).
- .3 The Code applies in the whole of the United Kingdom, but where Scottish practice differs, a suitable recommendation is printed in *italics*.
- .4 The general principles of the Code take into account the relevant recommendations of the National Economic Development Office (NEDO) Report 'The Public Client and the Construction Industries (1975)'; the Report 'The Placing and Management of Contracts for Building and Civil Engineering Work' (The Banwell Report); 'Action on the Banwell Report'; and 'Constructing the Team' (The Latham Report 1994).

1.5 Health and safety

The Construction (Design and Management) Regulations 1994 (CDM) place duties upon employers, architects, designers and

contractors with regard to health and safety. They must be taken into account, co-ordinated and managed effectively throughout all stages of a construction project: from conception, design and planning through to the execution of the works on site and subsequent maintenance, cleaning and repair.

2.0 EMPLOYER'S AGENT AND CONSULTANTS

2.1 Employer's Agent

Under the JCT Standard Form of Building Contract With Contractor's Design there is no provision for an architect, consulting engineer or quantity surveyor to be named. However, provision is made for a person to be named to act as the 'Employer's Agent' in the performance of anything which the employer is enabled or obliged to do under the conditions of contract. Unless the contractor is informed otherwise he/she can and must regard the Employer's Agent as the duly authorised agent of the employer, and whether or not the person so named is an architect, consulting engineer or quantity surveyor he acts as the employer, and not as certifier or valuer between the employer and the contractor.

2.2 Employer's consultants

Where an employer does not have professional advice from within his own organisation, he/she would be unwise to proceed with a design and build project without appointing professional consultants to:

- formulate the Employer's Requirements (see Section 5.0);
- make a preliminary appraisal of the contractor's capabilities so as to advise the employer in selecting the short list;
- make an appraisal of the tenders to enable the employer to make an informed choice.

The consultants could also be retained by the employer to advise him/her in the course of the contract on such matters as the implications and evaluations of design changes he may require and, where the Employer's Agent is not appropriately qualified, to advise on any other technical matter that may arise including such aspects as quality control which the employer may deem to be critical as well as to advise him/her on such matters as claims for delay, additional payments etc. It is also important that the employer has access to legal advice on such matters as liability for latent defects etc.

2.3 Planning supervisor

The employer has to appoint a planning supervisor under CDM, and the Approved Code of Practice issued in February 1995 by the Health and Safety Commission 'Managing construction for health and safety' should be followed.

It should be noted that the main contractor may take on the role of planning supervisor as well

as that of principal contractor under design and build arrangements.

3.0 DESIGN RESPONSIBILITIES

3.1 Avoidance of duplication

It will be prudent if the employer, in setting terms of engagement for any consultant architects, engineers, surveyors etc. to undertake direct work, ensures that these terms are complementary to and do not duplicate the design tasks that are to be ascribed to the contractor. It should be noted that the employer's consultants will have no responsibility to instruct or advise the contractor's designers.

3.2 Transfer of the design team

The employer may consider it advantageous to require his design team to be transferred to the successful tenderer's organisation so that any preliminary design work is sympathetically developed. Such action may only be successful if it is undertaken with great care to ensure that the employer's agreements with the design team do not overlap with or leave any gaps between the proposed agreements between the contractor and design team and there is no conflict of interest. The terms of such a switch of consultants should be drawn up with legal advice and communicated to likely tenderers in the preliminary enquiry so that they may withdraw from tendering if they consider the proposals to be incompatible with their organisation. The design team properly can only serve one client at a time and, to avoid confusion of responsibilities arising, any consultants' agreements with the employer should be terminated before agreements are entered into with the successful tenderer.

4.0 FORM OF CONTRACT

4.1 Form for design and build

The main standard forms of design and build contracts are those published by the Joint Contracts Tribunal (JCT Standard Form of Building Contract With Contractor's Design – WCD 81); by the Institution of Civil Engineers (Design and Construct Conditions of Contract or alternatively The New Engineering Contract) and the Government's GC/Works/1 Ed 3 Design and Build Version. Because historically JCT WCD 81 has been widely used, this Code has been based on that form of contract. This assumption in no way precludes the application of the Code where other standard forms of contract are employed, though certain details may require modification.

The JCT Practice Note CD/1 should be followed. Part A gives a general description of the content of WCD 81 and of the contents of other contract documents, the Employer's Requirements, the Contractor's Proposals and the contractor's

analysis of the Contract Sum. Part B gives a more detailed description of WCD 81 and guidance on the content of the Contract Sum Analysis.

4.2 Form for design requirements limited to a portion of the works

When the employer requires the contractor to design only a portion of the works, the remainder of the works having been required to be prepared under the direction of the employer's architect and being the subject of detailed drawings and bills of quantities, the JCT Standard Form of Building Contract (JCT 80) should be used but modified by the Contractor's Designed Portion Supplement (CDPS), or provisions relating to Performance Specified Work – JCT Practice Note 25.

The JCT Practice Note CD/2 should be followed. This consists of a general description of the contents of CDPS and of the other contract documents relating to the Contractor's Designed Portion. There are also detailed notes on the modifications to JCT 80 in the CDPS and on the contents of the Analysis of the Portion.

When using JCT 80 with CDPS this Code should be read in conjunction with the NJCC Codes of Procedure for Single Stage Selective Tendering or Two Stage Selective Tendering as appropriate, and the principles embodied in those Codes should be followed.

4.3 Avoidance of amendments

The NJCC strongly recommends the use of standard forms of building contracts in unamended form.

Although it is recognised that the terms of the standard forms are not mandatory and that the employer and his professional advisers may alter them at their discretion, the NJCC believes that alterations to the standard forms impede the efforts being made towards achieving greater standardisation of building procedures. The NJCC is firmly of the opinion that if alterations to the standard forms have to be made it is essential in the interests of good practice and of economic building that they be kept to an absolute minimum. They should not be undertaken without serious prior consideration and should then be drafted by a person competent to ensure that all consequential alterations to other clauses are made (see NJCC Procedure Note 2).

It is unfair to amend or delete standard conditions of contract related to the time and conditions of payment and under no circumstances should these conditions be omitted or changed. Only current editions of standard forms of contract should be used.

The tenderer's attention should be specifically drawn in the Preliminary Invitation to Tender (see Appendix A) to any alterations to be made to the standard form of contract and, where

appropriate, reasons should be given, so that the implications of such amendments may be considered by the tenderers prior to acceptance of the invitation to tender, so minimising the risk of subsequent queries at tender stage which may result in an extension of the tender period (see Section 9.3).

5.0 EMPLOYER'S REQUIREMENTS

5.1 Design requirements

To take full advantage of design and build the employer should decide the optimum amount of the design content that might appropriately be delegated to the contractor. By being too restrictive the employer may fail to take full advantage of the contractor's skills to build economically. On the other hand by being too brief the employer may discover too late that the building falls short of his or her expectations.

Considerable skill and care are necessary to strike the right balance between these extremes.

5.2 Specific requirements

In order to limit unnecessary work by tenderers, the employer should include in his or her requirements all information about the site and building that is in his/her possession. This could include:

- site survey including boundaries
- party walls and adjoining buildings
- trial pit or borehole information
- survey of existing services and obstructions
- information on mains services supply and outfall availability
- wayleaves and restrictive covenants
- ownership and other legal issues
- statutory permissions obtained including conditions
- statutory permissions required
- building insurance, scope and payment
- design indemnity insurance, scope and payment
- special risks and special risk insurance
- design warranties
- collateral warranties (see NJCC Guidance Note 6)
- user requirements, written and drawn information
- performance specification
- specific building materials required
- fitting out requirements
- employer designed components
- occupation prior to completion or stage completions
- testing requirements
- building maintenance requirements
- latent defects insurance, parties and duration
- any other special requirements.

It is also advisable to require a quality plan that defines the quality of management and the quality of the product. However, when defining the standard of design for a particular purpose

this should not exceed the standards normally acceptable under insurances.

Where performance of buildings, materials or building services engineering installations is specified, it is advisable to define how these standards are to be tested.

Great care should be taken to ensure that heating, ventilating, electrical and other specialist requirements are clearly defined.

6.0 SELECTION OF TENDERERS

6.1 Preliminary list

For a design and build project it is important that the employer should ascertain the design capability of each contractor to whom an approach is to be made, or the persons or firm to whom it is intended to delegate this responsibility, and their financial standing.

The employer should therefore first compile a preliminary list of, say, six to eight contractors each of whom he or she considers is capable of undertaking the work. This can be achieved, in the absence of an approved list already compiled by the employer, by means of the NJCC Standard Forms of Tendering Questionnaire, or other similar documents. However, any such questionnaires will have to be supplemented in order to include specific questions about the design capability of the contractor.

It is suggested that the selected firms are of a broadly similar capability if effective competition is to ensue.

6.2 Factors in selection

When compiling the list the following are among the points which should be considered:

- the firm's financial standing and record;
- whether the firm has had recent experience of designing and constructing the type of building envisaged by the Employer's Requirements under conditions similar to those imposed by the employer;
- whether the contractor's customary design capability is in-house, and, if not, what method will be used in order to provide a design capability;
- the firm's general experience and reputation in the area in question;
- whether the management structure of the firm is adequate for the type of contract envisaged;
- whether the firm will have adequate capacity at the relevant time; and
- the firm's competence and resources in respect of statutory health and safety requirements.

6.3 Final list

Any contractor invited to tender for a design and build project should be of established skill,

integrity and responsibility and proven competence for work of the character and extent contemplated. Because of the high costs involved in preparing tenders for work with a contractor's design involvement, the larger the tender list becomes the greater will be the cost of abortive tendering, and this must be reflected in building prices. It is recommended that as a guide in determining the number of tenders to be invited the final tender list should be limited to no more than three firms. If a two stage tender system is used the list may be increased to no more than five firms with either one or two going through to the second stage.

6.4 Approved lists

If an approved list is being drawn up for a series of projects it should be reviewed periodically to exclude firms whose performance has been unsatisfactory, and to allow the introduction of suitable additional firms.

7.0 PRELIMINARY ENQUIRY

7.1 Information

In order that contractors may be able to decide whether they wish to tender, and to anticipate demands on their tendering staff, each firm should be sent, and should reply promptly to, a preliminary enquiry as illustrated in Appendix A – Preliminary Enquiry for Invitation to Tender.

All the details listed in sub-paragraphs (a) to (dd) of Appendix A must be stated in the preliminary enquiry. The omission of relevant information may seriously impede contractors in deciding whether or not they wish to tender.

The information given in Appendix A should be as complete as possible.

The tendering procedure and basis of selection of the successful contractor as intended in the Tender Documents (see Section 8) should be clearly stated, together with the number of tenderers it is intended to invite. This information is critical if contractors are to be in a position to decide whether to accept an invitation to tender and, if so, the means by which they will provide the design input which may be required of them to the best advantage.

A design and build procedure requires that the preliminary enquiry letter should specify the type of building and, in addition, should give the information listed in Section 5.0.

A further essential item of information to be included in the preliminary enquiry is the most accurate forecast of the date when tender documents will be sent to selected tenderers. This information will enable contractors to judge whether they will have design and estimating resources available at the appropriate time.

7.2 Interview

After the responses to the preliminary enquiry letter (see Appendix A) have been received, each contractor considered to be suitable must be interviewed in order to:

- determine that the forms of construction, where applicable, to be used by each contractor will in general be acceptable;
- discuss and establish the organisation of work and the time required for tendering;
- discuss and establish (if required) the nature and extent of the design indemnity insurance if to be taken out by the contractor;
- provide any further information required by the firm;
- make a final judgement of each firm's competence bearing in mind the employer's particular requirements and to ensure that those supplying the necessary professional and technical services in connection with the design and detailing will be suitably qualified to prepare the Contractor's Proposals and to complete the design should the contractor's tender be accepted;
- determine the firm's competence and resources to undertake the role of principal contractor under CDM.

The composition of the interviewing panel should be carefully considered and should include appropriate professional advisers. Where a tenderer proposes to obtain design services from a source outside his/her own organisation (such as an architect, or a structural or services engineer), the employer should satisfy himself as to the competence of such consultants, if necessary by making his/her own enquiries.

The same agenda should be followed for each interview.

7.3 Confirmation

An appropriate period of time between the preliminary enquiry and the despatch of tender documents would normally be four to six weeks, although in some instances a period of three months would not be unreasonable, especially where the proposed project is large or complex. Where the period is more than three months the preliminary invitation should be confirmed a month before tenders are invited.

7.4 Notification

After the latest date for the acceptance of the preliminary invitation the final list of tenderers will be selected, and firms which notified their willingness to tender but are not included in the tender list should be promptly informed.

Selected tenderers should be advised if the forecast date for availability of tender documents will not be met and a new date given. It will be prudent in this case to obtain confirmation that a bona fide tender will be submitted despite the change of date.

7.5 Withdrawal

Once a contractor has signified initial agreement to tender it is in the best interests of all parties that he should honour that acceptance if invited. If in exceptional circumstances a contractor has to withdraw acceptance, notice of this intention should be given before the issue of tender documents. If for any reason this is not possible, notice should be given not later than two working days after receipt of the tender documents.

8.0 THE TENDER DOCUMENTS

8.1 Invitation and form of tender

On the day stated in the preliminary invitation all tender documents should be despatched to the tenderers. See Appendix B for suggested 'Formal Invitation to Tender' and Appendix C for suggested 'Form of Tender'.

8.2 Conditions

The conditions of tendering should be absolutely clear so that all tenders are submitted on the same basis. The Employer's Requirements should comply with and include all the items listed in paragraphs 15 and 16 of JCT Practice Note CD/1A. In addition they should state the priority of the following items that will determine the successful tender:

- appearance
- functional requirements
- capital cost
- expected 'lifespan' of the building(s)
- flexibility of use
- quality
- running and maintenance costs
- time of construction
- any other factors which will require evaluation on receipt of tenders.

8.3 Cost of tendering

It is acknowledged that design and build imposes high costs of tendering. Where substantial high quality design work is required or excessive competition is introduced it may be that some tenderers will seek to ameliorate their costs by, for example, giving inadequate consideration to design issues. Therefore in such circumstance it is in the employer's interest to offer payment for the preparation of unsuccessful competitive bona fide tenders.

The amount of such payment should reflect the complexity of the tender requirements and may vary greatly between projects. The advice of the employer's consultants should be sought in establishing a fair balance between the employer's requirements and the contractor's risk.

Such payment should be in the form of a predetermined lump sum that will become

payable as soon as another tender has been accepted.

8.4 Two stage tendering

The NJCC believes most employers would benefit from a two stage procedure that will enable post-tender changes and development of design and cost.

8.5 Single stage tendering

Exceptionally, if the employer's requirements are for a well defined design with little or no modification after the receipt of tenders, then a single stage procedure may be used.

8.6 Extent of information

In order to facilitate appraisal and comparison of tenders the employer should stipulate the type, format and extent of information he/she wishes to receive with the tender proposals. A full set of drawings and fully detailed specification should not be expected at tender stage; therefore the employer must indicate the minimum required to enable him/her to select a contractor.

The NJCC does not recommend that all tenderers be required to submit a response to the health and safety plan with their tender. The selected tenderer should be required to submit its response as part of the production information process.

8.7 Time for production information

Tenderers should be instructed to indicate in their tender the period they require to elapse between the acceptance of their tender and the commencement of work on site (date for possession) to enable them to complete their design and such production drawings as they consider are necessary and to obtain any necessary statutory approvals.

9.0 TIME FOR TENDERING

9.1 Tender Period

The time allowed for the preparation of tenders should be determined in relation to the size and complexity of the project. It must be sufficient to enable adequate design work to be carried out before the contractor submits his tender since realistic tenders will not otherwise be received. The appropriate time to be allowed for the preparation of tenders will depend on the nature of the Employer's Requirements. Exceptionally it could be as little as six weeks for a very straightforward project, but for most projects a period of three or four months, or even as long a period as nine months where extensive specialist work is involved or there are possible planning difficulties, would not be excessive, although the time required will depend on whether a two stage or a single stage procedure is being followed.

9.2 Compliance with tender requirements

It is essential, if the accurate comparison of tenders submitted is to be achieved and the best scheme is to be accepted, that the tender submitted by each contractor is based on the employer's requirements and that the tenderers should not attempt to vary that basis by qualification.

Tenders should not invite alternative periods of completion. Where time of completion is a likely variable, the two stage tender procedure should be adopted with the contract period being negotiated as part of the second stage activities.

9.3 Clarification

If a tenderer considers that any of the tender documents are deficient in any respect and require clarification, or contain unacceptable alterations to the standard form of building contract not previously set out in the preliminary invitation to tender (see Appendix A) the employer should be informed as soon as possible and in any event within a period of fourteen days from the receipt of tender documents. If it is decided to amend the documents the employer should inform all tenderers and extend the time for tendering if necessary.

9.4 Withdrawal of tender before acceptance

Under English law a tender may be withdrawn at any time before its acceptance.

Under Scots law, if the provision for the tender to be withdrawn at any time before its acceptance is to be available, the words 'unless previously withdrawn' should be inserted in the tender after the words 'this tender remains open for consideration . . .' (Note: this clause is not, however, contained in tenders issued in Scotland by the Department of the Environment, Transport and the Regions.) (See Appendix C for suggested form of Tender.)

10.0 ASSESSING AND ADJUSTING TENDERS

10.1 Opening

Tenders should be opened as soon as possible after the time for receipt of tenders.

10.2 Contents

The Contractor's Proposals, in accordance with the Employer's Requirements, should be submitted at the same time as the tender (see JCT Practice Note CD/1A, paragraphs 18–23, for the forms of such proposals).

Any analysis of the tender price (e.g. Contract Sum Analysis) should be submitted with the tender or later, as specified in the tender documents.

Any supporting design proposals and pricing documents should be submitted under separate cover endorsed with the tenderer's name at the same time as the tender.

10.3 Notification

All unsuccessful tenderers should be informed immediately it has been decided to accept a tender as this information is critical in relation to a contractor's strategic tender planning.

When the two stage procedure is adopted, each tenderer submitting an offer should be informed as soon as it is decided to proceed to the second stage (see Section 10.7).

Once the contract has been let every tenderer should be supplied with a list of firms who tendered (in alphabetical order) and a list of the tender prices (in ascending order of value).

It should be remembered that if price was not to be the sole criterion tenderers should have been informed (see 7.1, 8.2 and preliminary enquiry letter).

The tender documents of unsuccessful tenderers, including design proposals, should be returned to their originators at the same time as the result of tendering is notified. Under no circumstances should any use be made of any proposal contained in a rejected tender.

10.4 Assessment

The examination of the Contractor's Proposals and any pricing documents supporting the tender under consideration should be made by the employer or the employer's professional advisers who should treat the documents as confidential; on no account should any details of the Contractor's Proposals be disclosed to any person, other than the appropriate advisers, without the express permission of the tenderer.

It is essential that the evaluation establishes that the requirements and proposals are consistent and do not contain conflicting provisions. Once this is established the tenders may be compared to ascertain the most favourable offer received. The evaluation should be carried out in accordance with the criteria specified in the preliminary enquiry letter (see clause 8.2 and Appendix A).

The **BEST** tender, which may not necessarily be the lowest, should be accepted.

10.5 Errors

The pricing documents should be examined to detect errors in the computation of the tender. If such errors are found the employer should take the action required in conjunction with his/her advisers, under whichever is appropriate of the alternatives set out below and referred to in the Formal Invitation to Tender and Form of Tender (see Appendices B and C).

.1 Alternative 1 *(Single stage tendering only)*

The tenderer should be given details of such errors and afforded an opportunity of confirming or withdrawing the offer. If the tenderer withdraws, the pricing documents of the next preferred tenderer should be examined, and if necessary this tenderer be given a similar opportunity.

If the tenderer confirms the offer an endorsement should be added to the pricing documents indicating that all rates or prices (excluding preliminary items and contingencies) inserted therein by the tenderer are to be considered as reduced or increased in the same proportion as the corrected total of priced items exceeds or falls short of such items. This endorsement should be signed by both parties to the contract.

.2 Alternative 2 *(Two stage or single stage tendering)*

The tenderer should be given an opportunity of confirming the offer or of amending it to correct genuine errors. Should he/she elect to amend the offer and the revised tender is no longer acceptable, the offer of the next preferred tenderer in the evaluation should be examined.

If the tenderer elects not to amend the offer, an endorsement will be required as in 10.5.1. If the tenderer does amend the figure, and possibly certain of the rates in the pricing documents, he/she should either be allowed access to the original offer to insert the correct details and to initial them or be required to confirm all the alterations in a letter. If in the latter case the revised offer is eventually accepted or accepted as a basis for the second stage the letter should be conjoined with the acceptance and the amended figure and the rates in it substituted for those in the original tender. The other tender document should also be examined and any discrepancies and inconsistencies clarified with the tenderer.

10.6 Acceptability

On completion of the examination and evaluation of the tender, the tender deemed to be the best offer (whether this has been found to be free from error, or the tenderer is prepared to stand by the offer in spite of error, or the offer on amendment is still acceptable) should either be accepted by the employer as a basis for any second stage negotiation and finalisation of design or be accepted by the employer as the basis for the eventual contract.

10.7 Two stage tendering

.1 Acceptance of the initial tender

Acceptance of the first stage tender should be confirmed in writing between the

employer and selected contractor and the documents on which the acceptance is based should clearly define the intention of both parties in respect of:

- the grounds on which either party may be entitled to withdraw from the second stage;
- the entitlement to and the method of ascertaining costs that may have been incurred by the employer and/or successful contractor in the second stage negotiations should the parties fail to proceed beyond the second stage, either by withdrawal or by failure to reach agreement;
- the method of reimbursement for any work done on site before acceptance of the second stage contract sum should the second stage procedures prove abortive.

.2 Second stage procedure

The second stage is the process of finalisation of the contractor's proposals resulting in an acceptable basis for the contract.

A contract for the carrying out and completion of the works will not be entered into until the second stage tendering procedures have been completed satisfactorily and the employer is in a position formally to accept the results and consequences of the negotiations. At this stage the employer should proceed by executing, together with the contractor, the agreement.

When the employer fails for any reason to reach agreement with the selected contractor it will be necessary either to recommence second stage procedures with another tenderer, or to invite further competitive first stage tenders.

10.8 Single stage tendering

.1 Negotiated reduction of tender

Good tendering procedure demands that the contractor's tendered price should not be altered without justification. In particular, the NJCC strongly deplores any practice which seeks to reduce any tender arbitrarily where the tender has been submitted in full competition and no modifications to the specification, quantity or the conditions under which the work is to be executed are to be made, or to reduce any tender other than the lowest to a figure below the lowest tender.

Should the tender under consideration exceed the employer's budget, the recommended procedure is for a reduced price to be negotiated with the tenderer based on agreed changes to the specification or the Employer's Requirements. The basis of negotiations and any agreements made should be fully documented.

Only if these negotiations fail should negotiations proceed with the other tenderers on the list.

If all these negotiations fail, new tenders may be called for.

.2 Acceptance procedure where single stage tendering applies.

As soon as the employer is satisfied in regard to any queries or correction of errors in the tender and is ready to proceed by accepting a tender, he/she should inform the selected contractor accordingly and forthwith enter into contract by executing, together with the contractor, the agreement. It is important that this step is taken promptly so that the contractor can proceed with the completion of design work and production of working drawings. Further, it will be necessary to have regard to the length of period indicated in the contractor's tender which is required for the completion of design and drawings and to ensure this period is not eroded.

Dear Sirs,

Heading

I/We wish to prepare a preliminary list of tenderers for design and construction of the works described below under design and build procedures.

Will you please indicate whether you wish to be invited to submit a tender. Your acceptance will imply your agreement to submit a wholly bona fide tender in accordance with the principles laid down in the NJCC 'Code of Procedure for Selective Tendering for Design and Build' and not to divulge your tender price to any person or body before the time for submission of tenders.

You are requested to reply by . . . Your inability to accept will in no way prejudice your opportunities for tendering for further works; neither will your inclusion in the preliminary list at this stage guarantee that you will subsequently receive a formal invitation to tender for these works.

Yours faithfully . . .

- a** Status and financial resource of employer
- b** Project
- c** Type of building e.g. commercial, industrial, housing etc. with any other details
- d** Employer's Agent
- e** Planning Supervisor
- f** Location of and access to site (site plan enclosed)
- g** Availability of, or any restrictions on, the supply of services etc.
- h** General description of the work
- i** Approximate cost range £ . . . to £ . . .
- j** Number of tenderers it is proposed to invite
- k** Tendering method:
 - two stage selective tendering procedure in competition; or
 - single stage selective tendering procedure in competition
- l** Priority of items that will determine successful tender
- m** Scope of tender information
- n** Scope of design service required
- o** Sum payable to unsuccessful tenderers
- p** Planning requirements – the contractor will/will not be required to obtain/participate in the arrangements to obtain final approval of outline planning permission/planning permission before tender stage.
- q** Conservation area – the project is/is not within a conservation area.
- r** Form of contract
 - (i) JCT Standard Form of Building Contract With Contractor's Design 1998 Edition
 - (ii) Other standard conditions (e.g. ICE Design and Construct, ICE/NEC, GC/Works/1 Ed 3 Design and Build Version, CDPS)
 - (iii) Amendments to (i) if any – give details and reasons
- s** Optional clauses in JCT Standard Form of Building Contract With Contractor's Design 1998 Edition [2]:
 - clause 22: Insurance of the Works: 22A/22B/22C
 - Appendix 1: fluctuations: 36/37/38
 - Appendix 2: method of payment – alternatives
 - clause 30-2A Alternative A: Stage Payments
 - clause 30-2B Alternative B: Periodic Payments
- t** Particular conditions applying to the contract are . . .
- u** Whether the building will be affected by the provisions of the Defective Premises Act 1972
- v** (Where the Defective Premises Act 1972 does not apply) the limit of the contractor's liability etc.

continued

References

- [1] This letter is drafted on the assumption that the project is a complete Design and Build contract. Modifications will clearly have to be made if the contractor is required to design a part only of the works.
- [2] Alternative to be deleted as required.

- w The contract is to be a deed/simple contract [3]
- x Anticipated date for possession of site
- y Period (or latest date) for completion of works
- z Approximate date for despatch of all tender documents
- aa Tender period . . . weeks
- bb Tender to remain open for . . . weeks [4]
- cc Liquidated damages (if any), anticipated value £ . . . per . . .
- dd Details of guarantee requirement (if any)

References

- [3] Delete as appropriate before issuing.
- [4] This period should be as short as possible consistent with the need for proper appraisal and evaluation of the tender offers.

Dear Sirs,

Heading

Following your acceptance of the preliminary invitation to submit a (first stage) [1] tender for the above, I/we now have pleasure in enclosing the following:

- a tender documents [2] in duplicate comprising planning supervisor's pre-tender health and safety plan and . . .
- b addressed envelope for the return of the tender (endorsed with the project title only);
- c addressed envelope/label for the return of other tender documents (endorsed with the project title and the tenderer's name).

Will you please note:

- 1 The site may be inspected by arrangement with the employer's agent.
- 2 Tendering procedure will be in accordance with the NJCC 'Code of Procedure for Selective Tendering for Design and Build'.
- 3 Should obvious errors in pricing or errors in arithmetic be discovered before acceptance of this offer in the documents submitted to me/us these errors will be dealt with in accordance with Alternative 1/Alternative 2 [3] contained in Section 10 of the NJCC 'Code of Procedure for Selective Tendering for Design and Build'.

The completed form of tender together with your contractor's proposals and other supporting documents are to be lodged not later than . . . hours on . . . the . . . day of . . . 19 . . .

Will you please acknowledge receipt of this letter and enclosures and confirm that you will be able to submit a tender in accordance with these instructions.

Yours faithfully,
Employer's Agent

References

- [1] Delete if single stage tendering adopted.
- [2] The nature and extent of the tender documents to be issued will depend on the tendering method adopted but should include:
 - (a) Clear statement of the employer's requirements.
 - (b) Information to be supplied by the employer and/or his/her professional advisers including drawings, specifications etc.
 - (c) An explanation of the tendering method envisaged including a statement of the minimum as to type, format and extent of design and specification proposals required of the contractor at that stage.
 - (d) Any other necessary information, whether or not included in the preliminary enquiry letter. It should be noted that all items of information given in the preliminary enquiry letter should be incorporated within the tender documents in their final form including a statement of how the Appendices of the Contract Conditions will be completed.
 - (e) Form of Tender (see Appendix C).
 The extent of the documentation enclosed should be listed as appropriate. Where two stage tendering is to be adopted the tender documents sent to contractors should contain a statement or explanation of the anticipated nature and extent of matters to be dealt with and negotiated during the second stage.
- [3] Delete as appropriate before issuing.

Tender for . . . (description of Works)

To . . . (Employer)

Dear Sir(s),

A Two Stage Procedure [1]

I/We having read the conditions and other first stage tendering documents delivered to me/us do hereby offer to enter into second stage negotiations on the basis of the enclosed priced tender documents (for a first stage tender sum of £ . . .). [2]

I/We further undertake, subject to the satisfactory completion of the second stage negotiations and the preparation of and agreement of a contract sum, to execute and complete works in accordance with the conditions of contract.

I/We undertake in the event of your acceptance to execute with you a valid self proving contract embodying all the conditions and terms contained in this offer.

B Single Stage Procedure [1]

I/We having read the conditions of contract delivered to me/us and having examined the documents referred to hereby offer to execute and complete in accordance with the conditions of contract the whole of the works described for the sum of £ . . . and within . . . weeks [3] from the date of possession.

Should obvious errors in pricing or errors in arithmetic be discovered before acceptance of the offer in the documents submitted to me/us these errors will be dealt with in accordance with Alternative 1/Alternative 2 [4] contained in Section 10 of the NJCC 'Code of Procedure for Selective Tendering for Design and Build'.

This tender remains open for consideration for . . . days [5] from the date fixed for the submission or lodgement of tenders.

I/We undertake in the event of your acceptance to execute with you a valid self proving contract embodying all the conditions and terms contained in this offer.

C I/We require a period of . . . [6] working weeks between acceptance of tender and acceptance of all matters to be negotiated during the second stage of tendering and commencement of work on site to enable us to complete any remaining and necessary production drawings. [7]

D I/We require a period of . . . [6] working weeks between acceptance of tender and commencement of work on site to enable us to complete our design, prepare our health and safety plan and complete such production drawings as are necessary. [7]

Dated this day of 19

Name

Address

Signature Witness

References

- [1] Omit A or B as appropriate.
- [2] Insert first stage tender figure only if stage priced tender documentation permits.
- [3] To be completed before Form of Tender is sent out to or to be left blank for the tenderer to insert as required.
- [4] Delete as appropriate before issuing.
- [5] Any period quoted should be adequate to permit thorough appraisal and evaluation of the tender but only in exceptional circumstances should it extend beyond 56 calendar days.
- [6] To be completed by the contractor.
- [7] Delete C or D as appropriate.

NJCC
