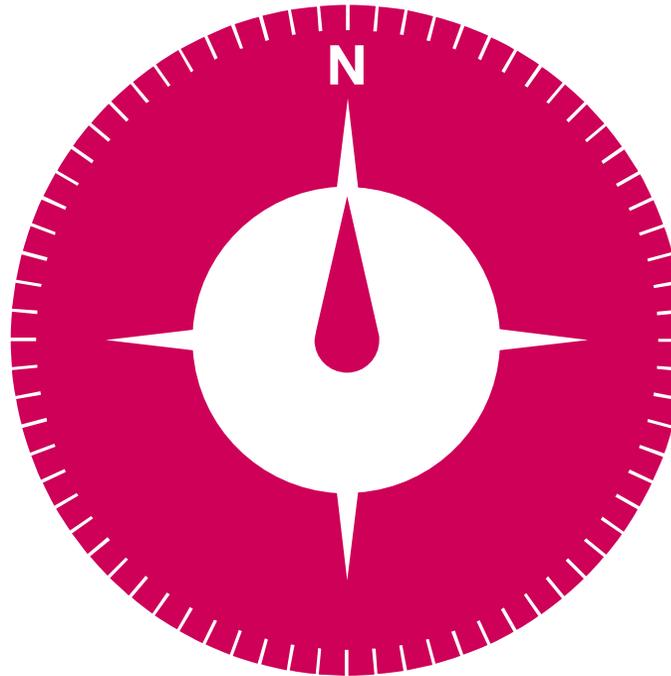


White Paper Procurement Conference

May 2017



Go further



Mike Mousdale
Partner, DWF LLP
@MikeMousdale
@DWF_LocalGov

Performance



How do you describe what you are looking for with more subjective criteria, without giving the answer to suppliers?

- "functionality" or "ease of use"
- innovative method statements and programmes of work
- demonstrations and interviews



What are the legal issues?



- Preliminary Market Consultation
- Technical Specifications
- Rules for evaluation
- Contractual terms



Technical Specifications (Regulation 42)



- Technical Specification shall lay down the characteristics required
- Broad discretion as to what to include
- Required characteristics may also refer to -
 - Specific process or method of production or provision
 - Specific process for another stage of its life cycle
- For Works, the technical specification *shall* define any characteristics required of a material, product or supply so that it fulfils the use for which it is intended
- **Non-discrimination**
- In its tender, the tenderer shall prove by any appropriate means that the works, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority



Principles of tender evaluation



- Contracts awarded on the basis of MOST ECONOMICALLY ADVANTAGEOUS TENDER
- Award criteria to be linked to the subject matter of the contract
- Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority



Tender evaluation – Regulation 67



- MEAT assessed by:
 - the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing in accordance with regulation 68, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, **linked to the subject-matter of the public contract in question.**
 - such criteria may comprise, for example—
 - (a) quality, including technical merit, **aesthetic** and functional characteristics, accessibility, **design for all users, social, environmental and innovative characteristics** and trading and its conditions;
 - (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
 - (c) after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.

Tender Evaluation (continued)



- Award criteria shall be considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle, including factors involved in—
 - (a) the specific process of production, provision or trading of those works, supplies or services, or
 - (b) a specific process for another stage of their life cycle,
even where those factors do not form part of their material substance.
- Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority.
- Award criteria shall—
 - (a) ensure the possibility of effective competition; and
 - (b) be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.
- In case of doubt, contracting authorities shall **verify** effectively the accuracy of the information and proof provided by the tenderers



Unrestricted choice – Objective/Subjective



- Criteria must be formulated in such a way as to allow all reasonably well-informed and normally diligent (RWIND) tenderers to interpret them in the same way (*C-19/00 SIAC Construction Ltd v Mayo CC*)
- *Commission v Netherlands (C-368/10)* – clear, precise and unequivocal criteria
- *Healthcare at Home v The Common Services Agency [2012] CSOH 75* – broad discretion in the criteria relating to issues such as creativity, innovation, understanding of NHS and its requirements
- Clearly no objection per se to subjective criteria, though should still be defined as precisely as possible and must be linked to subject matter of the contract



Potential problem areas



- Functionality
- Ease of use
- Social value
- Environment
- Added Value
- Innovation
- Checklist of questions:
 - Is it relevant?
 - How will I evaluate it?
 - How do I verify it?



Means of proof



- Subjective criteria are not per se the problem, but the evaluation may be
- How good is the verification?
- Do test reports or certificates apply/exist? (see Regulation 44)
- Specific testing (mainly for products)
 - Under what conditions?
 - Qualifications of the testers (see *Aquatron Marine v Strathclyde Fire*)
- Use of experts
- Demonstrations
 - Need to be conducted in a controlled environment
 - Need to be rules applied consistently to the demonstration
 - Remember general principles
- Is there manifest error?



The Interview



- Sales team or delivery team? Who did you get?
 - Is it a presentation or just questions?
- What is the purpose of the interview?
- What are you expecting to get out of it?
- Who is conducting the interview?
- Will you evaluate it (if not, explain it!)
- How will you evaluate it?



Final Thoughts



- Regulation 70 – conditions for the performance of contracts
- Regulation 84
 - Contracting authorities shall document the progress of all procurement procedures. To that end, contracting authorities shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure
- Applies to tests, demonstrations and interviews just as much as the tender review



Panel and Questions





Go further

DWF is the legal business where expertise, industry knowledge and leading edge technology converge to deliver solutions that enable our clients to excel.

Embracing our diverse skills, we gain a unique and more valuable legal perspective that can empower our clients, giving them a competitive advantage or simply delivering new solutions to old problems.

With over 2,300 people across the business, we make sure that wherever you are, wherever you aim to be, we will go further to help you get there.