

# White Paper

**Refining criteria:** how do you design a process that uses different criteria or approaches at different stages, while staying compliant with both s.20 (down-selection) and s.24 (refinement)? What is the interplay between s.24 and s.31 in this context?

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**FRESHFIELDS**

# Agenda

1.

Competitive flexible procedure

2.

Does the Procurement Act allow for 'different criteria or different approaches at different stages'?

3.

What constitutes 'refinement'?

4.

What is the interplay between s.24 and s.31 in this context?

# Competitive flexible procedure (s.20)

- Before awarding a contract, CA must carry out a competitive tendering procedure in accordance with a tender notice and associated tender documents
- This competitive tendering procedure can be conducted in multiple **stages** under the **competitive flexible procedure** being '*such other competitive tendering procedure as the contracting authority considers appropriate for the purpose of awarding the public contract*' (s.20 (2)(b))

## Can:

- limit the number of participating suppliers, generally or in respect of particular tendering rounds or other selection processes
- provide for the refinement of award criteria in accordance with s.24

## Cannot:

- permit the participation of suppliers that did not submit a tender in the first round of tendering or that were excluded following an earlier round

**NB** in designing and carrying out the procedure must have regard to procurement objectives (s.12) and meet procedural requirements

# Different criteria or different approaches at different stages? S.20

## Yes (and no)

Procurement Act retains (using different language) the distinction between selection criteria and award criteria

Permits their application at different stages to exclude suppliers by reference to:

### ▪ **conditions of participation**

- a proportionate means of ensuring that suppliers have: the legal and financial capacity/technical ability to perform the contract
- **may** exclude the supplier from participating in, or progressing as part of, the competitive tendering procedure (s.22(7))
- **must** be satisfied if a supplier is to be awarded the public contract (see also s.19(3)(a))

### ▪ **intermediate assessment of tenders**

- satisfy the CAs requirements
- best satisfy the award criteria at the point of exclusion, when assessed by reference to the assessment methodology and if there is more than one criteria, the relative importance of the criteria, at the point of assessment
- BUT see also s.24(3)

***NB** responses to the conditions of participation must be assessed separately from the tender, the tender (only) being assessed against the award criteria and must ensure details of down selection adequately included in tender notice*

# Different criteria or different approaches at different stages? 'Refinement' S.24

Procurement Act includes, for the first time, express ability to refine award criteria (as part of the competitive flexible procedure) if:

- The tender notice or associated tender documents provide for refinement of the criterion, and
- The authority is yet to invite suppliers to submit tender to be assessed under s.19 – being award following competitive tendering procedure (ie before inviting final tenders)

## Procedure

### Procedure type

Competitive flexible procedure

### Competitive flexible procedure description

Transport for London (TfL) is conducting a procurement under the Competitive Flexible Procedure, in accordance with the Procurement Act 2023, to appoint suppliers for on-street enforcement services. The process includes multiple stages of evaluation, clarification, and refinement of award criteria to ensure compliance, value for money, and alignment with TfL's objectives.

Note: All dates are indicative.

# Refinement s.24

## **‘Refine’ is not defined in the Procurement Act**

### Specifies:

- **May**  
refine the indication of the relative importance of the award criteria under s.23(3)(b)
- **May not**  
make a refinement under this section if it would result in award criteria that would, had the refinement been made earlier, have allowed one or more suppliers that did not progress beyond an earlier round or selection process to have done so (cf s.31)
- **Must**  
modify and republish or provide again the tender notice and any associated tender documents affected by refinements under this section

# Refinement ‘Guidance: assessing competitive tenders’

‘Mechanism by which a contracting authority can plan to add further detail to the award criteria as the procedure progresses’

- Can only refine what has already been provided
- **Cannot add new criteria**

## Likely to be permitted

- adding sub-criteria to those set out in the tender notice/associated tender documents as long as they directly relate to the relevant existing main criteria
- adding more detail to existing main criteria set out in tender notice/associated tender documents
- adding more detail to existing sub-criteria set out in the tender notice/associated tender documents
- changing weightings within a pre-existing range that was set out in the tender notice/associated tender documents, eg, if an award criterion relating to transition arrangements was set out at 10%-30%, a contracting authority could start with a 30% weighting and end with a 10% weighting for the final assessment if the other requirements in section 24 are met

## Likely *not* to be permitted

- adding new main criteria
- adding new sub-criteria not associated with the main criteria in the tender notice/associated tender documents
- adding or removing pass/fail tests
- reversing the answer to pass/fail tests expressed in the tender notice/associated tender documents (ie, changing what initially constituted a ‘fail’ to a ‘pass’ instead)

# What is the interplay between s.24 and s.31 in this context?

Under s.24 CAs may not make a refinement that would, had the refinement been made earlier, have allowed one or more suppliers that did not progress beyond an earlier round or selection process to have done so

Similar to s.31 which sets out the rules on wider modifications to a procurement prior to the deadline for submitting tenders or requests to participate (as relevant)

s.31 however deals with circumstances where **unforeseen** modifications are required and which apply in any competitive tendering procedure (not just competitive flexible procedure)



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