

**AWARDING PUBLIC  
CONTRACTS LAWFULLY &  
SKILFULLY WITHIN THE PUBLIC  
PROCUREMENT RULES**

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# PERFORMANCE

- Three questions arise for consideration in this talk
- How do you expose the culture of the bidder's organisation and the capability of senior management?
- How do you evaluate pitches, references, interviews and the team members who will perform the contract?
- Where are the limits of what you can ask?

# EVALUATION

- Evaluation of bids is the most important part of the tender process
- The purpose of the exercise is to identify the most economically advantageous tender
- This may be achieved through a variety of procedures – open, restricted, negotiated, competitive dialogue
- What we are considering here is how evaluation of performance can be carried out with the twin aims of ensuring MEAT and avoiding legal challenge

# SELECTION & AWARD CRITERIA

- Traditional dichotomy between the selection and award parts of the process
- Selection criteria designed to set minimum standards on a pass/fail basis
- Award criteria formulated to enable evaluation of the bid
- Two distinct questions – can they do it? and how will they do it?
- Or stage 1 assesses the tenderer and stage 2 the tender
- Regulation 67(1) of PCR 2015 states that contracting authorities shall base the award on MEAT (does extend to lowest price)
- Regulation 67 goes on to set out a non-exhaustive list of criteria which may be used

# DEVISING THE AWARD CRITERIA

- Generally, CA's enjoy a wide margin of discretion in the adoption of award criteria in a given competition
- However, reg 67(2) – award criteria must still be linked to the subject matter of the contract
- Reg 67(6) – cannot confer unrestricted freedom of choice on the contracting authority
- Ensure that criteria are published and are sufficiently clear (measured by the standard of RWIND tenderer per *Healthcare at Home*)
- Need to decide relative weighting of quality and price and be prepared to justify this – see *Traffic Signs –v- DRD*

# EVALUATION OF STAFF

- 2015 Regs add into list of permissible criteria:
- *“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” (67(3)(b))*
- Traditional view expressed in *Lianakis* that you cannot evaluate at the award stage what you took into account at selection stage –i.e. cannot consider experience and ability of tenderer at award stage
- But the abilities of staff can be relevant to both capability and quality – must have some bearing on the ultimate question of MEAT
- The key is the extent to which it can be said that the qualities of the team or the individual members of staff are relevant to the quality of the work to be carried out

# EVALUATION OF STAFF

- When can it be said that such relevance exists?
- Recital 94 of 2014 Directive says *“This might be the case, for example, in contracts for intellectual services such as consultancy or architectural services”*
- Should 67(3)(b) be interpreted as limited to ‘intellectual services’? Surely there are many fields in which it can be said that the quality of staff assigned has a significant impact on the level of performance, including works contracts
- In *Ambisig* CJEU decided (based on 2004 Directive) that CA was entitled to evaluate the proposed team to provide training and consultancy services in food safety
- Advocate General’s opinion draws distinction between the criteria relating to the tenderer’s experience generally and those which focus on the team to be assigned to delivery under the particular contract

# METHODS OF EVALUATION

- How do you set about evaluating the team or individuals staff members?
- Again, CA has wide discretion provided disclosed in the tender documents and do not infringe core principles of equality and transparency
- Tender response/method statements/presentations/interviews/references/site visits, etc
- Scoring 0-5 scale?

# INCUMBENTS

- There must be a real risk that a broad application of 67(2)(b) criteria will favour incumbents
- Note that Reg 67(7) requires award criteria to *'ensure the possibility of effective competition'*
- In *Travel Solutions* the CJEU held that the quality of tenders could not be evaluated on the basis of experience acquired by the tenderers with the contracting authority in connection with previous contracts
- Award criteria must not therefore permit advantage to incumbent providers

# ENSURING DELIVERY OF SERVICE

- Recital 94 of 2014 Directive recognises the problem faced by CA's when a tenderer is awarded contract on basis of a certain team but then fails to deliver
- *"Contracting authorities which make use of this possibility should ensure, by appropriate contractual means, that the staff assigned to contract performance effectively fulfil the specified quality standards and that such staff can only be replaced with the consent of the contracting authority which verifies that the replacement staff affords an equivalent level of quality"*
- What are the 'appropriate contractual means?'

# ENSURING DELIVERY OF SERVICE

- It is essential that the quality standards required of the staff are incorporated into the contractual terms
- The terms should specify the precise identity of the individuals who are to deliver the contract and, if necessary, the level of commitment specifically required from them
- Recognising that staff can and do change employment, the contract needs to set out arrangements for changes in staff, including the need for consent of the contracting authority based on the same standards as set out in the tender process
- These will reflect qualifications, experience and ability

# CONCLUSIONS

- CA's now have the entitlement to tailor make award criteria which have the aim of evaluating the ability of the bidder to deliver
- However, these still must relate to the subject matter of the contract and be disclosed
- The CA must keep a clear audit trail of the decision making process – see *Woods Building Services* for the need to record clear reasons
- Must also consider how the contract ensures that what is promised is actually delivered