

A&L Goodbody

Evaluator flexibility

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The thorny question...

Where is the wriggle room for evaluators to shift their initial views during moderation or in response to clarifications and presentations while upholding tender process integrity?

Shifting initial views...



Moderation



Clarifications



Presentations



Moderation & consensus scoring

“...The purpose of the moderation meeting is to agree a single consensus score. This is particularly important where evaluators’ scores differ for the same bidder”

“Once individual scoring is complete, evaluators should send their scores and evaluation reports to the moderator for review. The following would suggest an issue that might require discussion with the relevant evaluator:

- *use of inappropriate language or personal remarks;*
- *comments indicating the evaluator took account of matters outside of the actual bid (e.g. past experience with a bidder, or matters not expressly included in the bid response);*
- *comparisons to other bidders;*
- *a copy and paste of the evaluation criteria or the scoring descriptor;*
- *score justifications that only make sense if the evaluator is there to explain them;*
- *scoring justifications that are significantly more detailed for some bidders than others;*
- *poor quality, incomplete or incoherent justifications for scores given;*
- *inconsistencies between the score given and the reasons for that score”*

(Source: Bid Evaluation Guidance Note (May 2021) UK Government Commercial Function)

Moderation & consensus scoring in practice

*“...[Mr. Corsi’s] description of the evaluation process as a whole, both of his own personal analytical approach, and that of the team as a whole, describes a **fulsome, engaged, flexible and analytical approach to the entire tender.***

*The team did not act by merely processing the individual scores of its members, **but engaged in dialogue from which evolved an agreed score such that the end result was not formulaic but was the result of a dialectic and analytical process.** I am satisfied that this is so, and I am satisfied therefore not merely that Mr. Corsi’s personal notes did not lead him to fall into error, but also that **his personal approach was modified and evolved through the dialogue and process of the evaluation team.***

That is to my mind the key to the assessment process, and the assessment has been shown to my satisfaction to have been an analytical and not formulaic process and was sufficiently robust in terms of fairness and transparency.”

Somague v. TII [2016] IEHC 435 (Baker J)



Evaluation/moderation – the wriggle room

- Evaluation teams have a “wide” margin of discretion although that margin is not permitted where there is a failure to respect the principles of equality, transparency or objectivity (*SIAC*)
- Evaluators are bound by the content of the tender documents, the pre-established scoring methodology and what tenderers have been told (including pre-tender Q&A) (*SIAC, Gaswise, Word Perfect*)
- Evaluators can only assess what is in the tender response plus any clarifications
- Generally, no wriggle room on price evaluation
- Courts will exercise their function of judicial review in the case of manifest error (*SIAC, Word Perfect, Somague*)

Shifting initial views – no requirement to explain

Word Perfect v. Minister for Public Expenditure & Reform (No. 3) (Record No. 2018/203) – Court of Appeal, 7 June 2018

- WP argued that evaluators should be required to explain the progression of marks as between the evaluation meetings
- *“The test of manifest error is a ground of objection targeted ultimately at an impugned decision, not at the notes of the meetings which precede the making of such decision”*

	Initial “holding” marks (27/01/17)	Second Eval meeting (01/03/17)	Final Eval meeting (27/03/2017)
Word Perfect	878	874	870
Translations.ie	833	885	885

Shifting initial views – no requirement to explain



“...evaluators should have the freedom to explore, consider and reflect on the strengths and weaknesses of the various tenders. ...the task of the evaluators is already difficult enough. If they were required to explain possible changes in thinking between evaluation meetings prior to the final decision it would add new layers of complexity ...to an already complex system of public procurement litigation.

Such a requirement would, moreover, stifle the necessary freedom which evaluators must have to reflect on the respective merits of the bids.

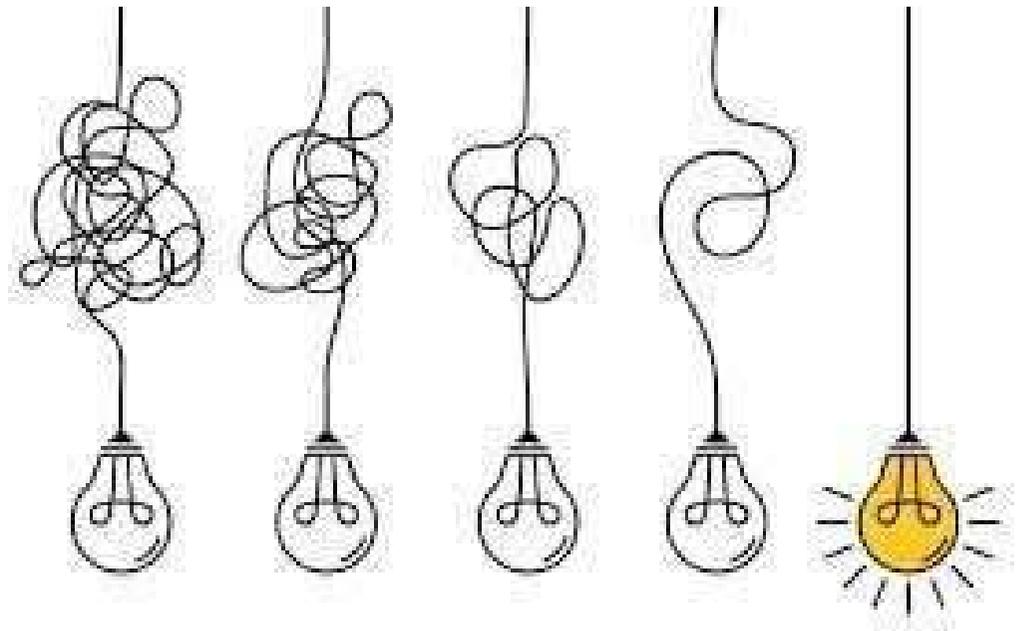
*The evaluators must be prepared to stand or fall by a review of the final published evaluation for manifest error. **But short of that they cannot be expected to have to defend what are, at best, tentative or provisional views expressed during the course of evaluation process.**”*

Word Perfect, Hogan J.

Wriggle room on clarifications

- Regulation 56(4) (SI 284 of 2016):

Where information or document is incomplete, erroneous or missing contracting authorities **may** request candidates/tenderers to **submit, supplement, clarify or complete** the relevant information or documentation within an appropriate time limit **provided** requests must be made **in full compliance with principles of equal treatment and transparency**



Limits on clarifications



- ITT must not mandate exclusion for non-submission of the requested information
 - Clarification request must not lead to submission of a new tender
 - Clarification request must not unduly favour or disadvantage tenderers
 - Permissible to seek clarification to correct obvious error provided that clarification does not lead to a new tender
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- *Ministry of Science v. Manova (Case C-336/12)*
 - *Esaprojekt Case (Case C-387/14)*
 - *Archus v Polskie Górnictwo Naftowe (Case C-131/16)*

Wriggle room on presentations

Regulation 7(a) -(d) SI 284 of 2016:

*(7)(a) ...oral communication may be used in respect of communications **other than those concerning the essential elements of a procurement procedure**, where the content of the oral communication is documented to a sufficient degree.*

*(b) For the purposes of subparagraph (a), the essential elements of the procurement procedure include the procurement documents, requests for participation, **confirmations of interest and tenders**.*

*(c) In particular, oral communications with tenderers which could have a substantial impact on the content and assessment of the tenders **shall be documented to a sufficient extent and by appropriate means**.*

*(d) For the purpose of subparagraph (c), appropriate means includes **written or audio records or summaries of the main elements of communication**.*

Presentations



Public Procurement Guidelines for Goods and Services

*“In Open or Restricted Procedures, tenderers may be asked to make a presentation on their proposals. **These presentations should only be used as an aid to understanding and for purposes of clarification and cannot be scored unless this is stated in the RFT.** Such presentations are not an opportunity for “post tender negotiation” on price or specifications....”*

Bid Evaluation, Guidance Note, UK Government Commercial Function

*Carefully consider the use of bidder presentations, interviews, scenario tests or site visits as part of the evaluation process. **You must clearly and transparently set out in the procurement documents whether and how these activities will be evaluated,** and the approach should be agreed with legal before proceeding.*

Upholding the integrity of the evaluation process

Dos

- Ensure a formal & confidential process (solemn exercise of critical importance)
- Completion of conflict of interest/confidentiality declarations
- Full transparency in what is being evaluated
- Consistency in evaluation team (both in membership and in application of scoring methodology)
- Robust moderation/reasoning process
- Inclusion of subject matter experts in evaluation panel (*Fresenius, Somague*)
- Creation and maintenance of an appropriate audit trail

Don'ts

- > Failure to carry out an objective evaluation in line with tender docs/criteria
- > Comparisons to other bidders rather than against the award criteria
- > Focus on the bidder/past performance rather than the bid
- > Blind-sighted by price (either low or high)
- > Taking into account matters not expressly included in the bid response
- > Manifest errors in evaluation
- > Generic or copy & paste reasoning



Questions?
