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# **Evaluating Performance**

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## Questions

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1. How do you expose the culture of the bidder's organisation and the capability of its senior management?
2. How do you evaluate pitches, references, interviews and the team members who will perform the contract?
3. Where are the limits of what you can ask?

# Choosing the Winner – in 2 Slides! (1 of 2)

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1. First, you have to set objective and transparent criteria throughout
2. You formulate and/or apply certain Selection Criteria
  - Must relate to the subject matter of the contract
  - Economic and financial standing
  - Professional and technical ability
  - Professional honesty, solvency and reliability
  - Qualifications
  - Mandatory exclusions – corruption/organised crime/money laundering/taxation etc
  - Discretionary exclusions – e.g. poor prior performance/conflict of interest
  - Verification requirement
  - (Open Procedure – assessment can be at the end)
3. You have to apply certain other exclusions
  - Non-compliant tender
  - Late tenders
  - Abnormally Low Tenders

## Choosing the Winner – in 2 Slides! (2 of 2)

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4. Then you compare the tenders not excluded and you select the winner
  - How? - Award Criteria
  - Must relate to the subject matter of the contract
  - Must be capable of verification
  - Rules on formulation and disclosure of Award Criteria
  - Identify the “Most Economically Advantageous Tender”
5. You have to consider the tenders as submitted
  - Can’t be altered substantially in post final-tender negotiations
6. You don’t have to award the contract to the “best” bidder
  - Abandon - but not because you didn't get the “right” result
  - Minimum Affordability conditions in Award Criteria
7. Any award must be in accordance with these rules

# Selection Process v Award Process

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There are two distinct processes:

1. Selection Process – selecting suitability qualified bidders that you think can do the job
  - Think –
    - “Are we allowed to deal with them?” (Mandatory Exclusions)
    - “Would we be happy working with them?” (Discretionary Exclusions)
    - “Can they do the job?” (Selection Criteria)
  
2. Award Process – choosing the winner from the suitably qualified bidders
  - Think –
    - “Who has submitted the Most Economically Advantageous Tender?” (Award Criteria)
  
  - Restricted, Competitive Dialogue and Competitive Procedure with Negotiation
    - Stage 1 (shortlist) and Stage 2 (tenders)
  
  - Open
    - Stage 1 (Should we mark their bids?) then Stage 2 (Assessing merits); or
    - Stage 2 (Who’s the winner?) then Stage 1 (Is the “winner” qualified?)

## Selection Criteria – (1 of 2)

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- Regulation 57, Public Contracts (Scotland) Regulations 2015
  - 57(a) – suitability to pursue an professional activity
  - 57(b) – economic and financial standing
  - 57(c) – technical and professional ability
- 57(3) & (4) – Selection Criteria must be “appropriate” and “related and proportionate to the subject-matter of the contract”.
- 57(16) – “With regard to technical and professional ability, a contracting authority may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to the appropriate standard”
- 57(17) – CA may require “that economic operators have a sufficient level of experience demonstrated by suitable references from contracts performed in the past”
- 57(19) – Professional ability for works, services or supplies with installation work may be evaluated “with regard to the skills, efficiency, experience and reliability of the economic operator.”

## Selection Criteria – (2 of 2)

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- European Single Procurement Document (“ESPD”)
  - Replaces PQQ - asks all sorts of questions
  - Use is mandatory – Reg 60 (also for PR(S)A regulated procurements)
  - Self certification, with supporting evidence only provided and verified at the end
  - The idea is that bidders only have to fill out one ESPD and keep it up to date
- Assessing experience/ability - means of proof (Reg 61(9))
  - Strictly controlled
  - Reg 61(9) – lists evidence that may be relied upon to assess technical abilities
    - Past experience
    - An indication of the technicians involved (Reg 61(9)(c))
    - The education and professional qualifications of the service provider/contractor or its managerial staff, provided they are not to be evaluated as an award criterion (Reg 61(9)(g))

## Prior performance as discretionary exclusion criteria

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- Grave professional misconduct which renders bidder's integrity questionable (Reg 58(8)(c))
- Significant or persistent difficulties in performance of a substantive requirement under a prior public contract – led to early termination, damages, comparable sanctions (Reg 58(8)(g))
  - Organisation level, rather than team level.
  - Bidder has to provide an explanation of the circumstances
  - Probably a high bar before you're safe to exclude – Court ruling
  - Exclusion for up to 3 years from the date of the relevant event (not the judgement)
  - “Self Cleaning” process
  - Exclude – must provide your reasons in writing
  - Fertile ground for Judicial Review – almost guaranteed to result in a challenge

## Award Criteria – (1 of 4)

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- Regulation 67
- Contracts must be awarded on the basis of the “Most Economically Advantageous Tender”
  - Broadly flexible – you have a wide “margin of appreciation” here, within limits
- Reg 67 (7) – Award Criteria
  - Can’t give an unrestricted freedom of choice on the CA
  - Must ensure effective competition
- Price or Cost may not be used as the sole award criterion
- Best Price-Quality Ratio
  - Based on assessment of criteria linked to the subject matter of the contract
  - Must include Price or Cost, using cost-effectiveness approach (includes Life Cycle Costing)
  - Possible to have a fixed price/cost and bidders compete on Quality only

## Award Criteria – (2 of 4)

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- *Lianakis* case – a strict interpretation suggested that you couldn't evaluate experience and resources at Award Stage if you evaluated the same thing at Selection Stage
  - The problem is that these things can be relevant to both Qualification and to Quality
  - *Lianakis* was much maligned. Strict interpretation now overturned.
- Reg 67(4) – Award Criteria may comprise or include
  - (a) quality, technical merit etc
  - (b) “organisation, qualification and experience of staff assigned to perform the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract”
- Don't be fooled – welcome flexibility, but not a revolution!
  - Selection Criteria and Award Criteria remain different
  - Regulation 61(9)(g) (means of proof) in Selection Criteria.
    - The education and professional qualifications of the service provider/contractor or its managerial staff, provided they are not to be evaluated as an award criterion

## Award Criteria – (3 of 4)

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- *Lianakis* is not (completely) dead. You can still score in the wrong way.
  - Quality of the team or individuals must link to the Quality of the work required under the Contract
  - Recital 94, Directive 2014/24/EU:
    - Example give is – “in contracts for intellectual services such as consultancy or architectural services”
- **Ask yourself**
  - Is experience always relevant to the contact?
  - Is it worth the extra cost?
  - Does experience bring “more bang for your buck”?

## Award Criteria – (4 of 4)

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- Reg 67(9) – Relative Weightings of Award Criteria must be disclosed
- *Healthcare at Home* – Award Criteria must be published and clear – to the standard of the “Reasonably Well Informed and Normally Diligent Tenderer” (RWIND)
- *Traffic Signs v DRD* – You may need to justify and defend your relative weightings of Quality and Price

# Verification

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- Award Criteria
- Reg 67(7) - Award Criteria must be accompanied with specifications that allow the information in the bids to be effectively verified and assessed against Award Criteria
- Reg 67(8) – “In case of doubt, the contracting authority must verify effectively the accuracy of the information and proof provided by the tenderers”.
- Selection Criteria
- Regulation 57- no reference to “doubt”
- Unclear how far these verification requirements go.

# Contract Terms and Enforcement

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- You should have enforceable contract terms for anything assessed as Award Criteria
- No point in evaluating a Team/Individual's experience if they don't work on the contract
- Buy "A Team" get "B Team"? Arguably you're in *Presstext* and "Material Change" territory.
- Solution
  - Have appropriate contract terms and enforce them
  - Recognise that the identity of key team members working on your contract may be subject to change, but only with your consent – "equivalent levels of skills and experience"
  - If the change is unavoidable and there is no direct equivalent, include appropriate contract variation terms
- Similar to changing a material sub-contractor

# Scottish Regime – PR(S)A 2014 and P(S) Regs 2016

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## “Regulated procurements” but not “EU regulated procurements”

- Goods/Services - £50,000 to £106,047 (Schedule 1 entities)/£164,176
- Works - £2M to £4,104,394
- Identical approach
- Selection Criteria and Award Criteria must not be confused.
- Selection and Award Criteria must be linked to subject matter of the contract.
- Award Criteria must not include criteria that formed part of the assessment at selection stage.
- If quality of staff assigned can have a significant impact on the level of performance of the contract then the “organisation, qualification and experience of those staff can be assessed at Award Stage.”

## Question 1:

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### How do you expose the culture of the bidder's organisation and the capability of its senior management?

#### Culture of the bidder's organisation

- Culture?
- Is it relevant to the successful delivery of the contract?
- Does "culture" matter at all?
- A culture of Quality?
- How are you going to prove and measure "culture" – CVs, references, interviews etc?
- May be better to stick with Quality, Ability, Standards, Qualifications, Experience etc

#### Capability of its senior management

- More familiar territory – clear and objective
- Bid document, CVs, references, interviews etc
- Must be linked to subject matter of the contract
- How important is senior management to your contract? How involved will they be?

## Question 2:

# How do you evaluate pitches, references, interviews and the team members who will perform the contract?

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### The team members who will perform the contract

- We've probably covered this by now.
- A Team vs B Team?

### Pitches and interviews

- Sales Team vs Delivery Team?
- Think about how you will mark it
  - Will you assign a score? Think about transparency and objectivity.
  - Will you use it to inform and amend your other scores?
  - Will there be any evaluation at all? If not, consider whether you need it.
- Will it be interactive?
  - Same questions for everyone?
- Will you include "Exam Questions"?
- Will it just be a presentation?
- Real danger of subjectivity

## Question 2:

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### How do you evaluate pitches, references, interviews and the team members who will perform the contract?

#### References #1

- Mentioned in Regulation 58(17) (Selection Criteria) – assessing experience on basis of “suitable references from contracts performed in the past”
- Reg 61(means of proof) - lists of prior contract experience
  - Goods/Services experience in last 3 years
  - Works experience in last 5 years
- Scottish Statutory Guidance under PR(S)A specifically mentions references for Selection
  - Goods/Services experience in last 3 years
  - Works experience in last 5 years
- No mention in Reg 67 on Award Criteria – but no reason why references can’t be used
- Consider the referee and the relevance of the reference to the subject matter of the contract
  - *GAT case* – the number of positive references alone was not relevant.
  - Content/rating in the reference mattered and how it related to MEAT assessment.

## Question 2:

# How do you evaluate pitches, references, interviews and the team members who will perform the contract?

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### References #2

- Regulation 56 - Verification of Selection Criteria
  - How must you verify references?
  - Not quite clear just how far this goes.
  - Are you simply checking self-declarations from ESPD?
  - Are you probing further? A telephone call to the referee?
  - Remember to treat everyone the same
- It's not just "in case of doubt" as with Award Criteria (Reg 67(8))
- Verification of references can be at the end in Open Procedure

## Question 3:

### Where are the limits of what you can ask?

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- You have to use the ESPD
- You can supplement the ESPD with your own additional Selection questions
  - Relevant to the subject matter of the contract
  - Fair, objective, proportionate etc.
- Selection Criteria and Award Criteria distinction and various rules
- DON'T ask for things you don't plan to assess
- DON'T assess things:
  - You can't reasonably evaluate or verify
  - You don't think is worth paying for (Ask: "What's a Quality point worth?")
  - You don't plan to enforce

# Conclusions

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1. Don't believe the hype! No revolution in the evaluation of bidder/team performance.
2. Helpful clarification that a more flexible approach can be followed in assessing bidder/team experience in Award Criteria.
3. *Lianakis* is not dead. The Selection Stage and the Award Stage are conceptually quite different. Sometimes Selection & Award Criteria will need to be closely scrutinised.
4. Bidder/team experience is not always going to be relevant to Quality. It depends on the subject matter of the contract.
5. It'll be interesting to see how the Courts interpret the verification requirements and any failure to enforce contract conditions.
6. Think carefully about what you ask for.
7. Keep a clear audit trail of your decision making process and your interactions with bidders.

# Questions?

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The logo for Anderson Strathern, featuring a stylized 'AS' monogram in red and the company name 'Anderson Strathern' in white serif font.

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