
How objective do evaluation criteria have to be?

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Three principles in play

- The RWIND tenderer principle
- The principle of objectivity
- The verification principle

Which criteria?

- Principles likely to apply equally to selection criteria and to award criteria
- May apply more rigorously to criteria setting minimum requirements (see *Clinton v DEL* [2012] NICA 48 – “fundamental importance to whole process”)

RWIND tenderer principle

C-19/00 *SIA Construction Ltd v Mayo CC* [2001]
ECR I-7725, para 42:

“Award criteria must be formulated . . . in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.”

Principle of objectivity

- C-368/10 *Commission v Netherlands* [2012] 3 CMLR 11, para 87:

“Compliance with the principles of equality, non-discrimination and transparency requires that the award criteria are objective, ensuring that tenders are compared and assessed objectively and thus in conditions of effective competition. That would not be the case for criteria having the effect of conferring on the contracting authority an unrestricted freedom of choice.”

Verification principle

C-448/01 *EVN AG CC* [2003] ECR I-14527, paras 50-52:

“Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders . . . Meet the award criteria. It is thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment . . . Therefore, an award criterion which is not accompanied by requirements which permit [effective verification] is contrary to the principles of Community law . . .”

Applying the RWIND tenderer principle (1)

Commission v Netherlands appears to set a very stringent standard

- Formulation of criteria should allow all RWINDTs “to know the exact scope thereof”
- All conditions and detailed rules “must be drawn up in a clear, precise and unequivocal manner” so RWINDTs can “understand their exact significance”
- Criteria in issue did not allow RWINDTs to be “completely sure” what criteria were, and did not “precisely indicat[e] to them what information they must provide”

Applying the RWIND tenderer principle (2)

But contrast *Healthcare at Home v Common Services Agency* [2014] 4 All ER 210; 2013 SC 411; [2012] CSOH 75:

- The law: RWIND test is an objective one, not depending on evidence of what particular bidders in fact understood
- The facts: Court of Session upheld criteria; Supreme Court said no basis to interfere with their conclusions – this endorsed provisions which said that areas to be covered by responses “should include but are not limited to” specified matters
- Inner House says important to understand *Netherlands* in context; question is whether tenderer could “understandably and plausibly” have interpreted in different way, and whether bidders’ path to understanding what required was obstructed by authority’s formulation
- Lord Hodge in Outer House re what is realistic and practicable in complex procurements – not necessary to have very precise and highly detailed descriptions

Applying the RWIND tenderer principle (3)

- Likely that requirement is more stringent if relevant criterion sets a minimum standard that has to be passed – as in *Netherlands* and *Clinton*
- Likely to be more problems with a criterion whose whole nature is ambiguous (e.g. “outcomes” in *Clinton*) than where it is simply the precise extent of what information is called for that may be debateable
- Completely vague criteria will not do e.g. in *Netherlands* references to fulfilling “criteria concerning sustainable purchasing and socially responsible business”, “improving sustainability of coffee market”
- Apparently not possible to cast onus of verification onto bidders

Applying the objectivity principle (1)

- *SIAC*: authority entitled to rely on expert's assessment of ultimate cost to authority (but must be based upon objective factors)
- T-70/05 *Evropaiki Dynamiki v EMSA* [2010] ECR II-313: possible to apply criteria objectively and uniformly although not quantitative – rejects “too vague” complaint about criteria consisting of proposed project methodology, understanding of specifications, quality of operational services
- T-4/01 *Renco SpA* [2003] ECR II-175: similar conclusion in relation to criteria including experience and competence of proposed team, quality of proposed sub-contractors/suppliers, technical quality of proposed equipment/materials, measures to meet timetable

Applying the objectivity principle (2)

Easycoach Ltd v Department for Regional Development [2012] NIQB 10:

- Requirement (as minimum selection criterion) to provide details of a relevant project within last 3 years
- Sample project to demonstrate ability successfully to perform the required transport service, and to be similar in nature and scale to required service
- What has to be avoided is unrestricted freedom of choice – court will be alert to criteria formulated so as to confer excessive discretion and subjective assessment on contracting authority
- Criteria here were not apt to establish fairly, transparently and objectively that bidders possessed specified minimum standards
- No clear link made with lot for which bidding – no benchmarks or minimum thresholds prescribed, including re project volume, characteristics, duration – panel left to form “intuitive and instinctive” opinions

Applying the objectivity principle (3)

- So when is discretion “excessive”?
- Again, more important to be precise about minimum thresholds than about criteria to be scored against a range of marks
- If a “checkbox” approach is to be taken in marking, need to identify clearly which boxes have to be ticked
- If authority makes clear what proposals are supposed to cover, should still be legitimate to score those proposals against descriptors of the excellent/good/fair/poor unacceptable nature
- Probably sensible to aim for descriptors that give a bit more guidance than that, but keep flexibility, both to make it harder to find manifest error, and to give a better chance of awarding to the best bidder!

What are the consequences of breach?

- *Easycoach* suggests that time for challenging criteria as excessively vague runs from when they are published (time extended there, but this ground of claim still (surprisingly) failed on basis that not shown to have disadvantaged plaintiff
- If a criterion fails RWIND test, appears that must give bidder full credit for any approach that it could reasonably have taken to what criterion was looking for (*Clinton; Energy Solutions EU Ltd v NDA* [2016] EWHC 1988 (TCC) at e.g. para 899) – this in itself raises equality issues
- May be cases where abandonment of procurement is only option
- Would it be permissible to issue clarification and give relevant bidder an opportunity to amend tender?