

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

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POST AWARD VARIATIONS

- In this talk I will consider the following:
- How do you move from your post tender negotiations into compliant post award variations?
- On a sliding scale, what are the do's and don'ts of tender negotiations?

BASIC PRINCIPLES

- All procurement exercises conducted under the Public Contracts Regulations 2015 are subject to the fundamental principles
- Regulation 18 – CA's are obliged to treat EO's equally and without discrimination and to act in a transparent and proportionate manner
- In both open and restricted procedures, these have been interpreted to preclude post tender negotiation with bidders

NEGOTIATION OR CLARIFICATION?

- *Slovensko* – once tender submitted, it cannot be amended at the request of CA or EO – equal treatment of tenderers and transparency preclude any post tender negotiation
- *Clinton –v- DEL Girvan LJ* “the principle of equal treatment precludes negotiation”
- However – clarification of bids is not prohibited
- In fact – per *Tideland Signal* – there is a duty to contact tenderers and seek clarification based on the principle of proportionality since to fail to do so could adversely affect fair competition
- Important that a power to seek clarification is included in the tender documents
- In *Clinton* 13 tenderers were afforded opportunity to clarify bids with respect to tutors’ qualifications, Plaintiff was not asked to clarify information given about ‘outcomes’ of previous training programmes

NEGOTIATION OR CLARIFICATION?

- Difficult questions for CA's as to when clarification strays into amendment of tender or negotiation
- Key issue – does the matter affect the merits of the tender? Is it an obvious error the alteration of which does not result in tender amendment?
- *Clinton* – Court of Appeal split 2-1 against the Plaintiff; majority held that situations were different and proportionality did not require the same opportunity to be given
- '*Minor*' and '*obvious*' ambiguities unlike data which was '*fundamental*' to the validity of the tender and would, in reality, have permitted a new tender to be submitted

COMPETITIVE PROCEDURE WITH NEGOTIATION

- Rigidity of open and restricted procedures gave rise to a need for more flexible approach – negotiated procedure and competitive dialogue
- Former renamed by PCR 2015 – details in Reg 29
- Grounds for use – Reg 26 – where the works or services *‘include design or innovative solutions’* or where the needs of the CA cannot be met *‘without adaptation of readily available solutions’* or where specific circumstances relating to nature or complexity of the contract
- Breadth of concept of *‘design’* means this procedure (and competitive dialogue) available for most, if not all, construction contracts
- Also can be used where only irregular or unacceptable tenders submitted under other procedures

COMPETITIVE PROCEDURE WITH NEGOTIATION

- Call for competition describes the needs of what is to be procured, fixes minimum standards and sets award criteria
- Invite number of tenderers to negotiate – can negotiate initial and subsequent tenders to improve their content but not the final tender
- Still subject to fundamental principles and contract must be awarded on the award criteria and minimum standards are non-negotiable
- Purpose of negotiations? Allow CA to refine specification on basis of market offer; adjust requirements on basis of solutions proposed; drive down price; correct misunderstandings or errors in tenders

COMPETITIVE DIALOGUE

- Available on same grounds as competitive procedure with negotiation – rules in Reg 30
- Contract notice sets minimum standards and award criteria
- Bidders selected and invited to participate in dialogue which lasts until the CA identifies the solution capable of meeting its needs
- Once declare dialogue concluded, final tenders sought based on solution(s) identified – such tenders can be *'clarified, specified and optimised'*

EXAMPLES OF USE OF COMPETITIVE DIALOGUE

- Renewal of C2K IT contract by DENI – IT services often seen as fitting criteria given likely innovation and complexity
- Animal health traceability system for DARD
- DOJ delivery of tech solutions for effective criminal justice in the digital age
- Design and build of SWAH in Enniskillen

PROS AND CONS OF NEGOTIATION AND DIALOGUE

- These procedures obviously allow for more flexibility, innovative solutions and, potentially, better outcomes for the CA
- However – they can prove expensive and time consuming for all involved
- One NI company involved in CD process for hospital construction spent over £1M on a bid which proved unsuccessful and process took over 2 years
- Cost of CD is putting bidders off – bid costs are irrecoverable and profit may not be sufficiently attractive to justify the spend

PROS AND CONS OF NEGOTIATION AND DIALOGUE

- One schools' project in Scotland, local authority offer to reimburse bidders up to certain level to encourage participation
- Costs incurred by CA can also be significant – need to have a body of advisors, legal, financial and technical in order to engage properly in process
- Important to remember that desired outcome remains the appointment of the most economically advantageous tender – this will not be achieved if EO's are less inclined to bid

ALTERNATIVE – POST AWARD VARIATION

- Modification of contract after award now covered by Reg 72 of PCR 2015
- Any substantial modification will constitute an illegal direct award and should be subject to new procurement process
- Need to include reference to modification in procurement documents

ALTERNATIVE – POST AWARD VARIATION

- Permissible modification : necessary additional works not exceeding 50% of contract value
- Unforeseen circumstances (again 50% rule)
- Change of contractor due to restructuring, etc
- Insubstantial modifications (*Pressetext*)
- Minor variations – 10% supplies/services; 15% works

DO'S AND DON'TS

- Preparation – scope the market in advance
- Identify what is required and draw up specification
- Avoid ambiguity in tender documents
- Permit clarification but exercise caution around its use
- Choose procedure carefully – what will actually deliver MEAT/VFM

DO'S AND DON'TS

- If need for flexibility outweighs disadvantages, use CPN or CD
- Ensure the right team is in place before embarking on procedure
- Don't permit negotiation unless expressly empowered by Regs
- Don't rely on post award variation to address changes in requirement