

MCCANN FITZGERALD



Subjective Criteria and Appropriate Disclosure

Jenny Mellerick, McCann FitzGerald

24 May 2017

Topic Question

- *How do you describe what you are looking for with more subjective criteria without giving the answer to suppliers, e.g. (1) "functionality" or "ease of use", (2) innovative method statements and programmes of work or (3) demonstrations and interviews?*
- Taking a step back to look at the premise of the question – not just “how do I do this?” but “is it ok to do this?”

Overview

- Law on “subjective” criteria
 - Focusing on award but similar principles will apply to selection stage
- Walking the tightrope – meeting disclosure obligations without writing the tender for bidders
- Some issues with the examples given

Award criteria refresher

- Are “subjective” criteria even allowed?
 - Recital 90 of Dir 2014/24/EU – *“Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment”*
 - However eggs given at Art/Reg 67 – clearly not strictly objective – technical merit, aesthetics, innovative characteristics – not objective facts but require application of judgment

Award criteria refresher (2)

- New Regs have helpfully incorporated a lot of the case law on award criteria
- Reg 67(2) – *“linked to the subject matter of the public contract in question”* (ie *“relate to the works, supplies or services to be provided under that contract in any respect”*) (Reg 67(5))
- Reg 67(6) – *“shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority”*

Award criteria refresher (3)

- Reg 67(7) – *“be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria”*
- Reg 67(8) – *“in case of doubt, a contracting authority shall verify effectively the accuracy of the information and proof provided by the tenderers”*
- So – position under Regs
 - subjective judgment ok, but not TOO subjective
 - must be linked to subject matter of contract (no “what else does your business do?” questions)
 - must be verifiable at least in principle

General principles

- Regs not only relevant law – case law on disclosure obligations and clarity of documents
- First question – what is the authority trying to achieve in holding information back?
 - “Don’t want to give answer” – examine why
 - Don’t want to get very similar offers (why?)
 - Don’t want to do work for bidders (but does it make life easier for evaluators?)
 - Need bidders to come up with own solutions – they are the experts

General principles (2)

- Assuming authority has considered and decided it wants to test bidders on eg understanding of the authority's needs, or innovative solutions only they can come up with – how does it safely go about it?
- First – be very clear on the specification
 - Bidders must have equality of opportunity in formulating the terms of their tenders
 - Difficult to fairly evaluate “understanding of authority needs” if authority needs aren't clear
 - Reg 42(1) – tech specs “*shall lay down*” required characteristics

RWIND Tenderer

- *Shetland Line (1984) Ltd vs Scottish Ministers* (March 2016)
 - Attack on clarity of specification as regards two requirements – inclusion of LoLo freight and meaning of “time sensitive freight”
 - Court assessed from perspective of RWIND tenderer reading requirements
 - Objective test – sufficiently clear for all RWIND tenderers to interpret in same way? Court will judge regardless of actual interpretation of individual tenderers

RWIND Tenderer (2)

- Court puts itself into shoes of RWIND tenderer, including technical knowledge and relevant surrounding facts and circumstances which would have been known to all
 - NB – not reading docs as lawyer or contracting authority but as bidder (see also *Gaswise* (Feb 2014))
- Here, not credible that any bidder would have thought LoLo freight included as (a) huge advantage to incumbent, and (b) evidence they had been clearly told position. “Time sensitive freight” well understood in industry

RWIND Tenderer (3)

- Try to challenge/test to check that specification is actually clear from RWIND perspective – ideally, cold read from someone not involved in writing it, but not always possible
- Next step – what to tell bidders in criteria?
- Disclosure obligations have been focus of many cases
 - all RWIND tenderers must be able to interpret criteria in the same way (eg *SIAC*)
 - tenderers must be aware of **all the elements** to be taken into account by authority when they prepare their tenders (eg *Lianakis*)

Disclosure

- Debate in case law – what can authority keep to itself in light of this?
 - new sub-criteria vs predictable content of model answer
- *McLaughlin & Harvey v Dept of Finance and Personnel* (Sept 2008) – guidance to evaluators
 - 39 undisclosed “topics” with weightings, 186 bullet points
 - “...I consider there is force [in the suggestion] that to have provided these in such detail to the bidders would have in fact undermined the efficacy of the process....”

Disclosure (2)

- *Mears v Leeds Co Co* (April 2011)
- Marked with undisclosed scoring guidance and against undisclosed model answers
- Court – to see if any breach of transparency, need to work out if model answers should have been disclosed in the first place
- Considered case law on equal treatment, uniform interpretation of criteria etc
- Would the matters contained in the model answers have been reasonably foreseeable to an RWIND tenderer? If yes – no obligation to disclose

Disclosure (4)

- *“...the initial test to be applied is, in my judgment, whether the answer is a reasonable response to the question...and also whether the answer over-emphasises a particular aspect so as to give it a weight which was not foreseeable”*
- Ran through model answers on this basis – some elements not predictable
- Move away from “reasonably foreseeable” language in recent cases (*Healthcare at Home* (May 2012, March 2013, July 2014))

Disclosure (5)

- However, similar approach in terms of examining whether matters marked *“fall within the reasonable ambit of the specified criteria, as it would have been understood by the hypothetical RWIND tenderer”*
- *“looked at objectively from the viewpoint of the hypothetical tenderer...tenderer would, or ought to, have anticipated the importance, or at least the relevance, of [X]” (Healthcare at Home, Inner House)*
- So – if authority knows “model answer” but doesn’t want to give it to bidders – vital it tests each element against this approach (incl weighting – eg references to “key aspect” or “critical feature”)

Duty to give reasons (standstill letter)

- Subjective judgment
 - Can authority articulate basis for decision sufficiently to satisfy duty to give reasons?
 - Bear in mind new Reg 84 Report obligations will apply to all stages incl demos etc – must be able to capture justification (NB “internal deliberations”)
 - Competence to assess (*Shetland (1984) Ltd*)
- Comfort factor of being able to say “we told you we would be looking at this”
- Another benefit of disclosure – starts clock ticking

Topic examples

- *How do you describe what you are looking for with more subjective criteria without giving the answer to suppliers?*
- No “one size fits all” answer – think through each time
- Clear specification so no argument over understanding what authority wants to buy
- Targeted submission requirements that will extract info that’s meaningful (room for creativity ok provided within “reasonable ambit” of criterion – *Healthcare at Home*)
- Clear scoring methodology that makes it clear what gets high marks (eg level of detail, calibre of supporting evidence, exceeding vs matching requirements)

Topic examples (2)

- *(1) "functionality" or "ease of use"*
 - The more functionality the better, or a needlessly expensive/confusing solution?
 - Ease of use by whose yardstick?
- *(2) innovative method statements and programmes of work*
 - Can authority verify something innovative?
 - Are assessors competent to make a judgment?

Topic examples (3)

- *(3) demonstrations and interviews*
 - Potential for inappropriate subjectivity high
 - Equal treatment
 - Same opportunity; same info/constraints; same time allowed; same personnel present; same questions?
 - Clarity for all parties around purpose of demo/interview – validation? Scoring? Compliance with mandatory minimum requirements? Who has to attend from bidder?

Conclusion

- “Do I really want to keep things back? What benefit will it get me vs the downsides?” (clock not ticking, argument about whether had to disclose)
- Am I clear about what it is I want to buy?
- Are the spec, criteria, and submission requirements cohesive (supporting a uniform interpretation)?
- Can an RWIND tenderer figure out what will get them a high score?
- If I have a model answer in mind – is everything in it predictable to an RWIND tenderer as being within reasonable ambit of the relevant criterion?

MCCANN FITZGERALD



Subjective Criteria and Appropriate Disclosure

Jenny Mellerick, McCann FitzGerald

24 May 2017