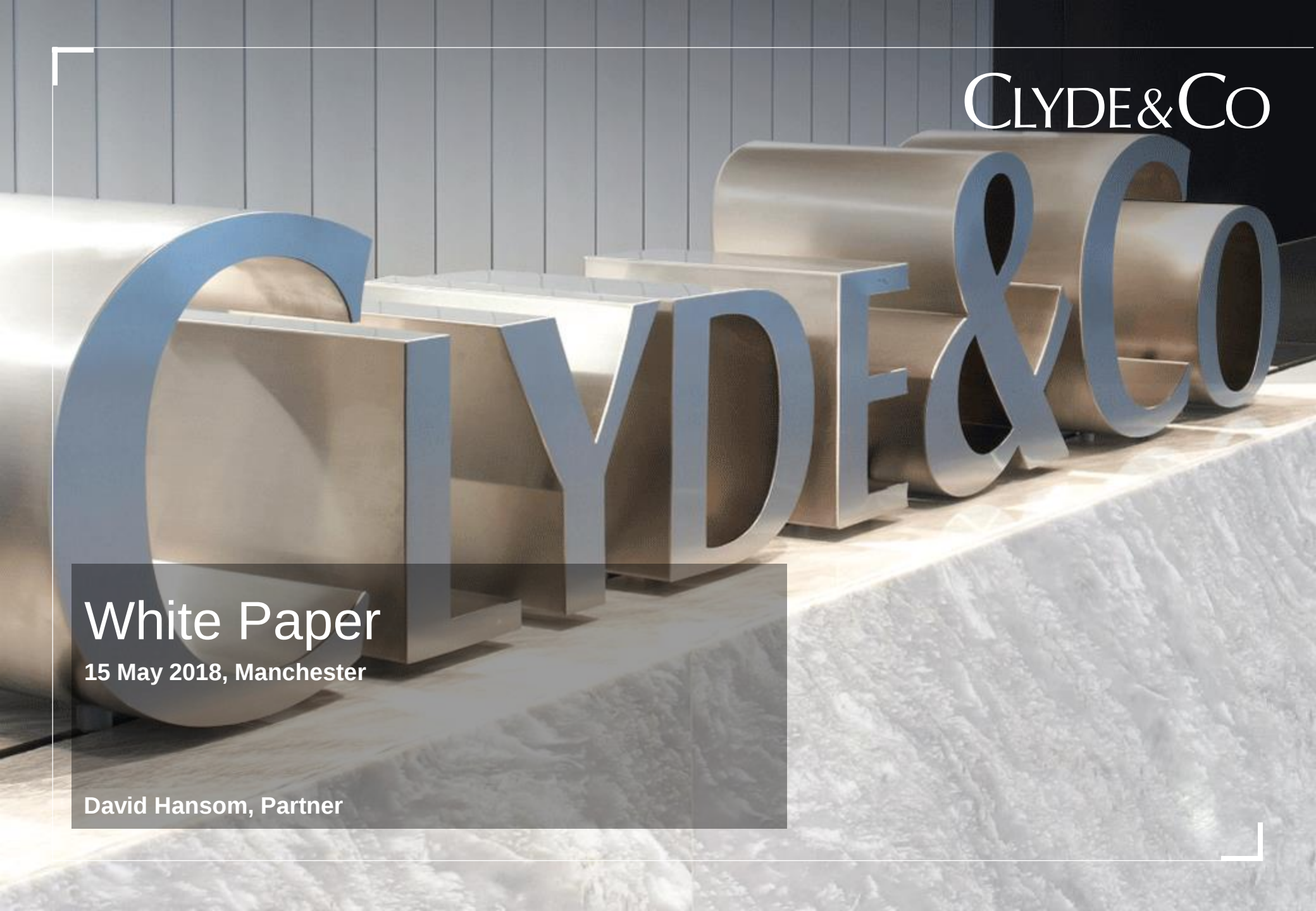


A large, three-dimensional sculpture of the Clyde & Co logo is the central focus. The letters are made of a polished, metallic material, possibly brass or copper, and are arranged in a row on a light-colored wooden surface. The 'C' is particularly large and prominent. The background consists of a wall with vertical wooden slats. The lighting is soft and even, highlighting the metallic texture of the sculpture.

CLYDE&Co

White Paper

15 May 2018, Manchester

David Hansom, Partner

The question

- What are the current practical trends and issues in the selection stage?
- How is the ESPD working in practice, and how can selection be used as an innovative tool and not just a procedural step?

Coverage

- Financial selection post-Carillion
- European Single Procurement Document – who, when and why?
- Practical strategies to innovate

Selection- starting point

- Directive 2014/24/EC Article 56/ Regulation 56 Public Contracts Regulations 2015
 - Contracts **shall** be awarded on the basis of criteria [...] provided that the contracting authority has verified [...] that all of the following conditions are fulfilled:—
 - (b) the tender comes from a tenderer that is not excluded in accordance with regulation 57, and **meets the selection criteria**, and where applicable, the non-discriminatory rules and criteria referred to in regulation 65.

Using the selection 'stage'

- Must apply selection criteria to above threshold contracts including frameworks and DPS
- In England/Wales, must not use separate stage for below threshold contracts (Regulation 111 PCR2015)
- In open procedure, can evaluate tender before selection questions but need
 - “*verification of absence of grounds for exclusion and of fulfilment of the selection criteria*”
 - carried out “*in an impartial and transparent manner*” (regulation 56(3) PCR2015)

Financial evaluation post Carillion

- Article 58 (7) Directive 2014/24/EC and regulation 58
- *“With regard to economic and financial standing, contracting authorities **may** impose requirements ensuring that economic operators possess the necessary economic and financial capacity to perform the contract”*
- CCS SQ sets standard questions but clear:
 - Parts 1 and 2 cannot be amended
 - PPN 02/13 *“assess the risk to the public sector/public money if a supplier were to go out of business or have inadequate resources”*
 - Credit check alone is not sufficient
 - Regulation 117 PCR says must follow statutory guidance

Financial evaluation post Carillion

- Systemic failure of financial evaluation models?
 - Accounts are out of date when submitted
 - Credit checks/bankers letter are a snapshot
 - Reliance on consortia resources
 - Group structures make true “worth” hard to evaluate
 - Self declaration regime
- More scrutiny of selection stage by bidders, regulators and the courts

Court's scrutiny of selection

- *Case C-391-15 Marina del Mediterráneo, SL, v Consejería de Obras Públicas y Vivienda de la Junta de Andalucía, (8 September 2016)* - public works concession contract for the expansion of port in Marbella
- One candidate alleged another candidate should not have been admitted to procedure
- *“Did not fulfil the requirements of economic and financial solvency”*
- *Advocate General view*
 - *Authority had established financial solvency met*
 - *The EU legislator did not intend to require immediate review for every single act adopted throughout the course of the award procedure*
 - *The initial draft of Article 1(1) included a requirement to ensure effective remedies at all stages of the award procedure – dropped from final version*
- How does this fit with 30 day procurement challenge timescales?

European Single Procurement Document

- Part of e-procurement/ Europe 2020 strategy
 - Standard form across all member states
 - Reduce administrative burden/ SME agenda
 - Self declaration (winning bidder only provide information)
- Scottish PQQ mirrors ESPD in full
- England/Wales – CCS SQ aims to replicate (not exactly!)
- From 18 April 2017, must only be in electronic format

e-ESPD

- Parts I – III are standard and can be resubmitted provided still up to date
- Part II is financial information
- Part IV deals with technical standing (this is the Part 3 of the CCS SQ)
 - The ESPD does include technical questions but CCS has deviated
 - Update for each project to reflect requirements?
 - Many authorities create an e-ESPD for only Parts 1 and 2
 - Need a partial SQ from each bidder each time

Practical strategies

- Add project specific questions to SQ Part 3 if relevant to delivery of previous contracts
- Ask for evidence during process
- Scope for tender stage questions post *Lianakis*?
- Build in contractual reporting/ updating requirements

The answer

- Selection increasingly high profile
- Not just a box ticking exercise
 - Set financial thresholds for each procurement, ask additional questions /evidence if unsure
 - Supply chain/consortia due diligence
- ESPD as “procurement passport”
 - Uptake in UK still limited
 - Technical experience often needs amendment
- Early candidate for blockchain?

Questions

David Hansom, Partner
44 (0) 207 876 4127
david.hansom@clydeco.com

404

Partners

2000

Legal
professionals

3600

Total staff

50+

Offices and associated
offices in 21 countries