



CLYDE & CO

White Paper

2020

David Hansom, Partner

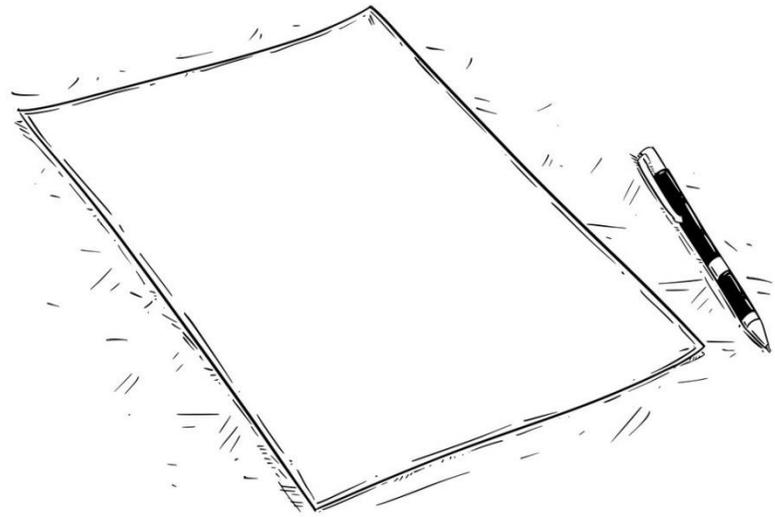
Evaluation

- When evaluating and scoring a tender, what can you do to eliminate 'bunching' and marginal score differentiation and so decrease the likelihood of a challenge?

Coverage

- **The law:** evaluation criteria; does the authority have any discretion?
- **Some practical problems and their solutions:** do differences in scores really matter; market modelling and pre-tender engagement; increased risk of procurement challenges in a recession
- **Practical strategies** to design a model which works for your tenders

Key principle on setting good evaluation criteria



<https://cubebites.wordpress.com/2014/07/24/rubbish-in-rubbish-out/>

What does the law say?

- **Regulation 56 (1) PCR:** Contracts shall be awarded on the basis of criteria laid down in accordance with regs 67 to 69
- **Regulations 67-69** say:
 - Award based on most economically advantageous tender
 - Must be set out in advance
 - Must be linked to subject matter of the contract
 - Must include price evaluation and, as a minimum, some pass/fail quality questions on spec
 - Could be fixed price and quality only

What does the law say?

- **Evaluation criteria must:**
 - (a) ensure the possibility of effective competition; and
 - (b) be accompanied by specifications
- Specifications must allow the information provided by bidders to be 'effectively verified' in order to assess how well the tenders meet criteria (regulation 67(7) PCR 2015)
- Criteria must not confer an 'unrestricted freedom of choice' on authority (regulation 67(6) PCR 2015)

Effective competition

- Evaluation criteria cannot favour a particular brand or supplier/solution
- Link to general principles of equal treatment and non-discrimination (regulation 18(1) PCR 2015)
- Procurement should not be designed to 'artificially narrow competition (regulation 18(2) PCR 2015)

- Note here interface with regulation 32 (negotiated procedure with no prior publication of an OJEU notice) where no bidders/ unacceptable tenders

Ensuring effective competition

- Advertise widely e.g through PIN or website
- Set questions in advance and stick to them
- Take a range of views from SME through to multinationals
- Ensure you build the feedback into the criteria
- Keep the audit trail – regulation 84 report and for award decision notices

Market engagement

- Law expressly permits early market engagement
- Regulation 40 PCR 2015 says authorities can conduct market consultations, and seek or accept advice from other authorities, experts and market participants
- Can then use the findings to build procurement provided:
 - Does not distort competition to do so
 - no breach of equal treatment etc rules
- Consult widely to avoid risk of favouritism/ unconscious bias in tender writing
- Meet with all, if you meet with one?
- Bidders will ask to be included

What do the cases say?

Lots of cases on evaluation

- That a bidder might fare better than a rival under a particular model does not necessarily mean that the model breaches equal treatment (*Abbvie Ltd v NHS Commissioning Board* [2019] EWHC 61 (TCC))
- Equal treatment principle does not place any obligation upon the contracting authority to neutralise **all** advantages enjoyed by an incumbent tenderer. (*Amplexor Luxembourg Sarl v European Commission* (Case T-211/17))
- Can use gateways in evaluation i.e law does not prohibit authorities from using award criteria which provide for the phased evaluation of bids (*Montte SL v Musikene* (Case C-546/16) - AG opinion)
- Authorities have a margin of appreciation in manifest error claims but not on equal treatment (*Woods Building Services v Milton Keynes Council* (2015))

What to avoid

- Awards not to the MEAT bidder
- Models which give authority more than an appreciable margin of discretion in applying criteria
- Models where it is impossible to score well/highly, for no reason
- Models which unreasonably favour the incumbent (but note some incumbent advantage often arises, and proportionality is key)
- Criteria which are not related to the subject matter of the contract or artificially narrow the market
- Questions where every bidder will get e.g a '3' for a pass increases the practical risk of bunching of scores

Practical strategies

- Don't use the same 0-5 marking scheme for all questions
- Use weightings to allocate proper importance to what really matters
- Sub – criteria can be weighted to draw out innovation or service 'must haves'
- Pass/fail tests where appropriate can give 'clear water' but be careful to keep proportionality otherwise all bidders might fail on something

Is 'bunching' really a problem?

- The scoring should be a direct consequence of the criteria being applied properly
- Especially in small/developed markets, bidders may just be close to each other
- Small errors in tenders or slightly better answers should make the difference
- Genuine tie breaks are unusual in practice
- A differential of 0.1% is no less defensible than a gap of 10% between bidders - if that is what the criteria generates and authority can justify
- Real challenge risk comes from trying to cover a manifest error in scoring / backfilling scores / changing outcome/ persuading evaluators to change their marks

The answer

- Good evaluation criteria need modelling, enough time, testing and input from the business
- ‘Bunching’ is only an issue if criteria don’t work / are discriminatory
- A very small margin between first and second place is fine legally as long as you can justify it
- Regulation 84 report will need to be detailed on the areas of differential and the reasons why
- Standstill letters need to be drafted with (extra) care

Your next steps?

Ask the organisation what it wants on the specific procurement:

- What does good look like?
- Draft criteria which bidders and authority both understand
- Model using a range of market feedback
- Test your evaluation criteria using dummy models before you go out
- Try innovation on lower value/risk contracts first
- Get feedback from suppliers and evaluators afterwards

Q & A

David Hansom, Partner

44 (0) 207 876 4127

david.hansom@clydeco.com

415

Partners

2000

Legal
professionals

3600+

Total staff

50+

Offices and associated
offices in 21 countries