

Other yeast extracts are available

David Gollancz

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White Paper conference

How do you describe what you are looking for with more subjective criteria, without giving the answer to suppliers? E.g.

- "functionality" or "ease of use"
- innovative method statements and programmes of work
- demonstrations and interviews

- Objective: uncoloured by feelings, opinions or personal bias; disinterested
- Subjective: not impartial, or literal; personal, individual

Transparency: *SIAC Construction Ltd v Mayo* CC C-19/00



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

Objectivity and the margin of assessment: *Lion Apparel Systems v Firebuy Ltd* [2007] EWHC 2179 (Ch)



If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a “margin of appreciation” as to the extent to which it will, or will not, comply with its obligations.

NB “appréciation”: sometimes translated as “discretion”, e.g. Antwerpse Bouwerken T-195/08, sometimes as “assessment”, e.g. Tideland Signal T-211/02.

Objectivity: *Cn v Netherlands* C-368/10 (judgment May 2012)



*The principle of transparency implies that all the **conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can **understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to **ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract*******

Subjectivity: *Easycoach v Dept for Regional Development* [2012] NIQB 10



*I consider one of the main purposes of the requirement of objectivity to be **the avoidance of unrestricted freedom of choice** by the contracting authority... Thus the court will be alert to any selection or award criteria which are formulated so as to confer **excessive discretion and subjective assessment** on the contracting authority... the additional vice of encouraging the formation and application of **subjective, intuitive judgment at the expense of clearly formulated objective standards.***

Healthcare at Home v Common Services Agency [2012] CSOH 75



- *Areas to cover in your response should include but are not limited to manufacturing facilities, clinical checks, compounding checks, communication of interventions back to prescribing centres, dispensing checks and turnaround times for changes.*
- RWIND tenderer expected to apply intelligent understanding – does not open the door to subjective assessment

Objectivity: Directive 2014/24/EU recital (90)



*Contracts should be awarded on the basis of **objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender.***



Award criteria shall—

- (a) ensure the possibility of effective competition; and
- (b) 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.

- The answer for assessment is generally *how* rather than *what*: contract notice and contract will tell EOs what the CA wants (subject matter and standards); tender will tell the CA how it will be delivered
- Generally possible to devise objective criteria to assess the extent to which the how will deliver the what

For example: “Website must be user friendly”



- What does that mean?
 - Visually clear (e.g. fonts; colours; resolution/ size of pictures)
 - Ease of navigation (e.g. menus; how many levels; back button)
 - Comprehensive (one-stop shop)
 - Language (simple; not only English)
 - Accessibility for users with disabilities

How to evaluate?



- Specifications – but requires resource, “tells them the answer”, transfers risk and may stifle innovation; or
- Assessment by opinion – but high risk of subjectivity / inequality; or
- Test – e.g. 5 users, set tasks, time and count clicks
- Score on time/clicks, possible threshold (benchmark against existing/comparator)

- Method statements and programmes should be effective and offer vfm
- True innovation generally increases risk
- If innovation itself is truly a criterion, define it, and how it is to be assessed, so that it's transparent

- “Being good at interviews/demonstrating” is an unlikely criterion (team working may be – caution required)
- Fine if they’re used to:
 - Substantiate aspects of the tender
 - Clarify facts
- Not fine if they’re used to:
 - Enable tenderer to improve tender
 - Introduce new criteria explicit or not (beware subject matter experts!)

- Criteria are rarely subjective
- Evaluation often is - but should not and need not be
- Ensure that your criteria are things you measure, evaluation is how you measure them
- Strive for objectivity

- In most procurements a rigorous disqualification, qualification and selection process, and a thoroughly-drafted contract, followed by active contract management, will minimise the scope of quality evaluation and, consequently, legal risk and assessment risk

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