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# White Paper

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David Hansom, Partner and Head of Procurement law, Clyde & Co LLP

# Evaluation

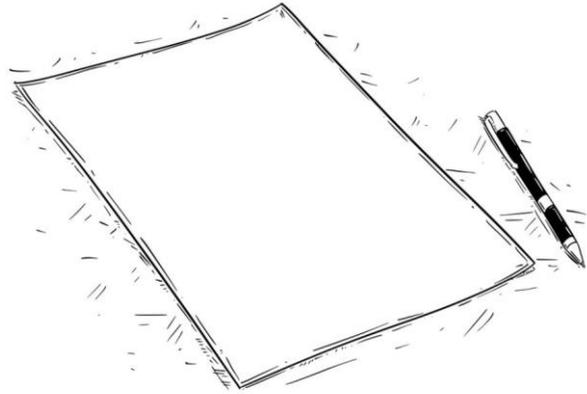
## **Bunching solutions**

What inventive approaches can you employ to effectively control and overcome challenges like bunching, marginal score differentiation, tie-breaks, and head-off confrontations with dissatisfied bidders?

# Coverage

- **The law** and a comparative assessment
- **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 principles on setting good evaluation criteria



# What does the law say?

## Public Contracts (Scotland) Regulations 2015

### Procurement Policy Manual

- **Regulation 57 (1)** : 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
  - Could be fixed price and quality only
  - Weightings or descending order of importance

# 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)(c))
- Criteria must not confer an 'unrestricted freedom of choice' on authority (regulation 67(7)(a))

# Effective competition

- Evaluation criteria cannot favour a particular brand or supplier/solution
- Link to general principles of equal treatment and non-discrimination (regulation 19(1))
- Procurement should not be designed to 'artificially narrow competition) (regulation 19(2))
- Note here interface with regulation 33 (negotiated procedure with no prior publication of an OJEU notice) where no bidders/ unacceptable tenders

# Ensuring effective competition

- Soft market testing
- Set questions in advance and stick to them
- What can the market offer?
- Take a range of views from SME through to multinationals
- Ensure you build the feedback into the criteria
- Keep audit trail for award decision notices

# What do the UK / EU 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 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
- Criteria which are not related to the subject matter of contract or artificially narrow market
- Questions where every bidder will get e.g a '3' for a pass increases the practical risk of bunching of scores
- Bidders having to exceed requirements to get top marks – how do you decide?

# 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 1<sup>st</sup> and 2<sup>nd</sup> is fine legally as long as you can justify it
- Regulation 83 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

# Thank you. Any questions?

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