

End-user specs

How do you control and overcome the risks of end-user specifications and requirements inadvertently restricting competition and breaching the rules?

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Overview (1) – key points

- PP rules are intended to facilitate competition
- Authorities have a broad discretion though when setting end-user specifications and requirements
- End-user specs can only be considered discriminatory if they cannot be objectively justified



Overview (2) – areas to cover

- Regulation 19 (Principles of procurement)
- Regulation 43 (Technical specifications)
- Case-law
- Controlling and overcoming the risks



Regulation 19 (Principles of procurement)

19.—(1) A contracting authority must, in carrying out any procurement (...)—

(a) treat economic operators equally and without discrimination; and

(b) act in a transparent and proportionate manner.

(2) A contracting authority must not design a procurement (...) with the intention of excluding it from the application of these Regulations or of artificially narrowing competition.

(3) Without prejudice to the generality thereof, competition shall be deemed to be artificially narrowed (...) where the design of the procurement (...) is made with the intention of unduly favouring or disadvantaging any particular economic operator.



Regulation 43 (Technical specifications) (1)

43.—(1) The technical specifications must—

(a) be set out in the procurement documents; and

(b) lay down the characteristics required of any works, supply or service.

- Risks around introducing specifications / requirements post-Contract Notice / ITT?
- Characteristics required = linked to the subject-matter of the contract?
- Must be formulated in terms of performance or functional requirements, by reference to (retained) EU standards “or equivalent”



Regulation 43 (Technical specifications) (2)

(9) Technical specifications must afford equal access of economic operators to the procurement procedure and must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(11) [Subject to limited exceptions], technical specifications must not, with the effect of favouring or eliminating certain undertakings or certain products, refer to—

(a) a specific make or source;

(b) a particular process which characterises the products or services provided by a specific economic operator; or

(c) trade marks, patents, types, or a specific origin or production.



Elekta v Common Services Agency [2011] CSOH 107

- NHS procurement for radiotherapy equipment on behalf of five hospitals (£21 million)
- Contract won by Varian, the only bidder
- The equipment had to be compatible with Varian's "ARIA" system, a closed system which was used by four of the five hospitals
- Elekta argued that: (i) the requirement was discriminatory as it meant only one provider was able to bid for the contract; and (ii) the requirement for a single provider was discriminatory since it imposed an unjustified obstacle to bidding to provide the fifth hospital, which was not using the ARIA system.



Elektá v The Common Services Agency [2011] CSOH 107

- Lord Glennie looked to ECJ case-law (*Case C-513/99, Concordia Bus*) and three principles (para. 14):
 - the authority must be entitled to decide what it wants, including the functional requirements;
 - the fact that the criteria can only be met by one bidder, or a limited range of bidders, does not of itself contravene the principle of equality; and
 - the inclusion of these criteria can only be considered discriminatory if they cannot be objectively justified having regard to the characteristics of the contract and the needs of the authority.



Shetland Line v Scottish Ministers

[2012] CSOH 99

- Competitive dialogue procurement by Transport Scotland for the provision of ferry services to the Northern Isles (Northlink)
- For the Aberdeen-Lerwick service there had to be at least one passenger sailing in each direction per day throughout the year
- No minimum requirement for freight-only sailings, the requirement simply being “to meet current and anticipated demand”
- SERCO had proposed a single freighter providing an off peak service on alternate days, which SL claimed was insufficient to meet current and anticipated demand
- SL argued lack of transparency and failure by TS to state its requirements such to allow for equal treatment and effective competition



Shetland Line v Scottish Ministers

[2012] CSOH 99

- Lord Malcolm considered (at para. 30) that the PCSR:
 - “*affords considerable discretion to the authority when drafting the technical specifications in the contract documents.*”
 - “*the whole purpose of the competitive dialogue procedure appears to be designed to meet the situation where it is not appropriate for the authority to be specific as to the technical means necessary to satisfy its needs or objectives*”



- Procurement of a framework agreement for street lighting for local authorities in Scotland
- Lot 5 was for ultra heavy duty aluminium columns designed to withstand a mean wind velocity of 29.5 metres per second (c.70 mph) at a maximum altitude of 250 metres
- Street Lighting argued the specification exceeded what was required under the applicable guidance for columns erected on mainland Scotland (and that authorities would actually procure non-heavy duty aluminium columns)



- Lord Doherty followed *Elekta*:
- *“It is, of course, for the contracting authority to decide what it wants. Criteria selected will only be considered to be discriminatory if they cannot be objectively justified having regard to the characteristics of the contract and the needs of the contracting authority (...). The desire to have a single specification for aluminium columns intended to meet all mainland needs would seem to provide prima facie objective justification.”* (at para. 8)
- *“This is not a case where the [authority has] (...) specified a specific brand or named product (...). Rather, they have decided that the product they want should have certain specified characteristics. That is a matter for them.”* (at para. 14)



Controlling and overcoming the risks?

1

Pre-procurement:
Specifications / requirements need to be tested against Regs 19 and 43 (objective justification); importance of pre-market engagement; care with pass/fail mandatory requirements; consider risks around incumbent advantage

2

In procurement:
Approach may depend on procedure (e.g., use of open v. CPN); care with quality questions and scoring methodologies; ensure evaluators score objectively in line with Regs 19 and 43

3

Contract award stage:
Note Reg. 85 on debriefs; authorities can possibly take some comfort from the case-law and strict time-bar rules?

Questions?

Thank you

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