

David Hansom Q&A

1. Not narrowing the competition? You mentioned if its not broken don't fix it but will this not been seen as narrowing the competition?

Narrowing the competition. The point here is that there is a prohibition (in regulation 18(2) and (3) PCR 2015) on designing the procurement with the intention of artificially narrowing competition. This is defined in 18(3) as making a process 'with the intention of unduly favouring or disadvantaging certain economic operators'.

This is really about criteria which act as a deliberate barrier to entry, for example, requiring certain brands or products to be used. But it does not prevent authorities from talking to each other about what their experiences of the market have been and what criteria worked well. The criteria should always be non-discriminatory of course, but the point really is that market testing allows you to talk to other customers and use their experience to draft your criteria.

2. Any comments on tie break situations and how to avoid?

Tie breaks. It is fairly unusual to see two genuine tie breaks where the bidders land at exactly the same price and quality score. If this is a risk, you could consider:

- a. **Using more granular marking schemes, e.g 0-20 or 0-40 ranges. This gives the authority more scope to recognise marginally better or worse responses (and so reduce the risk of a tie)**
- b. **Use weightings for key questions which have a meaningful impact on the scores. If a service delivery question had a weighting attached, or a multiplier ratio you can properly differentiate between bidders.**
- c. **We do sometimes see tie break questions (i.e those that are only scored if needed) but these tend to be on lower value or exempt services contracts. There is nothing in the law to prevent this but the difficulty always is coming up with a question that (1) isn't so important that you should be asking it anyway in the tender and (b) is important enough to decide who should win, and so to ensure ongoing equal treatment.**

3. You talk about getting feedback from the potential market when designing evaluation criteria and taking this into account. How would he advise you deal with the situation where you have conflicting feedback?

Answer: This often arises, particularly in well-developed markets where there will be a wide range of views. The authority is not duty bound to take on board any feedback from the market (be that from another authority, users or suppliers). In practice, feedback can often flush out particularly good or bad experiences, and so judgment needs to be applied. If any feedback is particularly good or bad, it is good practice to follow up with further questions to interrogate the reasons for the feedback. This should all be noted in the regulation 84 report.

4. I have joined a procurement part way through for a multi lot grounds maintenance contract. Some of the bidders are incumbents that the organisation has had real performance issues with in the past but they have never been formally performance managed. The contract manager doesn't want to re-appoint them. I can't see how we cannot. Any ideas?

Answer: this question is about exclusion for prior poor performance. This can be achieved under the Public Contracts Regulations 2015 (regulation 57 (8) (g) i.e *"where the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity, or a prior concession contract, which led to early termination of that prior contract, damages or other comparable sanctions"*;

This is a discretionary ground of exclusion i.e it occurred in the last 3 years. It need not be your own public contract, and here where you have not taken any steps to enforce the poor performance, you are right to say that you could not rely on this ground. You can check with other authorities as to any prior poor performance leading to early termination or financial sanctions. Failing that, you will need to evaluate the tender in accordance with your published criteria. It may be that this bidder scores lower than others on their quality criteria if the tender highlights their approach as being one with a lower overall quality submission.

5. In relation to bunching, there was much emphasis by both presenter and the panel on quality criterion but not much about the effect price. I have encountered a number of situation in tenders where the price has big impact on bunching despite good modelling with the evaluation criteria. How can we mitigate the effect that price may have on bunching ?

Answer: Many thanks for your question. Price bunching occurs where, in a crowded market, bidders are all offering broadly the same cost solution. A typical standard differential type price evaluation model (i.e cheapest gets 100% of available marks, and others are marked away from that price) will commonly lead to price bunching if all of the prices are similar. The trick is to use price evaluation criteria with weightings to identify which part of the price are more important, and to apply much higher weightings to these. This can often lead to greater 'clear blue water' between the bids. As I explained in my session, however, it is open to debate whether 'bunching' is really an issue at all. Provided the criteria work and can be applied to all bids in the same way, a gap of 0.1% is no less legally defensible than a gap of 10% between the winning bidder and the second place etc.