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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

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: 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.***

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



- Please detail the process that would be used for compounding and dispensing of the Herceptin. **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

- Rarely that criteria will be intrinsically subjective
- E.g. “aesthetics”: what are you looking for?
Contemporary or period? Materials? Layout etc.
- Not that difficult
- More commonly, subjectivity comes in at evaluation

“Functionality” or “ease of use”



- How will they be measured? If you don't know, you're in trouble. If you do know, tell the tenderers:
 - “Functionality/Ease of use *as measured by...*” (published standards? Practical tests?)
- Contractualise

Innovative method statements and programmes of work



- Why should innovation per se be rewarded? If I offered to paint your room by heating sealed paint pots till they explode, it would be innovative but I don't think you would like it.
- Method statements and programmes should be effective and offer vfm. If that's achieved by innovative methods, fine.
- If innovation is truly a criterion, you will have to 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 (user-friendliness of a website, effectiveness of a mechanical solution)
 - Provide opportunity to clarify facts
- Not fine if they’re used to:
 - Enable tenderer to improve tender
 - Introduce new criteria (beware subject matter experts!)

- Criteria are rarely subjective
- Evaluation often is
- Ensure that your criteria are things you measure, evaluation is how you measure them

- In most procurements – not all – a rigorous disqualification, qualification and selection process, and a thoroughly-drafted contract, followed by active contract management, will minimise the need for quality evaluation and, therefore, risk.
- Why not tell the tenderers what you are looking for? That way, you've got a better chance of getting it.

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