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The question

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

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

Objectivity

- Equality, non-discrimination and transparency requires that the award criteria are objective...
- ...ensuring that tenders are compared and assessed objectively
- “Exact scope” and “exact significance” of criteria

C-368/10 *Commission v Netherlands*

Purpose of objectivity

- “The essence of the principle of objectivity is somewhat elusive”
- One of the main purposes is the avoidance of “unrestricted freedom of choice”
- Court alert to criteria formulated to confer excessive discretion – intuition and instinctive

2012 NIQB10 *Easycoach v Dept for Regional Development*

What criteria might give excessive discretion?

- Criteria may comprise or include: “quality, including:
 - technical merit,
 - **aesthetic** and functional **characteristics**,
 - accessibility design for all users,
 - social, environmental and innovative characteristics and trading and its conditions;

Regulation 67(4) PCR 2015

Categorising permitted criteria

More Objective		More Subjective
Functionality	Technical merit	Aesthetics
Accessibility	Environmental	Design for all users
Social	Staff organisation	Innovation
Staff qualification	Staff experience	Trading conditions
After-sales service		
Delivery		

The RWINDT – pre Netherlands

- 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

C-19/00 *SIA Construction Ltd v Mayo CC*

The RWINDT – post Netherlands

- Important to understand comments in Netherlands judgement in their context
- It is OK to evaluate open ended questions. “....should include but are not limited to...”
- Realism as to what is practicable in complex procurements

Healthcare at Home v CSA

The balance

- RWINDT interpret them in the same way

VS

- not giving the answer to bidders

Functionality

- Need to specify core functional requirements
- Finding the balance
 - functionality for who
 - points for additional functionality
 - allow alternative functionality?
 - functionality must have benefit
 - negative guidance – no points for....

Ease of Use

- The same as accessibility?
- Finding the balance
 - different user groups
 - how measured – time / training requirements etc.
 - whole life costing

Innovative methods and programmes

- Don't specify intermediate steps
- Leave the methodology to the market
- Evaluate the benefits of the method statement or the programme, not the innovation
- The benefits may be whole life cost, quality, social, environmental etc.

Demonstrations

- Use as the means of evidence to support evaluation of other criteria
- Criteria and specifications must “allow the information provided by the tenderers to be effectively verified”

Regulation 67(7) PCR 2015

Interviews

- “It is important to remember that it is the quality of the tender and the tenderer’s proposed team that should be assessed, not the presentation itself. Marks should not be awarded for the effectiveness of the presentation.”
- Tenderers must not be penalised because of their delivery of the presentation. The NAO is interested in how well they will deliver its requirement, not how well they can conduct a presentation (unless the importance of conducting presentations or interviews forms part of the requirement and so is included in the specification).

Risk mitigation

- Time limit starts with publication
- OJEU notice
- ITT
- Consultation draft ITT?



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