

# REFINING THE CRITERIA

## HOW MUCH CAN YOU “REFINE” THE AWARD CRITERIA DURING THE COMPETITIVE FLEXIBLE PROCEDURE AND WHEN – WHILE STILL BEING COMPLIANT AND AVOIDING CHALLENGES

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# REMINDER OF PCR CASE LAW

- Fraser J in *Energysolutions*:

*“255 The principles of equal treatment, non-discrimination and transparency require a contracting authority that has adopted a decision-making procedure for assessing bids to comply with it once it has begun to do so. A different way of expressing the same principle is to state that a contracting authority that has set rules for that procedure must follow them, applying those rules in the same way to the different bidders. Changing the decision-making procedure during the process of assessment risks arbitrariness and favouritism, a risk that it is the purpose of such requirements to avoid. In C-226/09 Commission v Ireland ...the weighting was altered after tenders had been submitted and after an initial review of those tenders had been performed. This was held to be conduct that was not consistent with the principle of equal treatment and the obligation of transparency.”*

- Stuart-Smith J in *Stagecoach East Midlands Trains*:

*“36 ...it will seldom, if ever, be permissible for a contracting authority to vary the criteria that it has laid down or to permit non-compliance with them. Transparency and equal treatment require rigour in maintaining and enforcing the framework against which bidders have been asked to tender*

- We will see that PA 23 allows change, consistent with Arrowsmith view that change is permitted where not material and sufficient time given, given the practical reasons why change may be practically desirable
- Fundamentally is this always compatible with the (enduring) principles of equal treatment and transparency?
- Still best if possible to establish criteria, sub-criteria and weightings at outset and stick with them

# REMINDER OF KEY PA 23 PROVISIONS (1)

- Arguably, significant change vs PCR (cp Reg 29(14), at least as regards negotiated procedures: “*the award criteria shall not be subject to negotiation*”); but
- Is this more dangerous under PA 23 given fluidity of procedure? (eg dialogue, pilots, initial tender rounds)
- **s 24** permits “*refining*” of “*an*” Award Criterion; no definition of refinement in PA:
  - only one change? (presumably not, Guidance uses plural, and knock-on issue)
  - can I refine more than once? (Guidance refers to “*refin[ing] as the procedure progresses*”)
- Also relevant are:
  - **s 23** (Award Criteria):
    - requires that AC not disproportionate; relate to contract subject matter; are clear, measurable and specific
    - those obligations and (one assumes) the Principles and Objectives in Part 2 are paramount, so can’t (for example) refine so as to result in a disproportionate or discriminatory outcome
  - **s 22** (Conditions of Participation): test supplier not tender, but overlap between Cs of P and AC?
    - important because can refine latter but not former
    - consider overlaps:
      - AC can in some cases include qualifications and ability; Cs of P can include technical ability (recall that PCR is ‘either/or’)
      - can have pass/fail AC (see s 23(3)(a)), so akin to Cs of P

# REMINDER OF KEY PA 23 PROVISIONS (2)

- Also, procedural requirements (s 19(3)(d))

Implications?

- **s 31** (Modifying a s 19 procurement):
  - overlap with ss 22, 24 as “*terms of a covered procurement*” expressly include C of P and AC: surprising!
  - several time-related limits (NB different to s 24):
    - tender submission deadline where either no invitation to submit requests to participate or before deadline for request to participate; or
    - deadline for submitting a tender for assessment where modification is “*not substantial*”, with substantiality measured by reference to whether it would permit someone who isn’t a participating supplier to participate or vice versa
- So:
  - I can make a modification even if it would significantly disadvantage a bidder, if non-discriminatory; but
  - is such a change subject to the limits in s 24? Nothing suggests that it is
- Time limits reference “*tender[s] for assessment under s19*” which seems to distinguish such a stage from another stage which may however entail downselection

# WHAT IS THE SCOPE OF “REFINING”? (1)

- **Timing** and **Scope** aspects plus **notice requirements**:
  - **Timing**: only before inviting submission of tenders “*to be assessed under section 19*” so very limited.
  - seeming oddities:
    - refinement prohibited if (had refinement happened earlier) it would “*have allowed one or more suppliers that did not progress beyond an earlier round or selection process to have done so*”: this seems to contemplate AC-based previous rounds, but
    - s 20(5) and (6) contemplate exclusion “*by reference to an intermediate assessment of tenders*” which in turn refers (twice) to assessment by reference to AC “*at the point of exclusion/assessment*” (seemingly contemplating refinement) but doesn’t fit with timing requirements of s 24; language seems to contemplate failing by reference to AC at earlier stage
    - it may be that PA is seeking to draw distinction between final assessment of tenders and earlier rounds, but is this consistent with case law on transparency and equal treatment?
- Implications for process design (- see para 75 of Competitive Tendering Guidance).
- How will I test this for suppliers who have dropped out before submission of tenders?

# WHAT IS THE SCOPE OF “REFINING”? (2)

- **Timing** and **Scope** aspects plus **notice requirements**:

- **Scope**:

- CFP only
- “refining” suggests no removal or addition of novel criteria, and Guidance confirms this
- can “*refine the indication of the relative importance*“ of criteria, ie weightings, but:
  - odd language: “*in consequence of refining*” rather than “by way of”
  - (say) 30% down to 1% likely offside; can I switch from ‘relative importance’ to weightings?
- can add sub-criteria

- **Notice** - two elements:

- tender documentation needs to provide for “*the refinement of the criterion*” so always leave this option open (for all criteria)!
- must modify and republish affected tender documents (not just an e-mail, even if only minor change): what a pain!

# WHAT DOES THE GUIDANCE SAY?

- Contemplates consequential amendments to assessment methodology
- “*Useful when there is a multi-stage procedure where all of the detail is not known at the first stage*”: then isn’t starting a process precipitate?
- Refer to only refining “*before inviting final tenders*” but that’s not what PA says
- Examples of “likely” permitted refinements:
  - adding sub-criteria to those set out in the tender notice/associated tender documents as long as they directly relate to the relevant existing main criteria; cp ATI EAC: this seems more liberal
  - adding more detail to existing main criteria;
  - adding more detail to existing sub-criteria;
  - changing weightings within a pre-existing range set out in the tender documents, “*e.g. if an award criterion relating to transition arrangements was set out at 10%-30%, a contracting authority could start with a 30% weighting and end with a 10% weighting for the final assessment*”: but does s 24 notification require a range, and what is the idea of starting with one % and ending with another?
- Examples of “likely” impermissible refinements:
  - adding new main criteria;
  - adding new sub-criteria not associated with the main criteria (-are these sub-criteria then?)
  - adding or removing pass/fail tests;
  - reversing the answer to pass/fail tests expressed in the tender notice/associated tender documents (i.e. changing what initially constituted a ‘fail’ to a ‘pass’)
- Narrow range of situations in which output is innovative but we can set a range on AC or know main criteria but not sub-criteria? Better to utilise EME?

# FURTHER THOUGHTS AND PRACTICAL STEPS

- What is the nature of these permissive rights? We may refine under s 24 in the circumstances already considered, but are other refinements prohibited?
  - PA doesn't say so
  - it does explicitly prohibit other changes in some areas: see eg s74(9)
- Implications for historic practice of altering intra-process?
- Insofar as one of the perceived risks historically has been that criteria will be modified to disadvantage or advantage particular bidders, the PA 23 provisions would seem to enable this; s24(3) clearly contemplates prior drop-outs
- Practical Steps:
  - always provide in tender documents for right to refine
  - consider whether something should be a C of P or an AC (or have some overlap)
  - encouragement for a series of rounds with only later rounds involving application of ACs: process design implications
- If refining, clear audit trail vital
- Remember to republish tender documents
- Practical reality is that challenge is unlikely intra-process unless a tenderer is convinced that the refinement will be fatal to its chances

# SUMMARY

- New flexibility: refinement is possible but limited in terms of scope and timing, and there are notice requirements
- Can only refine, not add or subtract
- Historic practice of amending ‘as we go along’ now even more likely to be viewed as offside, unless
  - s 20(5) and (6) rules?
- Implications for process design: new thinking desirable under PA 23
- Consider how best to use differences between AC, Cs of P and Procedural Requirements

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