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Non-tangible criteria: How do you incorporate softer, non-tangible criteria into tenders, such as social inclusion, biodiversity and accessibility and evaluate them? Can you include pass/fail

Terminology - Non-tangible criteria / *wider considerations*

- Social and environmental considerations (PRSA14, and PCSR15)
- Climate Change, Fair Work First, Community Benefits
 - Biodiversity (3.3 Statutory Guidance for PRSA14)
 - Social inclusion / diversity (FWF Non-statutory guidance)
 - Accessibility (7.8.1 Statutory Guidance for PRSA14)

Exploration / high level take aways

- The architecture of the procurement rules is generally helpful:
 - focused on '*how you buy not what you buy*'
 - Bidders generally to raise issues within 30 days from date of knowledge
- The architecture (PRSA14) is specifically shaped to accommodate wider considerations
- Other sector specific legislation introduces relevant positive obligations and areas of constraint
- A number of options for incorporating wider considerations through procurement:
 - Selection (including exclusion grounds)
 - Requirement/Specification
 - Contract
 - Award Criteria

Exploration / high level take aways

- Use of options to incorporate wider considerations (indeed any requirement) must pass the filter of:
 - Relevant specific procurement law provisions
 - Equal Treatment
 - Transparency
 - Fairness
 - Non-discrimination
 - Proportionality
- We will explore within 'award' the potential for and risk with:
 - Scored
 - Scored with minimum (pass/fail)
 - Pass fail / gateway

Relevant “Procurement Architecture” refresh

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Concordia Buses Case (C-513/99)

*"in the context of a public contract for the provision of urban bus transport services, the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, it **may take into consideration ecological criteria such as the level of nitrogen oxide emissions or the noise level of the buses, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination**"* (para 69)

Dutch Coffee Case C-368/10

“..contracting authorities are also authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons” (para 85).

*“the determination of these criteria depends on the object of the contract since they **must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications,** and the value for money of each tender to be measured”* (para 86)

Dutch Coffee Case C-368/10

“there is no requirement that an award criterion relates to an intrinsic characteristic of a product...legislation on public procurement does not preclude, in the context of a contract for the supply of electricity, a contracting authority from applying an award criterion requiring that the electricity supplied be produced from renewable energy sources. There is therefore nothing, in principle, to preclude such a criterion from referring to the fact that the product concerned was of fair trade origin”

(para 91)

Dutch Coffee Case C-368/10

*“compliance with the principles of equality, non-discrimination and transparency requires that the award criteria are objective, ensuring that tenders are compared and assessed objectively and thus in conditions of effective competition. That would not be the case for criteria having the effect of conferring on the contracting authority an unrestricted freedom of choice.....the same principles require the contracting authority to ensure...the principle of the equal treatment of potential tenderers and the principle of transparency of the award criteria, **the formulation of the award criteria being such as to allow all reasonably well-informed tenderers exercising ordinary care to know the exact scope thereof and thus to interpret them in the same way**” (paras 87 and 88)*

Dutch Coffee Case C-368/10 (Specification / Award)

*“..the requirements relating to compliance with the ‘criteria of sustainability of purchases and socially responsible business’ and...to ‘contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production’ are **not so clear, precise and unequivocal as to enable all reasonably informed tenderers exercising ordinary care to be completely sure what the criteria governing those requirements are...***

*..The same applies, and all the more so, in relation to the **requirement addressed to tenderers that they state in their tender ‘in what way [they] fulfil’ those criteria or ‘in what way [they] contribute’ to the goals sought by the contracting authority with regard to the contract and to coffee production, without precisely indicating to them what information they must provide.**” (Dutch Coffee Case, para 110)*

Dutch Coffee Case C-368/10 (Selection)

*“by requiring, on the basis of suitability requirements and minimum capacity levels stated in the specifications, that tenderers comply with the criteria of sustainable purchasing and socially responsible business and state how they comply with those criteria and contribute to improving the sustainability of the coffee market and to environmentally, socially and economically responsible coffee production, **the province of North Holland established a minimum level of technical ability not authorised** by Articles 44(2) and 48 of Directive 2004/18. [Reg 59]” (para 108)*

Public Contracts (Scotland) Regulations 2015

19. (1) A contracting authority must...

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

(b) act in a **transparent and proportionate** manner...

(3) ...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**.

(4) A contracting authority **must include**...such **conditions relating to the performance of the contract or framework** as meet the requirements mentioned in paragraph (5) and are **reasonably necessary to ensure that the economic operator complies with environmental, social and employment law**, including any relevant collective agreements or international law measures referred to in Annex X of the Directive as amended from time to time.

(5) The requirements...are—

(a) **linked to the subject matter of the contract or framework** within the meaning of regulation 70 (conditions for performance of contracts); and

(b) **indicated in the call for competition or in the procurement documents**.

Contract Award Criteria: Reg 67 PC(S)R15

...

(4) Criteria,,may comprise....(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, **social, environmental** and innovative characteristics and trading and its conditions;

...

(6) Award criteria must be.. **linked to the subject-matter of the contract...** in any respect and at any stage of their life cycle, including factors involved in—

(a) the specific process of production, provision or trading of those works, supplies or services; or

(b) a specific process for another stage of their life cycle,
even where such factors do not form part of their material substance.

(7) Award criteria **must—**

(a) **not have the effect of conferring an unrestricted freedom of choice upon the contracting authority;**

(b) **ensure the possibility of effective competition;** and

(c) **be accompanied by specifications that allow the information provided by the tenderers to be effectively verified** in order to assess how well the tenders meet the award criteria.

Conditions for performance of contracts – Reg 70 PC(S)R15

70. (1) A contracting authority may lay down special conditions relating to the performance of a contract, provided that they are—

(a) linked to the subject-matter of the contract within the meaning of regulation 67(6) (contract award criteria); and

(b) indicated in the call for competition or in the procurement documents.

(2) Such **conditions may include economic, innovation-related, environmental, social or employment-related considerations.**

Procurement Reform (Scotland) Act 2014

9 Sustainable procurement duty

(1) ...the sustainable procurement duty is the duty of a contracting authority..to consider how...it can—

(i) improve the economic, **social, and environmental wellbeing of the authority's area,**

(ii) facilitate the involvement of small and medium enterprises, third sector bodies and supported businesses in the process, and

(iii) promote innovation, and

(b) in carrying out the procurement, to act with a view to securing such improvements identified as a result of paragraph (a)(i).

...

(2) The contracting authority must consider under subsection (1) **only matters that are relevant to what is proposed to be procured** and, in doing so, **consider the extent to which it is proportionate in all the circumstances to take those matters into account.**

...

(4) In this section, **references to the wellbeing of the authority's area include, in particular, reducing inequality in the area.**

PR(S)A14 – Procurement Strategies – s15

15 Procurement strategy

(5) The procurement strategy must, in particular—

(a) set out how the authority intends to ensure that its regulated procurements will—

(i) **contribute to the carrying out of its functions and the achievement of its purposes**,

(ii) deliver value for money, and

(b) **include a statement of the authority's general policy on—**

(i) **the use of community benefit requirements**,

(ii) consulting and engaging with those affected by its procurements,

(iii) **the payment of a living wage to persons involved in producing, providing or constructing the subject matter of regulated procurements**,

(iv) promoting compliance by contractors and sub-contractors with the Health and Safety at Work etc. Act 1974 (c.37) and any provision made under that Act, and

(v) **the procurement of fairly and ethically traded goods and services**,

(c) include a statement of the authority's general policy on how it intends its approach to regulated procurements involving the provision of food to—

(i) **improve the health, wellbeing and education of communities in the authority's area**, and

(ii) **promote the highest standards of animal welfare**

Useful sources relevant to practical considerations

- PRSA14 Statutory Guidance
- Non-statutory guidance and toolkits, in particular
 - Fair Work First Guidance and Toolkit – new guidance March 2024
 - Sustainable Procurement Toolkit and SPPN/2/2022
- UK government, Crown Commercial Services and European Union publications

Wider obligations / constraints

- *Obligation: Climate Change* (Duties of Public Bodies: Reporting (Scotland)) Order 2015 - obligation to report annually on how procurement activity contributes to compliance with climate change duties
- *Obligation:*
 - The Equalities Act 2010
 - The Equalities Act 2010 (Specific Duties) (Scotland) Regulations 2012
 - Regulation 9 – Duty to consider award criteria and conditions in relation to public procurement
 - The Equalities Act 2010 (Gender Pay Gap Regulations) (Scotland) 2017
 - Equalities and Human Rights Commission: Procurement and the Public Sector Equality Duty: A Guide for Scottish Public Bodies (2022)
- *Constraint:* Section 17(5) of the Local Government Act 1988

Selection



- Make Use of Regulation 58.
- Consider possibility of building-in 'wider considerations' as part of technical experience.



- Base a decision to exclude on something other than technical ability (i.e. care in minimum scored technical experience questions).
- Care around proportionality / relevance to contract IF building in wider considerations as part of technical experience.

Specification



- Be clear what the specific requirements are.
- Ensure requirements are relevant and proportionate for the contract.
- Connect requirements to your Procurement Strategy.
- Remember to use contract conditions / connect to contract.



- Be vague.
- Use discriminatory / unrelated / irrelevant requirements.

Award - Scored



- Ensure scored question links to clear specification.
- Ensure bidder's responses relate to the specification and delivery of the contract.
- Score by applying clear scoring methodology.



- Be vague.
- Score non-contract / performance specific / general assertions.
- Be vague in scoring methodology or fail to apply scoring methodology

Pass Fail / Scoring with Minimums



- Ensure that it is very clear that a fail will result in exclusion.
- Ensure that the scoring methodology permits the RWIND tenderer to understand what is needed to pass.



- Inadvertently create a non-transparent, discriminatory, or disproportionate requirement.
- Leave room for transparency arguments.

MLS (Overseas) Ltd v Secretary of State for Defence [2017] EWHC 3389 (TCC)

Capita Business Services Ltd v Common Services Agency for the Scottish Health Service [2023] CSOH 9

QUESTIONS?

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