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# White Paper Procurement Conferences

Awarding Public Contracts Skilfully and  
Lawfully within the Procurement Rules

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# Capability

“How do you assess competence and capability without favouring known suppliers with experience of the contract type?”

*Can bidders with sketchy experience refer to projects they carried out for other companies?*

# Known?

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# Sketchy?

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# What are you waiting for?

- The EU is already there (Directive 2014/24/EU)
    - Public procurement should be adapted to the needs of SMEs
    - Simplification of selection procedures
    - Division of contracts into lots (UK opted not to include a mandatory requirement, but still a notification requirement)
    - Self-declaration
    - No more “overly demanding” requirements concerning economic and financial capacity
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# Application

- General principles, especially proportionality
- Specific selection rules
- PPN 8/16 including CCS Selection Questionnaire
- Award criteria?
- Frameworks and Dynamic Purchasing Systems
- Light Touch regime
- Below Threshold Procurements
- Lots

# Principles

- Treaty principles generally
- Regulation 18(1) - treat economic operators equally and without discrimination and act in a transparent and proportionate manner
- Regulation 18(2) - design of the procurement shall not be made with the intention of artificially narrowing competition
  - i.e. unduly favouring or disadvantaging certain economic operators
- Proportionality is the key in this case

# Selection

- Regulation 58(1) - selection criteria may relate to:
  - suitability to pursue a professional activity
  - economic and financial standing
  - technical and professional ability
- Regulation 58(3) - limit requirements to those that are appropriate to performance of the contract
- Regulation 58(4) - all requirements shall be related and proportionate to the subject matter of the contract
- Contracting Authorities may impose requirements relating to:
  - possession of human and technical resources (58(15))
  - sufficient level of experience, demonstrated by suitable references from contracts performed in the past (58(16))
- Professional ability may be evaluated with regard to skills, efficiency, experience and reliability (not for supplies)
- Means of proof - see Regulation 60(9)
- Use of SQ and ESPD

# Experience - Means of Proof

- Proof *may* be provided by *one or more* of the following means (including)
  - (a) list of works carried out over [5 years] or services and supplies over [3 years] (no restriction to public contracts - see ***Commission v Italy (C-362/90)*** - projects for other companies are as relevant as public contracts);
  - (f) qualifications of staff (if not used in award)
  - (j) proportion to be sub-contracted
- Ensure equal treatment despite apparent discretion to look beyond experience
- Proportionality cuts both ways

# A Problem with Procedures

- How do you apply the criteria?
  - Open *versus* 2-stage
  - In Open Procedures selection relies only on passing minimum levels - no comparative exercise
  - Self-certification
  - In Open Procedures, verification of minimum levels to take place *before* award of contract
  - In 2-stage, evaluation of SQ is made in order to shortlist
  - Any such evaluation must be in accordance with the criteria, weighting and scoring set out in the SQ documentation
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# 2-Stage Procedures

- General principles apply
- Disclosure in OJEU and/or invitation to confirm interest.
- Transparency over criteria and methodology apply just as much as with tender evaluation criteria - the RWIND tenderer should be able to understand what is required
- Difficult to see how the less experienced tenderer can prevail in a fair and objective assessment which is weighted towards experience

# Dealing with Experience

- Does experience need to be the key determining criterion?
- Are we able to look behind reference projects and evaluate their worth?
- SQ Part 3 includes only experience and intention to sub-contract - everything else is for the contracting authority to determine (and justify)
- Deviation from the SQ has to be reported and justified
- Directive and Regulations give a discretion
- Application of general principles

# An Alternative? - Dealing with Experience in the Tender

- Once upon a time completely off-limits
- Organisation, qualification and experience of staff may be used as evaluation criteria
- Cannot use these criteria in selection stage if they are to be used as award criteria
- Enables contracting authority to ‘neutralise’ organisational experience in selection but still assess the applied experience of a candidate (but subject to equal treatment and proportionality principles)

# Frameworks

- Procurement of a framework subject to same Part 2 PCR procedural rules
- But call-off contracts are not
- Apply appropriate minimum levels to a multiple operator framework procured under open procedures
- Need for clarity as to how the framework will be operated
- A framework acts as a safety net against concerns that might apply on a single contract award to less known suppliers with “sketchy experience”

# Dynamic Purchasing Systems

- Similar advantages apply as with frameworks
- Although the DPS must follow a restricted procedure, all applicants satisfying selection criteria must be admitted (no comparative exercise)
- Contracting Authorities may require a renewed ESPD at any time

# Below Threshold Procurements

- Regulation 111 - a contracts authority shall not include a pre-qualification stage.
- May ask “suitability assessment questions” (provided relevant to the subject matter and proportionate)
- Questions may relate to: suitability, capability, legal status or financial standing
- Standard questions from SQ and exclusion questions may be used as a guide
- One stage procurement only allowed - no comparative analysis to be carried out
- Minimum levels should not be set too high

# Light Touch Regime

- Public contracts for social and other specific contracts
  - Principles of transparency and equal treatment are overriding
  - Part 2 PCRs does not apply, but contracting authority may choose to apply corresponding procedures
  - Relevant considerations to award decision:
    - quality, continuity, accessibility, affordability, availability and comprehensiveness of the services
    - specific needs of uses
    - involvement and empowerment of users
    - innovation
  - No requirement to feature experience in the decision to award (or even short-listing if that is included)
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# Division into Lots

- Discretion for the contracting authority over the size of and subject matter of Lots
- Requirement to provide justification for not dividing into Lots
- Ability to limit the number of Lots any one tenderer may bid for
- Ability to limit the number of Lots any one tenderer may be awarded
- Sensible sizing of Lots and limitations upon bidding and award levels the playing field of SMEs
- See also Small Lots exemption (£65,630 - supplies and services; £820,370 - works; up to 20% total value) - in effect creates a reserve of work for SMEs

# Conclusions

- Open procedures - set minimum levels which are relevant and proportionate
  - 2-stage procedures - consider focusing scoring on issues other than institutional experience but ensure equal treatment and proportionality
  - Make use of lots and small lots exemption
  - Where appropriate use Frameworks and DPS flexibly
  - Take an active interest in the supply chain
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# Thank you

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