

CLYDE&CO

White Paper

Belfast 19 October 2023

David Hansom, Partner and Head of Procurement law, Clyde & Co LLP

Evaluation

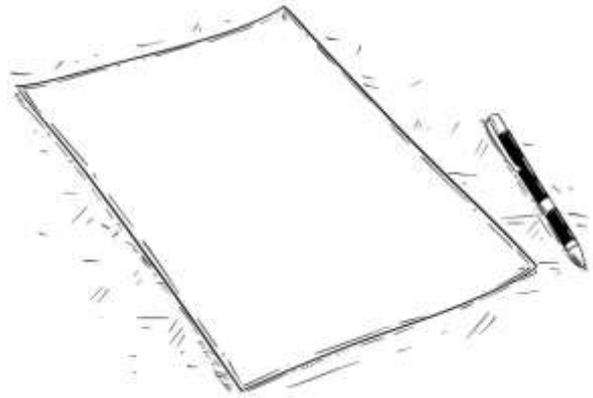
Bunching solutions

What inventive approaches can you employ to effectively control and overcome challenges like bunching, marginal score differentiation, tie-breaks, and head-off confrontations with dissatisfied bidders?

Coverage

- **The law**
- **Some practical problems and their solutions:** establishing value for money; do marginal differences in scores really matter; market modelling; increased risk of procurement challenges in a recession
- **Practical strategies** to design models which work for your tenders

Key principles on setting good evaluation criteria



What does the law say?

Public Contracts Regulations 2015

NI Procurement Policy

- **Regulation 56 (1)** : Contracts shall be awarded on the basis of criteria laid down in accordance with regs 67 - 69
- **Regulations 67-69** say:
 - Award based on most economically advantageous tender
 - Must be set out in advance
 - Must be linked to subject matter of the contract
 - Must include price evaluation and, as a minimum, some pass/fail quality questions
 - Could be fixed price and quality only?
 - Weightings or descending order of importance

What does the law say?

- **Evaluation criteria must:**
 - (a) ensure the possibility of effective competition; and
 - (b) be accompanied by specifications
- Specifications must allow the information provided by bidders to be 'effectively verified' in order to assess how well the tenders meet criteria (regulation 67(7)(b))
- Criteria must not confer an 'unrestricted freedom of choice' on authority (regulation 67(6))

Effective competition

- Evaluation criteria cannot favour a particular brand or supplier/solution – describe features
- Link to general principles of equal treatment and non-discrimination (regulation 18(1))
- Procurement should not be designed to ‘artificially narrow competition’ (regulation 18(2))
- Note here interface with regulation 32 (negotiated procedure with no prior publication of an FTS notice) where no bidders/ unacceptable tenders

Ensuring effective competition /VFM

- What does good look like?
- Can we afford 'good'?
- Can the market deliver it?
- Use pre-market feedback to help draft criteria, thresholds and weightings
- Keep audit trail for award decision notices / reg 84 report

What do the UK / EU cases say?

Lots of cases on evaluation

- **That a bidder might fare better than a rival** under a particular model does not necessarily mean that the model breaches equal treatment (*Abbvie Ltd v NHS Commissioning Board* [2019] EWHC 61 (TCC))
- Equal treatment principle does not place any obligation upon the contracting authority to neutralise **all** advantages enjoyed by an incumbent tenderer. (*Amplexor Luxembourg Sarl v European Commission* (Case T-211/17))
- **Can use gateways** in evaluation i.e law does not prohibit authorities from using award criteria which provide for the phased evaluation of bids (*Montte SL v Musikene* (Case C-546/16) - AG opinion)
- Authorities have a margin of appreciation in manifest error claims **but not on equal treatment** (*Woods Building Services v Milton Keynes Council* (2015))

What to avoid

- Awards not to the MEAT bidder
- Baskets of example services or works which don't represent the actual contract
- Models which allow for lots of discretion in applying criteria
- Models where it is impossible to score well/highly, for no reason
 - Questions where every bidder will get e.g a '3' for a pass increases the practical risk of bunching of scores
 - Bidders having to exceed requirements to get top marks – how do you decide?
 - Transparency risk
- Models which unreasonably favour the incumbent
- Criteria which are not related to the subject matter of contract or artificially narrow market

Practical strategies

- Don't use the same 0-5 marking scheme for all questions and tailor to question/ importance
- Weightings are our friend for clear blue water between bidders. Risk ratios?
- Sub – criteria can be weighted to draw out innovation or service 'must haves'
- Pass/fail tests where appropriate can give clear water but:
 - Be careful to keep proportionality otherwise all bidders might fail on something
 - **Always** need to clear what bidders need to provide
- Social value 10% weighting here could help to really differentiate

Is 'bunching' really a problem?

- The scoring should be a direct consequence of the criteria being applied properly
- Especially in small/developed markets, bidders may just be close to each other
- Small errors in tenders or slightly better answers **should** make the difference
- Genuine tie breaks are unusual in practice
 - Model it first
 - Tie break question?
 - Re-evaluate (but don't rewrite history)
 - Split contracts?
 - A differential of 0.1% is no less defensible than a gap of 10% –but will be more scrutiny on evaluation and authority needs to take extra care

The answer

- Good evaluation criteria need modelling, enough time, testing and input from the business
- Real challenge risk comes from trying to cover a manifest error in scoring / backfilling scores / changing outcome/ persuading evaluators to change their marks
- 'Bunching' is only an issue if criteria don't work / are discriminatory
- A very small margin between 1st and 2nd is fine legally - as long as you can justify it
- Regulation 84 report will need to be detailed on the areas of differential and the reasons
- Standstill letters always need to be drafted with (extra) care.
- If there is no reason, no need to hide!

Thank you. Any questions?

Clyde & Co LLP accepts no responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this summary. No part of this summary may be used, reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, reading or otherwise without the prior permission of Clyde & Co LLP.
© Clyde & Co LLP 2023

www.clydeco.com/publicprocurement

Clyde & CoLLP

www.clydeco.com