

# PRIOR PERFORMANCE

Charles Livingstone, Partner

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ENLIGHTENED THINKING

## THE QUESTION

How do you deal with and curtail bidders who have scored well on tender submissions but performed poorly on other contracts, without making this known?

## THE QUESTION

Can you deal with and curtail bidders who have scored well on tender submissions but performed poorly on other contracts, without making this known?

- Any headline which ends in a question mark can be answered by the word “no”
  - “If the headline asks a question, try answering 'no'. Is This the True Face of Britain's Young? (Sensible reader: No.) Have We Found the Cure for AIDS? (No; or you wouldn't have put the question mark in.) Does This Map Provide the Key for Peace? (Probably not.) A headline with a question mark at the end means, in the vast majority of cases, that the story is tendentious or over-sold.”
    - Andrew Marr, *My Trade*, 2004

# THE ANSWER(S)

Can you deal with and curtail bidders who have scored well on tender submissions but performed poorly on other contracts, without making this known?

- The short answer:
  - No

### **19.— Principles of procurement**

(1) A contracting authority must, in carrying out any procurement or design contest which is subject to the application of these Regulations—

- (a) treat economic operators equally and without discrimination; and
- (b) act in a transparent and proportionate manner.

# THE ANSWER(S)

Can you deal with and curtail bidders who have scored well on tender submissions but performed poorly on other contracts, without making this known?

- The short answer:
  - No
- The technically correct answer:
  - Not lawfully
- The Machiavellian answer:
  - Only if you don't get caught
- The slightly more useful answer:
  - Not if you wait until submissions are in



## 19.— Principles of procurement

(1) A contracting authority must, in carrying out any procurement or design contest which is subject to the application of these Regulations—

- (a) treat economic operators equally and without discrimination; and
- (b) act in a transparent and proportionate manner.

(2) A contracting authority must not design a procurement or design contest with the intention of [...] artificially narrowing competition.

(3) Without prejudice to the generality thereof, competition shall be deemed to be artificially narrowed for the purpose of paragraph (2) where the design of the procurement or design contest is made with the intention of unduly favouring or disadvantaging any particular economic operator.

# SO WHAT CAN YOU DO?

## Exclusion grounds – PCSRs Reg.58

(8) A contracting authority may exclude an economic operator from participation in a procurement procedure where—

[...]

(c) the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;

[...]

(g) the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract, a prior contract with a contracting entity or a prior concession contract which led to early termination of that prior contract, damages or other comparable sanctions;

(12) In the cases referred to in paragraph (3)(b) or (8), [...] the period during which the economic operator may be excluded is 3 years from the date of the relevant event.

# SO WHAT CAN YOU DO?

## Exclusion grounds

- Self-cleansing
- Primarily a contract management issue – past and future
- Any contract with any public authority or utility
  - But must lead to termination, damages or “other comparable sanctions”
  - Share information between authorities?
- Procurement Act 2023
  - Debarment list
  - Contract termination notices – stating the contract has terminated and the reasons, including details of any breach or failure to perform (if applicable)
  - Discretionary exclusions if conducting a PA23 procurement:
    - 5-year window
    - Breach resulting in termination, damages or a settlement agreement
    - Not performed to the contracting authority’s satisfaction, and failed to rectify

# SO WHAT CAN YOU DO?

## Technical standards – PCSRs Reg.43

- (1) The technical specifications must—
  - (a) be set out in the procurement documents; and
  - (b) lay down the characteristics required of any works, supply or service.
  
- (4) In the case of a public supply or public service contract, the required characteristics may include—
  - (a) quality levels [...]
  
- (5) In the case of any public contract, the required characteristics may also refer to—
  - (a) the specific process or method of production or provision of the requested works, supplies or services; [...]

[...] provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

# SO WHAT CAN YOU DO?

## Technical standards – PCSRs Reg.43

(9) Technical specifications must afford equal access of economic operators to the procurement procedure and must not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

(11) Subject to paragraph (12), technical specifications must not, with the effect of favouring or eliminating certain undertakings or certain products, refer to—

- (a) a specific make or source;
- (b) a particular process which characterises the products or services provided by a specific economic operator; or
- (c) trade marks, patents, types, or a specific origin or production.

(12) Reference of a kind referred to in paragraph (11) is permitted in any of the following circumstances—

- (a) where justified by the subject-matter of the contract [...]

# SO WHAT CAN YOU DO?

## Selection criteria – PCSRs Reg.59

(2) A contracting authority may impose upon economic operators as requirements for participation only the criteria referred to in paragraphs (5) to (19).

(3) A contracting authority must limit any requirements to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded.

(4) All requirements must be related and proportionate to the subject-matter of the contract.

# SO WHAT CAN YOU DO?

## Selection criteria – PCSRs Reg.59

(16) With regard to technical and professional ability, a contracting authority may impose requirements ensuring that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard.

(17) A contracting authority may require, in particular, that economic operators have a sufficient level of experience demonstrated by suitable references [...].

(19) In a procurement procedure for works, for supplies requiring siting or installation work or for services, a contracting authority may evaluate the professional ability of economic operators to execute or provide the works, siting or installation or the services with regard to the skills, efficiency, experience and reliability of the economic operator.

(20) A contracting authority must state the requirements for participation, which may be expressed as minimum levels of ability, together with the appropriate means of proof, in the contract notice or in the invitation to confirm interest.

# SO WHAT CAN YOU DO?

## Award criteria – PCSRs Reg.67

- (2) [...] the most economically advantageous tender [...] must be assessed on the basis of criteria linked to the subject-matter of the public contract in question [...]
- (4) Criteria referred to in paragraph (2) may comprise or include—
- (a) quality, including technical merit [...];
  - (b) organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract [...]
- (7) Award criteria must—
- (a) not have the effect of conferring an unrestricted freedom of choice [...];
  - (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 [...].
- (8) In case of doubt, the contracting authority must verify effectively the accuracy of the information and proof provided by the tenderers.



**Charles Livingstone**

Partner

+44 (0) 131 656 0273

[charles.livingstone@brodies.com](mailto:charles.livingstone@brodies.com)

ANY QUESTIONS?