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Often bidders make mistakes, so how far can you push the boundaries of Regulation 56(4), allowing a bidder to clarify after the tender deadline?

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Introduction

- Errors/omissions from PQQs and tenders are a common problem
- Can include
  - answers are missing completely, or not sufficiently detailed;
  - typo's on key figures;
  - bidder misinterprets the question, so provides irrelevant information;
  - bidder omits requested document.
- Leaves Contracting Authority ("CA") with difficult problem, not of its own making.

Introduction

- Regulation 56(4) Public Contracts Regulations 2015:-

  "Where information or documentation to be submitted by economic operators is, or appears to be, incomplete or erroneous or where specific documents are missing, CA's may request the economic operator concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit provided that such requests are made in full compliance with the principles of equal treatment and transparency."

- Concluding words of Regulation 56(4) are key. CA's must comply with equal treatment and transparency and that means "look at the case law!".

Introduction

3 issues to cover:

- In open and restricted procedures, when can a CA clarify if it wants to do so?
- In open and restricted procedures, are there circumstances where a CA must clarify?
- Do different rules apply for Competitive Dialogues and Competitive Procedures with Negotiation?

When is clarification permitted?

- Law is the same whether bidder approaches CA (during evaluation or even after standstill letter) or CA itself takes the initiative.
- *SAG Slovensko* (2012) confirms a discretion to allow clarification (and sets the limits):-

  "[The General Treaty Principles do not] preclude, in particular, the correction or amplification of details of a tender where appropriate on an exceptional basis, particularly where it is clear that they require mere clarification or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender"

When is clarification permitted?

- Additional conditions from *SAG Slovensko*:-
  - CA must review all tenders before it clarifies any;
  - If CA clarifies with one tenderer it must clarify with all who need it (unless they are in objectively different position)
  - If CA clarifies some aspects of a tender, it must clarify "*all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications*"
- CA lost in SAG Slovensko because it clarified some points with tenderers concerned, but then rejected their bids for issues it hadn't clarified!

When is clarification permitted?

- Additional conditions added in *Manova* (2013) for missing documents or information:-
  - the information/documents requested must be objectively shown to pre-date relevant deadline (tender or PQQ)
  - no clarification/supplementation possible where information was required initially "on pain of exclusion".
- Missing documents in Manova (last set of accounts) clearly pre-dated the PQQ deadline.

When is clarification permitted?

- *Cartiera dell Adda* (2014) is leading CJEU example of *Manova's* "one chance only" rule.
- But this also arose in Scottish case *Dem-master* in 2016. ITT required completion of financial template, which included the warning:

  "PLEASE NOTE THAT FAILURE TO PROVIDE A RESPONSE TO THIS QUESTION WILL RESULT IN YOUR OFFER FOR LOT [X] NOT BEING CONSIDERED".

When is clarification permitted?

- Dem-master failed (properly for Lots 1 and 2, or at all for Lot 3) to complete financial template. CA rejected the bids and refused to consider completed templates subsequently provided.. Dem-master sued.
- Court said the warning was "*clear and unequivocal*" and Dem-master could not complain about not being allowed to correct.
- Moral: if you want to keep open the possibility of saving a careless bidder etc, don't say errors/omissions will lead to exclusion!

When is clarification permitted?

- *SAG Slovensko* requirement to be sure tenderer is not changing its tender when making the amendment/addition often precludes clarification.

- See for example *EsaProjekt* (2017): previous experience put forward by tenderer with its bid was insufficient, so it sought to proffer new experience gained by a third party (who was now held out as consortium partner!). Held: new tender.

When is clarification permitted?

- But clarification was lawful in *Antwerpse Bouwwerken* (2009) because although tenderer had omitted to insert figures in correct places, the relevant numbers were evident from other parts of the tender.
- Likewise in *Solelec* (2017) where tenderer had given unit prices which totalled to EUR 41m based on original quantities required. Had forgotten that CA had changed the required quantities during tender process. CA itself applied tendered rates to new quantities and evaluated new bid value of EUR 45m. HELD: lawful.

When is clarification permitted?

- So, it seems CA can clarify issues that require tenderers to confirm a fact: “Does your product comply with European Standard XYZ?” or “Do you have Investors in People?” or “Does your photocopier print at least 50 sheets per minute?”
- Likewise, issues that it can cross-check from elsewhere in the tender.
- But not issues that are unverifiable; eg “is your proposed project manager dedicated to this contract?” CA cant be sure that tenderer isn't taking the opportunity to change its original intention.

Is there ever a duty to allow clarification/amendment?

- *SAG Slovensko* (2012) suggests no general duty:

  "*In any event it does not follow from Article 2 or from any other provision of Directive 2004/18 or from the principle of equal treatment or the obligation of transparency that in such a situation the CA is obliged to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the CA since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender to which they, like other tenderers, are subject.*"

Is there ever a duty to allow clarification/amendment?

- Bidders have frequently argued for a duty to allow corrections but *Tideland Signal* (2002) is the only successful case:

  "In cases where the terms of a tender itself and the surrounding circumstances known to the [CA] indicate that the ambiguity probably has a simple explanation and is capable of being easily resolved, then in principle it is contrary to the requirements of good administration for an evaluation committee to reject the tender without exercising its power to seek clarification."

Is there ever a duty to allow clarification/amendment?

- *Tideland* principle was amplified in series of cases against Legal Services Commission around 2011-12. See eg *Harrow* (2011):-
  - there must be an ambiguity/obvious error on the face of the bid; and
  - which probably has a simple explanation and can be easily resolved; and
  - provided the CA can be sure the tenderer is not thereby changing its bid.
- Conditions not met in Harrow where Tenderer had selected "no" instead of "yes" from a drop-down menu.

Is there ever a duty to allow clarification/amendment?

- Are these old "duty" cases still good law in the face of Regulation 56(4)?
- Regulation 56(4) is exclusively permissive ("…*CA may request*…"). Does that mean there is never now a duty to allow clarification etc??
- Certainly, any such duty will rarely arise.

What is the position in Competitive Dialogues and Competitive Procedures with Negotiation?

- No ban on post tender negotiations for intermediate rounds: quite the reverse. So tenderers may change bids subject to basic fairness etc considerations.
- Regulation 29(13) prohibits any negotiation of final tenders in competitive procedure with negotiation. So by this stage rules are the same as for open/restricted procedures. So foregoing case law applies.
- Regulation 30(17) allows even final tenders in a competitive dialogue to be "*clarified, specified and optimised*" and Regulation 30(18) envisages possibility of additional information being provided. So foregoing case law doesn't apply: changes are allowed subject to basic fairness considerations?

Conclusion

- Regulation 56(4) defers to large body of case law. It is not as straight forward as it appears!
- No general duty on CA's to allow corrections, but such a duty may arise exceptionally in *Tideland* circumstances.
- Even if it wants to, CA may only allow clarifications, corrections or additions etc in certain circumstances. Requirement to be sure T isn't changing its bid kills most cases. And beware equal treatment.
- Courts are generally not sympathetic to a careless bidder. Line of least resistance is often to evaluate only what was first submitted.

Case References

- SAG ELV Slovensko a.s and others v Úrad pre verejńe obstarávanie (2012). Case C-599/10
- Ministeriet for Forskning, Innovation og Videregaende Uddannelser v Manova A/S (2013). Case C-366/12
- Solelec SA & others v European Parliament (2017). Case T-281/16
- Cartiera dell' Adda SpA v CEM Ambiente SpA (2014). Case C-42/13
- Dem-master Demolition Ltd v Renfrewshire Council [2016]. Case CSOH 150
- Esa Projekt Sp.zo.o v Województwo Lodzkie (2016). Case 387/14
- Archus sp.zo.o and Gama Jacek Lipik v Polskie Gornictwo Naftowe i Gazownictwo S.A (2017). Case C-131/16

Case References

- Antwerpse Bouwwerken v Commission (2009). Case T-195/08
- Tideland Signal Ltd v Commission (2002). Case T-211/02
- R (on the application of Harrow Solicitors) v The Legal Services Commission [2011] EWHC 1087

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