

# **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?

**Ciara Kennedy-Loest**

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# Breaking down the question

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- Assessing competence and capability
- No unfair favouring of experienced suppliers
- Perhaps no undesirable favouring of experienced suppliers
- BUT...experience should not work to the disadvantage of the experienced bidder either, after all it's not a bad thing(!)
- The question of incumbent advantage/disadvantage
- The real challenge is to make sure that the terms of a PQQ/ITT are such as to allow smaller but competent players to get more experience and expand the available pool of contractors while keeping the already experienced contractors in the pool

→ The aim: **Create a competitive, sustainable and reliable pool of contractors to ensure security of supply at a reasonable price**

# Current public sector legislative framework

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- In February 2014 the EU adopted 3 procurement directives:
  - Directive 2014/24 (public sector)
  - Directive 2014/25 (utilities)
  - Directive 2014/23 (concessions awarded by the public sector or utilities)
- Implemented into UK law by:
  - The Public Contracts Regulations 2015
  - The Utilities Contracts Regulations 2016
  - The Concession Contracts Regulations 2016
- These are underpinned by General Treaty Principles...

# General Treaty Principles

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- Non-discrimination
- Transparency
- Equal treatment
- Proportionality
- Good administration

*These must be observed at all stages of the procurement process!*

# The legal framework for assessing competence and capability

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- Regulation 58 PCRs – sets out the selection criteria
  - suitability
  - economic and financial standing
  - technical and professional ability
  
  - NB: Reg 58 says that:
    - requirements for participation must be related and proportionate to the subject matter of the contract and
    - specifically states that CAs may require that economic operators have a sufficient level of experience demonstrated by contracts performed in the past

# The legal framework for assessing competence and capability (2)

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- Regulation 18 PCRs:
  - not permitted to draw up the parameters of the competition to favour one bidder over another:
  - *"the design of a procurement shall not be made with the intention of excluding it from the scope of these Regulations or of artificially narrowing competition....competition shall be considered to be artificially narrowed where the design of a procurement is made with the intention of unduly favouring or disadvantaging certain economic operators"*
- Some comfort:
  - *Whelan Group v. Clare County Council [2001] 1 IR 717*
    - An experience criterion relating to technical ability is not restricting competition if it is *"proportionate [...] a rational basis exists for it and is applied objectively"*. Therefore *"it does not [...] offend the requirements of Community law"*.

## The legal framework for assessing competence and capability (3)

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- The selection criteria must be met also by entities on which the main contractor relies
- Regulation 63(4) PRC – Reliance on capacities of other entities

*"The contracting authority shall, in accordance with regulations 59 to 61, verify whether the entities on whose capacity the economic operator intends to rely fulfil the relevant selection criteria and whether there are grounds for exclusion under regulation 57 [...]"*
- Query whether exclusion grounds offer CAs some protection generally here?

# The legal framework for assessing competence and capability (4)

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- Summary of requirements at selection stage:
  - experience is one of the benchmarks used to assess suitability BUT
  - CAs can't over emphasise importance of experience (may not be related or proportionate or it could be considered as artificially narrowing competition)

# The legal framework for assessing competence and capability (5)

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- But remember - capability and competence can also be assessed at the award stage
- The award criterion is:
  - the "most economically advantageous tender"
  - and the CA must state the factors it will take into account and their weightings
- Acceptable award criteria:
  - in principle assess the bid not the bidder (but see following slides)
  - must be related to the subject matter of the contract, proportionate and non-discriminatory
  - must be effective to identify the MEAT

## The legal framework for assessing competence and capability (6)

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- *Hastings & Co (Insolvency) Ltd v The Accountant in Bankruptcy* [2013] CSOH 44
  - there is no "general rule that an invitation to tender is invalidated because it is easier for larger enterprises to meet the tender requirements than SMEs [...] but a contracting authority may risk breaching the equal treatment principle if it adopts criteria which are not sufficiently linked to the subject matter of the contract and which favour one type or size of economic operator over another."

# The legal framework for assessing competence and capability (7)

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- NB - the world has moved on since *Lianakis* (C-532/06)
- Pursuant to Regulation 67(3)(b) PCR award criteria can include
  - "*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*"
- What does this mean?
- So much for the theory – what does all this mean in practice?!

# Practical issues

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- What can you do with information "in your head"?
- T-457/07\_ - *Evropaïki Dynamiki v European Food Safety Authority*
  - "[...] the quality of the tenders must be assessed on the basis of the tenders themselves and not on that of the experience acquired by the tenderers with the contracting authority in connection with previous contracts [...]"
- Can you use information you as a CA have learned through experience?
- Can you use it as verification or validation of a bid?
- Are conflicts of interest relevant here? (see the *Sunderland* case)
- How can you level the playing field?

## Practical issues (2)

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- What do you do about incumbency advantage/disadvantage?
- What constitutes incumbency advantage?
- What constitutes incumbency disadvantage?
- Does all incumbency advantage need to be eliminated?
- It is only unfair advantage that needs to be eliminated?

# What do you do about incumbency advantage/disadvantage?

- What approach are CAs taking in practice?
- Is this the right balance?
- What should you/they be doing?

# The challenge – balance the known and unknown

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Run the tender in a way that will enable a CA to get access to the "unknown/less experienced" contractors to build a supply base



Make sure to assess them fairly against the "known" contractors and not put your contract at risk from inept contractors



# How can you do this?

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- Division into lots
- Regulation 46 PCRs
  - clearly encourages CAs to divide contract into lots by permitting:
    - CAs to limit the number of lots that a tenderer may bid for
    - CAs to limit the number of lots that a tenderer may be awarded (proviso)
    - Safeguard - CAs can combine several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility of doing so and indicate the lots or groups of lots that may be combined.
  - this is a way of allowing non-incumbent EOs to participate and build experience while mitigating the potential risk associated with awarding them the whole contract

# How can you do this? (2)

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- Don't inflate the economic and financial standing thresholds
- Practical example
- Regulation 58(3) PCRs:
  - stresses that all requirements shall be limited to what is necessary to ensure the smooth performance of the contract; unnecessary requirements that might limit the pool of participants should be avoided – and could be challenged

# How can you do this? (3)

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- Engage in preliminary market consultations
- Regulation 40 PCRs:
  - encourages CAs to engage in market consultations
  - this has a number of benefits for the CA, namely;
    - it can help give potential bidders a better feel for what the contract may entail so that it can set up appropriate consortium/sub-contracting arrangements
    - it gives an idea of the capacities and capabilities available and
    - the CA can better shape its needs in relation to what the market can offer

# How can you do this? (4)

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- And when they are on the job?
  - run workshops
  - share experiences
  - think about shared IP rights

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

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- Yes – can refer to work they carried out for others
- Implicit in the following
  - C-387/14 - Esaprojekt sp. z o.o.
  - *"[...] in so far as the possibility to rely on experience acquired in relation to several contracts has not been excluded either in the contract notice or in the tender specifications, it is for the contracting authority [...] to check whether the experience gained from two or more contracts, having regard to the nature of the works concerned and the subject matter and purpose of the contract concerned, ensures the proper performance of that contract"*
  - *"[...] where an economic operator relies on the experience of a group of undertakings in which it has participated, that experience must be assessed in relation to the effective participation of that operator and, therefore, to its actual contribution to the performance of an activity required of that group in the context of a specific public contract*

# Can bidders with sketchy experience refer to projects they carried out for other companies? (2)

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- Not only that – they can also refer to reliance on third parties
- See earlier reference to Reg 63(2)
- See also Case C-324/14, *PARTNER Apelski Dariusz*
  - *"... likewise it is conceivable that, in specific circumstances, having regard to the nature and objectives of a particular contract, the capacities of a third part entity, which are necessary for the performance of a particular contract, cannot be transferred to the tenderer. Accordingly, in such circumstances, the tenderer may rely on those capacities only if the third party entity directly and personally participates on the performance of the contract concerned"*
  - 3 points to note:
    - tenderer can't claim third party experience as their own
    - can rely on third party experience
    - provided third party actually has that experience

# Can bidders with sketchy experience refer to projects they carried out for other companies? (3)

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- But there are some limits

- Case 387/14 *Esaproject*

*"the rules don't allow an economic operator to rely on the capacities of another entity ... by combining the knowledge and experience of two entities which, individually, do not have the capacities required for the performance of a particular contract, where the contracting authority considers that the contract concerned cannot be divided, in that it must be performed by a single operator, and that such exclusion of the possibility to rely on the experience of several economic operators is related and proportionate to the subject matter of the contract which must be therefore performed by a single operator"*

- Implicitly acknowledges that in principle two (or more) entities can combine to assemble the required capacity

- NB have regard to the limitations of competition law

# Summary: Practical steps for a CA

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- \* Educate the market
  - \* Think about PQQ /ITT requirements
  - \* Create a greater pool of experienced contractors
  - \* Smaller risk short term for the project to collapse if it has been awarded to multiple EOs by dividing into lots
  - \* Think of long term benefit

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- \* Don't unnecessarily deprive yourselves of experienced contractors
  - \* CAs need to invest and spend time to make this approach work to encourage and enable new EOs or SMEs to participate
  - \* Invest in working with new EOs so that they can gain the adequate experience

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