

Past Performance

Fionnuala McCredie Q.C.

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White Paper Conference

- **What is the key to an objective and legally robust assessment of a bidder's past performance?**
- **How much weight do you give it, especially if the bidder is a start-up, a phoenix company or new to the market?**

Themes



- Standard Selection Questionnaire (SQ)
- Exclusions pursuant to Regulation 57
- Self cleansing
- Weightings
- EOs with limited track record - proportionality and equal treatment

Standard Selection Questionnaire (SQ) (1)



Standard Selection Questionnaire CCS Action Note 8/16

- **Part 1** potential supplier information
- **Part 2** Exclusion grounds – contains all grounds, whether mandatory or discretionary – onus on supplier to tell CA about everything in Regulation 57
- **Part 3** Selection questions

SQ (2) Mandatory



- **Must** use in all above threshold procurements
- **Mandatory** to follow Parts 1 and 2
- May add project specific questions in Part 3 provided **relevant and proportionate**

SQ (2) – Exemptions



- Part 3 does not apply to
 - CAs that exercise wholly or mainly reserved (non-devolved) functions in Wales or NI
 - Procurement of health care services for the NHS within the meaning of the NHS (Procurement, Patient Choice and Competition (No 2) Regs 2013

- Below threshold procurements in supplies and services contracts must not include a PQQ stage; SQ may be used as a guide for one stage process.

SQ (3) – Works Contracts



- For works contracts between the supplies and services threshold and the works threshold a 2 stage procedure may be used with the PAS91 PQQ.

SQ (4) Reportable deviations



- **No changes** may be made to **Part 1** (Potential Supplier Information and **Part 2** (Exclusion Grounds))
- **Expectation** that **CAs will not deviate from the questions in Part 3**. Deviations must be reported to the CCS Mystery Shopper scheme
- CAs **must** report changes to the wording of the standard questions and instructions and additional questions which are not specific to the individual procurement
- No need to report omissions

“In Scope organisations” (“ISO”) – Central Govt, Executive Agencies and Non Departmental Public Bodies

- Contracts with value £20m or more
 - IT and communications technology
 - Facilities management
 - Business processing outsourcing
- Requires ISO to
 - provide Certificates of Performance to suppliers on request and provide information gathered about past performance to CCS
 - Has some general guidance which might assist



- Past performance relevant at **selection** stage
 - Grounds for **mandatory** exclusion (criminal offences) Reg 57(1) and (2)
 - Grounds for **discretionary** exclusion (including bankruptcy, grave professional misconduct, social security and tax breaches) Reg 57 (8)
 - Evidence of **economic and financial standing, technical and professional** ability by reference to contracts previously carried out Reg 58, 60(9) but see 60(9)(f) – staff educational and professional qualifications, provided not evaluated at award stage

Reg 67 Contract Award Criteria

- (3)(b) organisation, qualification and experience of staff assigned to the contract, where quality of staff ... can have significant impact on performance
- (7)(b) Award criteria shall be accompanied by specifications that allow the information provided by tenders to be effectively verified
- (8) in case of doubt, CAs shall verify effectively the accuracy of information and proof provided by the tenderers

Mandatory exclusions



- Criminal offences (57 (1))
- Established in accordance with the Regulations (or “are otherwise aware”)
- Also applies where the person convicted is a member of the administrative, management or supervisory body of that EO, or has powers of representation, decision or control in the EO

- Examples
 - Grave professional misconduct

 - Significant or persistent deficiencies in performance in prior public contract which led to early termination, damages or other comparable sanctions

Significant or persistent deficiencies



- See Recital 101 to Directive 2014/24
[CAs] ... should also be able to exclude candidates or tenderers whose performance in earlier public contracts has shown **major deficiencies** with regard to substantive requirements, for instance **failure to deliver or perform, significant shortcomings of the produce or service delivered**, making it unusable for the intended purpose, or **misbehaviour which casts serious doubts** as to the reliability of the EO”

Obligation/right to exclude continues throughout the procedure



- The obligation/right to exclude continues throughout the procedure where it turns out that the EO falls within the mandatory or discretionary exclusion grounds in, before or during the procedure (Reg 57(9) and (1))
- Make sure that
 - you **make that right explicit** in procurement documents and
 - **require EOs to update** you of any material changes to their response to the SQ or the tender generally

Long stop date



- If no sufficient measures are taken, exclusion period
 - 5 years from the date of criminal conviction
 - 3 years from the date of the relevant event for discretionary exclusions

BUT

- Subject to the self cleansing provisions

Proportionality



- CAs must act proportionally at all stages of the process (Reg 18(1))
- Proportionality is a General Treaty principle in respect of which there is no margin of appreciation
- Even if acting in accordance with explicit rights conferred by the Directive, CAs must act proportionately (Forposta (C-465/11))

What is proportionality?



- ...the principle of proportionality requires that **measures...do not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued** and that where there is a choice between several appropriate measures **recourse must be had to the least onerous.**

Case T - 211/02 Tideland Signal Ltd

Equal treatment



“...equality of treatment means not only treating like cases alike but unlike cases differently”

Public Interest Lawyers v Legal Services Commission
[2010] EWHC 3277 (Admin)

Self cleansing (1)



- In relation to the grounds for exclusion, a bidder can provide evidence to enable the CA to assess whether it has taken measures sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion
- If the CA considers sufficient, the EO **shall not** be excluded from the procurement

(Reg 57 (13), (14))

Self cleansing (2)



- EO Measures:
 - Payment of compensation
 - Comprehensive clarification/ collaboration;
and
 - Concrete technical, organisational and personnel measures appropriate to prevent further misconduct

- Consider all information submitted and seek clarification where necessary: possible clarifications
 - Personnel and organisational measures such as the severance of all links with persons or organisations involved in the misbehaviours
 - Staff reorganisation measures
 - Implementation of reporting and control systems
 - Creation of an internal audit structure to monitor compliance
 - Adoption of internal liability and compensation rules

(Recital 101 to Directive 2014/24)

Self Cleansing - What must CA do? (2)



- Evaluate the measures taken by EO in the light of the gravity of the offence/misconduct
- Timescales for investigation must be reasonable and proportionate, as must the extent of that investigation
- Burden of proof is on the CA (“where the CA can demonstrate...” Reg 57(8))

Self Cleansing - What must CA do? (3)



- Process must be transparent
- Clear audit trail of decision and reasons for decision
- The decision and reasons (for or against) must be in the Regulation 84 Report
- Reasons must be factually accurate and a fair summary of CA decision making process
- If the CA decides that the evidence is insufficient, it must give a statement of reasons
- Potential for challenge by EO or other bidders

Significant or persistent deficiencies - tricky areas



- Are liquidated damages for delay a major deficiency?
- What if the parties are in formal dispute over the performance of that previous contract? See Action Note 04/15 – Authority has to form its own view
- What about service credits or KPI deductions in a long running PFI?
- Ex gratia payments to settle disputes and avoid litigation?
- Tip offs? Again see Action Note 04/15

How much weight do you give it, especially if the bidder is a start-up, a phoenix company or new to the market?



- Weightings should be set at the start of the procurement
- Weightings should be dictated by the needs of the procurement
- If market engagement demonstrates that you are likely to get bidders with little track record, you need to decide how to design your procurement so as to encourage competition and innovation (and SMEs etc.)
- **Cannot** adjust weightings afterwards

- SQ Part 3 Section 4
- Procurement Policy Note 02/13 18.2.13
 - Credit rating reports useful as part of a broader appraisal, should not be sole assessment tool for above threshold procurements
 - Deselection should not be on the basis of turnover alone, but after analysis of financial position, capacity, capability and dependency
 - There has to be clear evidence that the supplier's financial position places public money or services at unacceptable risk

- Alternative evidence
 - Parent company accounts
 - Deeds of guarantee
 - Bankers statements and references
 - Accountants references
 - Management Accounts
 - Financial projections and cash flow forecasts
 - Details and evidence of previous contracts including contract values
 - Capital availability
- Require EOs to update CA of relevant changes

- Entitled to seek references
- Contract Notice should say
 - References will be taken up to assess skills, efficiency, experience and reliability
 - An EO who for good reason cannot supply references may submit specified examples of past performance
 - If there are relevant changes during the procurement, reserve right to re-evaluate and say what basis of evaluation will be

- Subjective - depends on whether referee is
 - knowledgeable about the contract
 - in a hurry/under pressure
 - away or on holiday
 - very effusive, alternatively very mean with praise, alternatively terminally cautious
 - hated the EOs contract manager because he supported Arsenal/didn't support Arsenal
- David Gollancz has suggested that EOs be asked to provide relevant case studies and ask referees if they were a fair account of the contract performance

Conclusion



- In all things be **proportionate** and **treat EOs equally**
- Are there grounds for a mandatory exclusion?
- Are there grounds for discretionary exclusion?
- Has there been adequate self cleansing?
- Conduct a proportionate and rigorous assessment
- Document it at every stage and give reasons for what has been done
- Be very cautious about exclusion without a thorough, documented and defensible review; it has profound implications and may well be challenged

Thank you for listening

FIONNUALA MCCREDIE Q.C.
FMCCREDIE@KEATINGCHAMBERS.COM