

# Often bidders make mistakes, so how far can you push the boundaries of Regulation 57(5): allowing a bidder to clarify after the tender deadline?

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GRAEME PALMER, PARTNER

22 MAY 2019

## Agenda

- Regulation 57(5) of the Public Contracts (Scotland) Regulations 2015
- Scottish Government Procurement Journey
- When can a contracting authority clarify?
- Is there ever a duty to clarify?

## Regulation 57(5)

- *“Where information or documentation to be submitted by an economic operator is or appears to be incomplete or erroneous, or where specific documents are missing, a contracting authority 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.”*

# Procurement Journey

- Clarifications may become necessary....
- ...aspects of bids that are unclear or contain minor errors.
- ...certain aspect of the bid seems ambiguous...
- ...might be prudent to request clarification.
- Example given:
  - If specification required a service to be delivered daily and a tenderer specified that it would be delivered 7 times a week, you would seek clarification that the services are indeed completed once per day.
- All clarifications must be properly recorded

# Procurement Journey

- What's not permitted:
  - Negotiations in relation to price
  - Clarifications regarding essential aspects of the tender
  - Other areas where bid improvements may be possible

## When can a contracting authority clarify?

- *Slovensko case:*
- Restricted procedure – in principle, tenders cannot be amended after submission either at the request of the contracting authority or at the request of the tenderers
- Risk of negotiating, or appearing to negotiate on a confidential basis in breach of the principle of equal treatment
- However ....

## When can a contracting authority clarify?

- *Slovensko case:*
- “[the] *directive does 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**.*”
- Must treat tenderers equally and fairly – the request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer to whom it was addressed, once the procedure for selection of tenders has been completed and in light of its outcome.

## When can a contracting authority clarify?

- *Slovensko* case specified a number of requirements
- Before making a request for clarification, authority must have looked at all of the tenders
- The request must be sent in an equivalent manner to all undertakings in the same situation (unless different treatment can be objectively justified)
- The request must relate to **all** sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications – the authority is not entitled to reject a tender because of lack of clarity in a part of the tender which was not covered by that request.

## When can a contracting authority clarify?

- *Manova*
- Concerned financial statements not submitted by the tender submission deadline
- Documents pre-dated the deadline
- A request for clarification cannot make up for the lack of a document or information which was required by the tender documents

## When can a contracting authority clarify?

- *Dem-Master Demolition case*
- Tenderer had not submitted figures for overheads and profit
- Tenderer submitted information after deadline
- Could not be shown that information pre-dated deadline
- No ambiguity
- Commercial envelope stipulated that failure to provide a response to a question would result in the response not being considered
- Accepting the late submission in those circumstances
  - would have amounted to a new tender
  - would give rise to a “*powerful case*” regarding breach of equal treatment

## When can a contracting authority clarify?

- *Solelec* case
- General Court accepted that contracting authority could accept a project completion reference which was dated after the tender submission deadline, but related to a project which was satisfactorily completed prior to that deadline.

## When can a contracting authority clarify?

- *Antwerpse Bouwwerken* case
- The contracting authority could permit completion of missing figures where they could be objectively determined from other parts of the tender submission.
- Simple clerical error capable of being easily resolved
- Principle of proportionality - where there is a choice between several measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued.

## When can a contracting authority clarify?

- *Esaprojekt* case
- Initial submission did not meet minimum experience requirements
- Sought to bring in third party partner and submitted its experience after the submission deadline
- Treated as a new tender and was rejected

## When can a contracting authority clarify?

- *Archus case*
- Submission of microfilm sample in accordance with requirements of specification
- Bidder sought to supplement bid with further sample after deadline
- Not permitted as this would amount to a new tender

## Is there ever a duty to clarify?

- *Tideland case*
- Concerned tender validity period of 90 days from tender submission date
- Tender deadline postponed
- Date of validity of tender not updated – specified date 90 days after original tender submission date
- A reasonable and easily remedied reason existed for the ambiguity in the tender - authority should have sought clarification
- It was disproportionate to reject the tender in those circumstances - rejection of the tender unlawful
- An exceptional case?

## Is there ever a duty to clarify?

- *Hersi* case (English High Court)
- Only in exceptional circumstances
- Where tender is ambiguous
- Ambiguity has a simple explanation and is capable of being easily resolved
- Where there is a “simple clerical error”, where a tender requires “mere clarification, or to correct obvious material errors” or “serious manifest errors”; error must be “simple”, “material”, “serious” and “manifest”
- Cannot result in a new tender; cannot permit late submission of documents which the tender required to be sent.

## Is there ever a duty to clarify?

- Wrong tick box selected – *Jones case*
- Answers left blank – *Hersi* and *Hoole*
- Question answered in the negative using a drop-down menu option – *Harrow*
- Location of office not specified in tender – *Hossacks*

## Clarification in other procedures

- Principles above apply to open and restricted procedures
- Greater flexibility to clarify in competitive dialogue, competitive procedure with negotiation and innovation partnership procedures.
- Final tenders

## Conclusion

- No general duty to clarify (unless exceptional circumstances)
- Can confirm facts
- Can correct / complete information that can be objectively verified elsewhere in the tender
- Late submission – sometimes
- Must comply with specified tender rules
- Cannot submit a “new tender”
- Equal treatment

## CASE REFERENCES

*Slovensko* (2012) – case C-599/10

*Manova* (2013)– case C-366/12

*Dem-master* (2016) CSOH 150

*Solelec* (2017) – Case T-281/16

*Antwerpse Bouwwerken* (2009) – case T-195/08

*Esaprojekt* (2016) – case C-387/14

*Archus* (2017) – case C-131/16

*Tideland* (2002) – case T-211/02

*Hersi* – (2017) – EWHC 2667

*Jones* (2010) – EWHC 3671

*Hoole* (2011) EWHC 886

*Harrow* – (2011) EWHC 1087

*Hossacks* (2012) EWCA 1203

 Burness Paull

Q / A



**Graeme Palmer**

PARTNER

+44 141 273 6738

[graeme.palmer@burnesspaull.com](mailto:graeme.palmer@burnesspaull.com)

[burnesspaull.com](http://burnesspaull.com)

[@BurnessPaullLLP](#)