
White Paper Procurement Conferences

Awarding Public Contracts Skilfully and
Lawfully within the Procurement Rules

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Capability

“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?

Known?

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Sketchy?

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What are you waiting for?

- The EU is already there (Directive 2014/24/EU)
 - Public procurement should be adapted to the needs of SMEs
 - Simplification of selection procedures
 - Division of contracts into lots (UK opted not to include a mandatory requirement, but still a notification requirement)
 - Self-declaration
 - No more “overly demanding” requirements concerning economic and financial capacity

Application

- General principles, especially proportionality
- Specific selection rules
- PPN 8/16 including CCS Selection Questionnaire
- Award criteria?
- Frameworks and Dynamic Purchasing Systems
- Light Touch regime
- Below Threshold Procurements
- Lots

Principles

- Treaty principles generally
- Regulation 18(1) - treat economic operators equally and without discrimination and act in a transparent and proportionate manner
- Regulation 18(2) - design of the procurement shall not be made with the intention of artificially narrowing competition
 - i.e. unduly favouring or disadvantaging certain economic operators
- Proportionality is the key in this case

Selection

- Regulation 58(1) - selection criteria may relate to:
 - suitability to pursue a professional activity
 - economic and financial standing
 - technical and professional ability
- Regulation 58(3) - limit requirements to those that are appropriate to performance of the contract
- Regulation 58(4) - all requirements shall be related and proportionate to the subject matter of the contract
- Contracting Authorities may impose requirements relating to:
 - possession of human and technical resources (58(15))
 - sufficient level of experience, demonstrated by suitable references from contracts performed in the past (58(16))
- Professional ability may be evaluated with regard to skills, efficiency, experience and reliability (not for supplies)
- Means of proof - see Regulation 60(9)
- Use of SQ and ESPD

Experience - Means of Proof

- Proof *may* be provided by *one or more* of the following means (including)
 - (a) list of works carried out over [5 years] or services and supplies over [3 years] (no restriction to public contracts - see ***Commission v Italy (C-362/90)*** - projects for other companies are as relevant as public contracts);
 - (f) qualifications of staff (if not used in award)
 - (j) proportion to be sub-contracted
- Ensure equal treatment despite apparent discretion to look beyond experience
- Proportionality cuts both ways

A Problem with Procedures

- How do you apply the criteria?
 - Open *versus* 2-stage
 - In Open Procedures selection relies only on passing minimum levels - no comparative exercise
 - Self-certification
 - In Open Procedures, verification of minimum levels to take place *before* award of contract
 - In 2-stage, evaluation of SQ is made in order to shortlist
 - Any such evaluation must be in accordance with the criteria, weighting and scoring set out in the SQ documentation
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2-Stage Procedures

- General principles apply
- Disclosure in OJEU and/or invitation to confirm interest.
- Transparency over criteria and methodology apply just as much as with tender evaluation criteria - the RWIND tenderer should be able to understand what is required
- Difficult to see how the less experienced tenderer can prevail in a fair and objective assessment which is weighted towards experience

Dealing with Experience

- Does experience need to be the key determining criterion?
- Are we able to look behind reference projects and evaluate their worth?
- SQ Part 3 includes only experience and intention to sub-contract - everything else is for the contracting authority to determine (and justify)
- Deviation from the SQ has to be reported and justified
- Directive and Regulations give a discretion
- Application of general principles

An Alternative? - Dealing with Experience in the Tender

- Once upon a time completely off-limits
- Organisation, qualification and experience of staff may be used as evaluation criteria
- Cannot use these criteria in selection stage if they are to be used as award criteria
- Enables contracting authority to ‘neutralise’ organisational experience in selection but still assess the applied experience of a candidate (but subject to equal treatment and proportionality principles)

Frameworks

- Procurement of a framework subject to same Part 2 PCR procedural rules
- But call-off contracts are not
- Apply appropriate minimum levels to a multiple operator framework procured under open procedures
- Need for clarity as to how the framework will be operated
- A framework acts as a safety net against concerns that might apply on a single contract award to less known suppliers with “sketchy experience”

Dynamic Purchasing Systems

- Similar advantages apply as with frameworks
- Although the DPS must follow a restricted procedure, all applicants satisfying selection criteria must be admitted (no comparative exercise)
- Contracting Authorities may require a renewed ESPD at any time

Below Threshold Procurements

- Regulation 111 - a contracts authority shall not include a pre-qualification stage.
- May ask “suitability assessment questions” (provided relevant to the subject matter and proportionate)
- Questions may relate to: suitability, capability, legal status or financial standing
- Standard questions from SQ and exclusion questions may be used as a guide
- One stage procurement only allowed - no comparative analysis to be carried out
- Minimum levels should not be set too high

Light Touch Regime

- Public contracts for social and other specific contracts
- Principles of transparency and equal treatment are overriding
- Part 2 PCRs does not apply, but contracting authority may choose to apply corresponding procedures
- Relevant considerations to award decision:
 - quality, continuity, accessibility, affordability, availability and comprehensiveness of the services
 - specific needs of uses
 - involvement and empowerment of users
 - innovation
- No requirement to feature experience in the decision to award (or even short-listing if that is included)

Division into Lots

- Discretion for the contracting authority over the size of and subject matter of Lots
- Requirement to provide justification for not dividing into Lots
- Ability to limit the number of Lots any one tenderer may bid for
- Ability to limit the number of Lots any one tenderer may be awarded
- Sensible sizing of Lots and limitations upon bidding and award levels the playing field of SMEs
- See also Small Lots exemption (£65,630 - supplies and services; £820,370 - works; up to 20% total value) - in effect creates a reserve of work for SMEs

Conclusions

- Open procedures - set minimum levels which are relevant and proportionate
 - 2-stage procedures - consider focusing scoring on issues other than institutional experience but ensure equal treatment and proportionality
 - Make use of lots and small lots exemption
 - Where appropriate use Frameworks and DPS flexibly
 - Take an active interest in the supply chain
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Thank you

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