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White Paper Procurement Conference

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Today's Questions

- 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?

Agenda

- The first question
 - Quick recap of evaluation requirements
 - The evaluation panel
 - Avoiding favouritism
- The second question
 - Legal requirements
 - Practical steps

Evaluating tenders

- Key principles:
 - Equal treatment
 - Non-discrimination
 - Transparency
 - Proportionality
- The RWIND tenderer
- Disclosure of selection and award criteria
- Separate evaluation of selection and award criteria

Evaluation of the tender

- *Case T-457/07 - Evropaïki Dynamiki Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Food Safety Authority*
- “*according to settled case-law, 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 ...*”

Evaluation panel

- Composition
 - Expertise
 - Different disciplines
 - Sufficient capacity
- Agree approach to evaluation
 - Involved in development of selection and award criteria
 - Training – full understanding of the methodology
 - Separate scoring of price
 - Each panel member to consider tender submissions separately before coming together

Conflicts of interest

- Regulation 25 of the Public Contracts (Scotland) Regulations 2015
 - Requirement to take “*appropriate measures*” to prevent, identify and remedy conflicts of interest
 - Conflict includes staff members with a direct or indirect financial, economic or other personal interest which might be *perceived* to compromise their impartiality and independence

Conflicts of interest

- Counted4 v Sunderland County Council
 - Challenger claimed contracting authority has not met requirements as project manager of current project was on evaluation panel
 - History of complaints and less than harmonious relationship
- If working relationship considered to have grave problems, then risk of perception that project manager's independence and impartiality compromised
 - Protecting personal professional reputation
 - Determination to award contract to anyone but the incumbent

Conflicts of interest

- Woods Building Services v Milton Keynes Council
 - Former employee of one of the bidders (with ongoing relationship) should not be on panel; also misled bidder re his involvement in the evaluation process
- Afcon (T-160/03)
 - Panel member was an employee of a subsidiary of a winning bidder
- Nexans (T-145/10)
 - Perceived conflict from employment (employer was part of successful consortium) even though not involved in scoring

Conflicts of interest

- Communicaid (T-4/13)
 - Ex-authority moved to employment of bidder – no relevant knowledge; not involved in bid preparation
- Risks when officers / employees change sides – HS2

Conflicts of interest

- What steps should a contracting authority take?
 - Understanding of market – who is likely to bid
 - Know your staff – previous positions in likely bidders; or previous employees of the authority
 - Watch for service provider staff supporting contracting authority in the procurement
 - Declaration from staff members involved in the process that there is no conflict on the basis of the subject matter of the procurement and likely bidders
 - Re-assess once expressions of interest are received, or once bids are received

Challenge by incumbent

- Scott & Co (Scotland) LLP v Aberdeenshire Council
- Scott & Co were incumbent
- Comment from Council: website was restrictive and complex to use; winning tenderer's website was more user-friendly
- Weak case that it was an undisclosed award criterion or overly subjective
- Strong case that RWIND tenderer would have considered fell within scope in ITT
- What if it was the other way around?

Allegation of bias

- *Traffic Signs & Equipment Ltd v Department for Regional Development (NI)*
 - *whether the fair minded and informed observer would conclude, having considered the facts, that there was a real possibility that the defendants would not evaluate the tender objectively and impartially against other evidence*
- Involvement in a previous dispute
- Alleged favouritism towards another bidder
- No evidence of discrimination

Avoiding favouritism

- Record keeping - of entire decision making process
- Follow scoring methodology
- Clear reasons given for scoring
 - Woods case
 - Partial answers
 - Scoring methodology not followed
 - No proper reasons recorded – brief notes only

Reliance on the capacity of others

- Regulation 64 of the Public Contracts (Scotland) Regulations 2015
 - *“an economic operator may, where appropriate and for a particular contract, rely upon the capacities of other entities, regardless of the legal nature links which it has with them”*
 - *“where an economic operator wants to rely upon the capacities of other entities, it must prove to the contracting authority that it will have at its disposal the resources necessary, for example by producing a commitment by those entities to that effect”*
 - Requirement for contracting authority to verify those entities –re fulfilling selection criterion and not subject to exclusion criteria

Reliance on the capacity of others

- Definition of “economic operator”
 - *“Means any person or public entity or group of such persons and/or entities including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of services or the provision of services on the market”*
 - Regulation 59(17):
 - *“a contracting authority may require, in particular, that economic operators have a sufficient level of experience to perform the contract to an appropriate quality standard”*

Reliance on the capacity of others

- Corporate restructuring
 - Merger
 - Takeover
 - Spin-out
 - Transfer of team to new company
 - Transfer of individual to new company
- Successor entity

Q/A



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