

# **Competence & Capability**

**Awarding Public Contracts Skilfully and Lawfully, Whitepaper  
Conference, Dublin**

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***“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?”***

- 1. Assessment of competence and capability**
- 2. Bias?**
- 3. Evaluation of experience**

- A contracting authority shall, in procuring, treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner (Reg 18, SI 284 of 2016)
- *Objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria (Case C-448/01, EVN)*
- Equal treatment & non-discrimination require tenderers to be afforded equality of opportunity when formulating their bids (*Case C-496/99P Succhi di Frutta,*)
- Principle of transparency is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority (Case (C-42/13, *Cartiera dell'Adda*)

# 1. Assessment of Competence & Capability

Public Sector	Utilities	Concessions
<ul style="list-style-type: none"> <li>• Suitability</li> <li>• Financial standing</li> <li>• Professional &amp; technical ability</li> </ul>	<ul style="list-style-type: none"> <li>• Objective rules &amp; criteria</li> </ul>	<ul style="list-style-type: none"> <li>• Financial standing</li> <li>• Professional &amp; technical ability</li> </ul>
<ul style="list-style-type: none"> <li>• Requirements for participation must be related &amp; proportionate to subject matter of contract</li> </ul>		<ul style="list-style-type: none"> <li>• Requirements must be related &amp; proportionate to subject matter of contract</li> </ul>
<ul style="list-style-type: none"> <li>• May require sufficient level of experience demonstrated by suitable references from <b><u>past contracts</u></b></li> <li>• Means of proof specified in Regs</li> <li>• May rely on capacities of others</li> </ul>	<ul style="list-style-type: none"> <li>• May rely on capacities of other entities</li> </ul>	

## “Experience of the contract type”

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- *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 (Reg 18)*
- Is experience criterion:-
  - (a) related and proportionate to the subject matter of the contract?
  - (b) defined in a clear, objective and non-discriminatory manner?

## Whelan Group v. Clare County Council [2001] 1 IR 717

- *Requirement that contractor must have satisfactorily completed an individual road works project to the value of £10 million (excl. VAT) within the period 1995 – 1999*
- Court deferred to expertise of the expert standing committee who had devised the criterion
- Applied equally to all and was objective and proportionate
- Criterion was related to technical ability and “*did not suffocate genuine competition*” – “*once the stipulation is proportionate... and a rational basis exists for it and is applied objectively it does not in my opinion offend the requirements of Community law*”.

SWM Construzioni v Provincial Di Fermo, Case C-94/12 (10 October 2013)

*“Directive 2004/18 must be held as permitting the combining of capacities of more than one economic operator to satisfy minimum capacity requirements”*

PARTNER Apelski Dariusz, Case C-324/14 (judgment of 7 April 2016)

*“...there may be works with special requirements necessitating a certain capacity which cannot be obtained by combining the capacities of more than one operator, which, individually, would be inadequate. In such circumstances, the contracting authority would be justified in requiring that the minimum capacity level concerned be achieved by a single economic operator or, where appropriate, by relying on a limited number of economic operators...as long as that requirement is related and proportionate to the subject matter of the contract at issue...”*

Regulation 63(2) of SI 284 of 2016:-

- *“...with regard to criteria relating to the educational and professional qualifications... or to relevant professional experience, an economic operator may only rely on the capacities of other entities where those entities will perform the works or services for which these capacities are required...”*

PARTNER Apelski Dariusz, Case C-324/14

- *“...Likewise, it is conceivable that, in specific circumstances, having regard to the nature and objectives of a particular contract, the capacities of a third party 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 in the performance of the contract concerned**”*

## 2. Bias?

- Obligation on contracting authority to prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures (Reg 24, SI 284 of 2016)
- *“If unsuccessful tenderer presents objective evidence calling into question the impartiality of one of the contracting authority’s experts, it is for that contracting authority to examine all the relevant circumstances ... in order to prevent and detect conflicts of interests and remedy them, including, where appropriate, requesting the parties to provide certain information and evidence”* (Case C-538/13, eVigilo)
- Evaluation may be unlawful solely on the grounds that the tenderer had significant connections with evaluation experts (eVigilo)

- Favourable / unfavourable view of a contractor more difficult to prove
- “...*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...*”  
(Case T-169/00, *Esedra v Commission*)
- Robust record keeping – *Somague*; *Word Perfect*; *Fresenius*;
- Standard of review?

- *“The Court will permit an expert body... a margin of appreciation or discretion in respect of scoring and assessing tender bids, and will defer to that body in this respect... The Courts must not lightly interfere in the tender process, including the result... That margin of appreciation... explains and is consistent with the principle by now well-established in the case-law that the Court will not do so except where a manifest error has occurred in the process – in other words a very clear error, an error obvious to the eye, and one which prompts the Court to ask itself could this possibly be correct, and upon close examination answer that question in the negative.”  
(Fresenius v. HSE)*
- *“...the obligation to render effective the public procurement principles means that where there has been an established failure to respect the principles of equality, transparency or objectivity, there can be no question of permitting the discretion or margin of appreciation to overlook it. In such clearly established circumstances the Court must act and quash the decision...” (SIAC v. Mayo CC)*

Word Perfect Translation Services Limited v. The Minister for Public Expenditure and Reform [2018] IEHC 237 (judgment of 4 May 2018)

- *“the court is bound by the renowned observations of Fennelly J. in SIAC Construction Ltd v. Mayo County Council [2002] 3 IR 148 concerning manifest error, including the point that there is no question of permitting a margin of discretion in the face of manifest error...the court does not consider that there was any error on the part of the Minister in its evaluation and scoring of the tenders... However, if the court is wrong in this (and it does not consider that it is), it does not consider that any of the errors contended to present amounts to a manifest error: all of the conclusions of the Minister which it has been sought to impugn are supported by material that was before the Minister and were made within the margin of appreciation that falls to be allowed to the Minister when scoring and assessing the bids”*

### 3. Sketchy Experience?

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- Sketchy experience:-
  - » by reference to selection criteria?
  - » By reference to award criteria?
- Can they refer to projects they carried out for other companies? YES
- Generally cannot limit to public sector experience unless justified by subject matter of the contract and non-discriminatory

## Unlawful and/or discriminatory selection criteria

The selection criteria must not be disproportionate or unfair and should not unnecessarily limit the number of tenderers. For example, contracting authorities must give a reasonable revenue requirement per year **and may not distinguish between a public sector and a private sector reference**. If in doubt, legal advice should be sought.

The examples of obligations set out below refer to cases where economic operators have been deterred from tendering because of unlawful selection criteria and have led to financial corrections for contracting authorities:-...

3. having at least 5 similar references from the public sector only, and not the private sector (e.g. for cleaning contracts), unless justified and non-discriminatory;

4. providing references for previous works that are significantly higher in value and scope than the contract being tendered, unless justified and non-discriminatory;

*Source: Public Procurement Guidance for Practitioners on avoiding the most common errors in projects funded by the European Structural & Investments Funds (2018)*

- May evaluate “*organisation, qualification and experience of staff assigned to performing the contract where quality of staff assigned can have a significant impact on the level of performance of the contract*” (Reg 67(3)(b))

Tender Evaluation	Pre-qualification
Staff experience	Organisation experience
Quality	Capability
Impact on Level of Performance	Related & proportionate

- Follow the rules...
- Clarity on the subject matter
- Clear, proportionate & non-discriminatory criteria
- Objective evaluation
- Conflict of interest protocols
- Evaluate on basis of written submissions only
- Robust record-keeping

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