

McCANN FITZGERALD



Assessing Performance

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Three Questions

- How do you expose bidder culture/senior management capability?
- How do you assess pitches / interviews / references / proposed team?
- What are the limits of what you can ask?

How to Expose Culture/Capability

- Ask the questions which will get at what you want to expose – usually track record/attitude, capabilities, proposed approach to the job
- Mix of commercial and legal decisions in determining what to ask a bidder and at what stage of the process
- Commercial – what matters enough to the outcome of the project that it is worth assessing?
- Legal – what are you allowed to assess? What are the limits of what you can ask?

Limits of what can be asked

- 3 points in any procurement process where you can ask “whittling down” questions from your participants
 - Outright exclusion (Reg 57)
 - Selection/qualification (Regs 56 – 65)
 - Award (Regs 67 – 69)
- Utilities rules – similar but less regulation on exclusion/selection criteria

Limits of what can be asked (2)

- Selection/qualification (Reg 58)
 - Technical and professional ability:
 - necessary human and technical resources and experience to perform the contract to an appropriate quality standard
 - sufficient level of experience demonstrated by suitable references from contracts performed in the past
 - professional ability...may be evaluated with regard to...skills, efficiency, experience and reliability

Limits of what can be asked (3)

- Can only ask for proofs set out in Regs 60/62 and Schedule 8 (Annex XII), including:
 - List of previous projects (with certificates of satisfactory execution, for works)
 - Supply chain management and tracking systems/environmental measures which can be applied
 - Educational & professional qualifications of provider/managerial staff, if not award criteria
 - QA facilities and technicians available

Limits of what can be asked (4)

- So at selection/qualification stage: commercially, what would authority like to know about the bidder, and then what can it ask under the selection criteria rules?
 - Sch 8 doesn't expressly refer to references, but Reg 58 does; also refers to “skills, efficiency, experience and reliability”
 - Should allow you to get at track record, capability, senior management involvement if relevant
- Must be related and proportionate (Reg 58(4))

References

- References
 - Expressly referred to in Reg 58 – must they be checked?
 - Reg 56 – award “provided that authority has verified...that tenderer meets the selection criteria” – no “in case of doubt” carve-out as there is for award (Reg 67(8))
 - also clear reference to “verification” being carried out in open procedures where winner determined before checking suitability

References (2)

- Not clear what level of verification required
 - is it simple check between self-declaration and supporting documents, or independent verification?
- If checking references, ensure do so in an equal and transparent manner
- Preferable to stick to objective facts eg job description accurate as to role, scale of job etc

Limits of what can be asked (6)

- Award stage (Reg 67)
- Clarification regarding team evaluation (similar to *Ambisig* case)
 - “organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract”
- “Significant impact on level of performance”
 - Recital 94 of Directive eg intellectual services incl consultancy/architectural services

Team Evaluation

- “organisation” of staff – often asked now in any event (“deployment”/“skills balance”)
 - query whether, going forward, only where over “significant impact” hurdle
 - ensure evaluators in a position to assess
- “qualification” and “experience” – consider whether meaningful to assess both
- NB recital 94 – if assessing staff, ensure they are then tied into contract and can only be replaced if verified that replacement has equivalent level of quality

Pitch/Interview

- Assessing pitch/interview (bidder or team)
 - general approach has been avoid if possible
 - difficult to control what is said and cannot “unhear” additional information
 - high level of subjectivity

Pitch/Interview (2)

- if proceeding
 - prepare well & have strong chair
 - ensure clear about parameters of discussion and impact on assessment
 - confine to what is relevant to criteria
 - Reg 22 – oral communications which could have a substantial impact on the content and assessment of tenders shall be documented to a sufficient extent and by appropriate means, including written or audio record

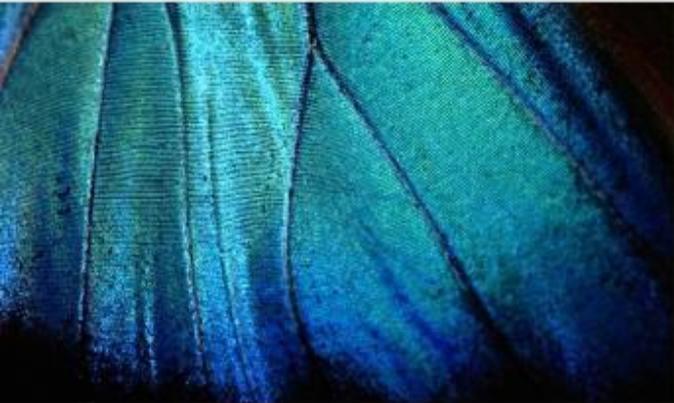
Procurement outside Directives?

- Most authorities tend to take similar approach in choice of criteria – so similar considerations will typically apply
- Less clear where legal limits are – but where cross-border interest, EU Treaty principles of equal treatment, transparency etc will still apply
- Even for wholly domestic procedures, many of the issues will still be relevant in terms of the decision-making process

Summary

- Think carefully about what really matters in terms of bidder culture/performance
- Ensure legally allowed to ask what you want to ask
- Be satisfied that you are able to evaluate what you are asking for (and robustly defend that evaluation)
- Document any interactions with bidders carefully

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