

WHITE PAPER 2024

EVALUATOR FLEXIBILITY – A LEGAL AND PRACTICAL GUIDE

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THE QUESTION

Where is the wiggle room for evaluators to shift their initial views during moderation or in response to clarifications and presentations?



STARTING POINT: THE LAW

- Regulation 18 PCR 2015 – Duty to treat all economic operators equally, without discrimination and act in a transparent and proportionate manner
- s.12(2) Procurement Act 2023 – Must treat suppliers the same unless a difference between them justifies different treatment (but no longer an express duty of transparency)
- Must follow the procedure set out in the procurement documents (*EnergySolutions v NDA*)
- Wide margin of discretion/appreciation for evaluations (*Bechtel v HS2*, *Siemens v HS2*)



MANIFEST ERROR

- The Courts will only rule that a score is incorrect where there has been a “manifest error” (*Braceurself*)
- In addition to a clear and obvious mistake, a Claimant must show that the result of the manifest error impacted the score awarded – 2-stage test
- Courts acknowledge the expertise of evaluators as subject-matter experts (*Bechtel v HS2 and Bromcom v ULT*)



MODERATION

1. What it is
2. When it happens
3. The purpose
4. What the PCR/Procurement Act say about it
5. What the Courts say about it:

“[The evaluation] process necessarily involves some form of moderated discussion which leads to agreement as to overall scores (with or without dissent) for which the essential reasons can then be articulated.” (Bromcom v ULT)

CAN EVALUATORS CHANGE SCORES DURING MODERATION?

- Yes!
- Caselaw is clear that initial views and scores are a step in the evaluation process and not definitive (*Bechtel, Siemens*)
- A challenger will not succeed if its argument simply relates to initial scores being higher (*Bechtel, Siemens*)
- A proper moderation stage is expected and sensible to stress-test initial views, identify and correct errors before a final, consensus score and reasons are given (*Bromcom and Bechtel*)
- **Essential element:** clear audit trail showing why changes were made to initial scores/views.



CLARIFICATIONS

- Regulation 56(4) – CAs may request clarification provided that such requests comply with the principles of equal treatment and transparency
- Must take equal approach to all bidders (*SAG Slovensko*)
- Must not lead to submission of a new tender (*Esaprojekt*)
- Clear explanation in the procurement documents
- **Essential element:** clear audit trail showing the impact of any clarification on scores/views.



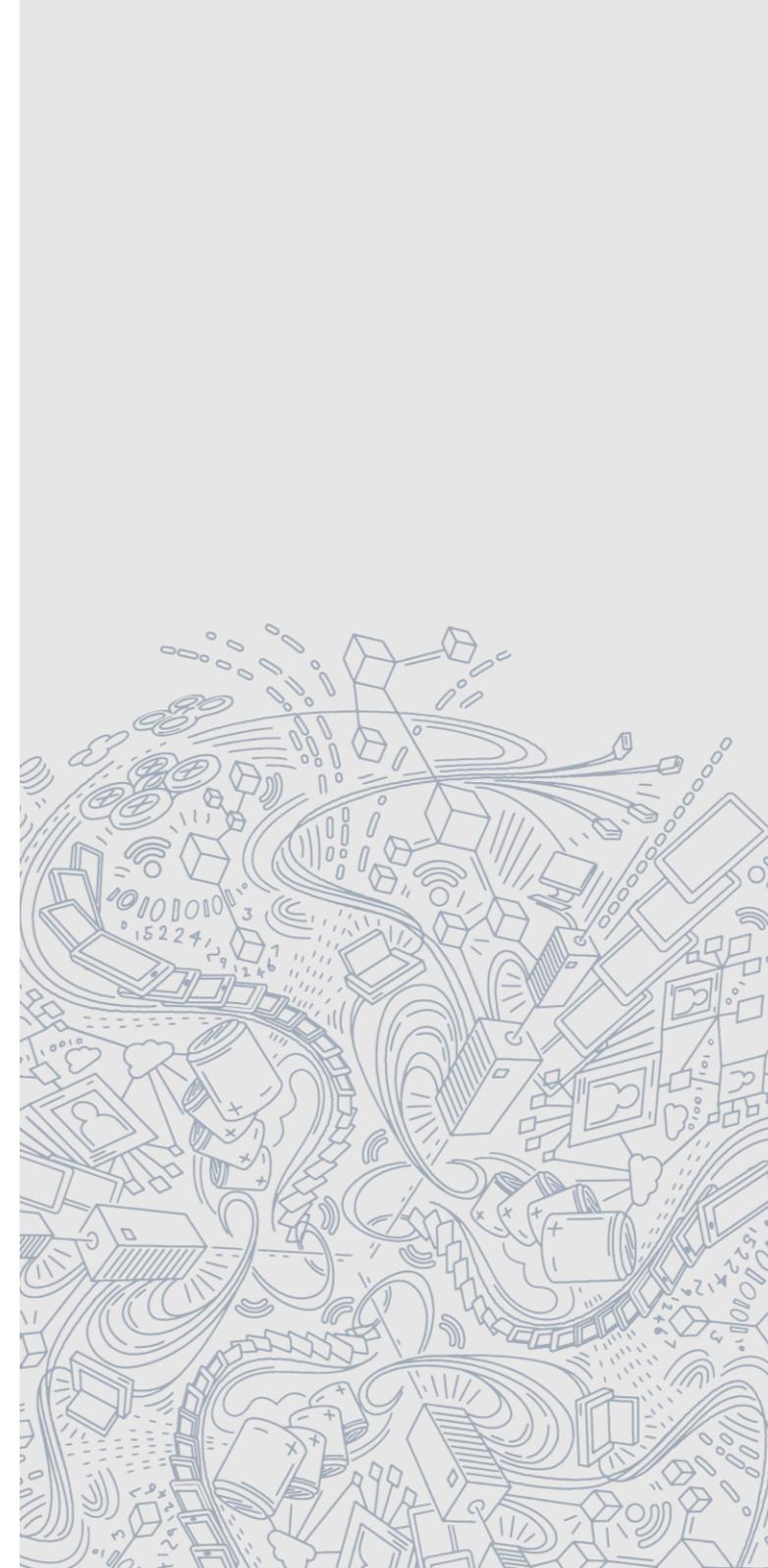
PRESENTATIONS

- Clear explanation of the scope and purpose in the procurement documents –
 - Confirm scores?
 - Allocated weighting?
- Equal treatment of bidders
- **Essential element**: clear audit trail showing the impact of the presentation on scores/views.



FIVE PRACTICAL EVALUATION TIPS

1. Evaluate each question based on the scoring methodology in the procurement documents – avoid “this answer does not feel like a 10” type comments.
2. Provide appropriate supporting comments for your evaluation. Don’t just put “good response” without reasons why. It is just as important to list weaknesses as much as strengths.
3. Do not compare bids or make comments to another bid in your evaluation. E.g. “This response is not as good as X’s response.”
4. Award only scores in the scoring methodology (i.e. 0,1,2,3,4 or 5): don’t use half scores (e.g. 2.5) or scores not listed.
5. Word/page counts: Only review up to limit and ignore excess → Bidders should include the count at the end of each response.



FIVE PRACTICAL MODERATION TIPS

1. Ensure your timescale allocated sufficient time for the moderation process
2. Establish a clear process so all evaluators are aware of how moderation will be conducted and its purpose
3. Ensure that other evaluators' comments are first checked for factual errors and language which does not align with the scoring methodology
4. Ensure that the reasons for any changes to initial scores are recorded with an appropriate level of detail
5. Have printed copies of scoring tables available

