

Price/Quality Scoring

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Topic Question

- ▶ *Is there a creative way of going beyond conventional Price/Quality formulae and scoring methodologies?*
- ▶ *Why do standard deviation calculations disadvantage some bidders?*
- ▶ Looking at European-level rules
- ▶ “Standard deviation” - looking at average pricing approach

Overview

- ▶ Background
- ▶ Basic parameters
- ▶ Pricing issues - case law
- ▶ Equal treatment issues - case law
- ▶ Scoring methodologies
- ▶ Lessons learned

Background and Context

- ▶ Trying to drive specific tenderer behaviour, in context of regulated relationship between authorities and tenderers
- ▶ Scoring approach doesn't always produce desired result in terms of quality vs price
- ▶ Particular concern around low bids and potential for methodologies and formulae to be gamed
- ▶ Carillion - raised fears throughout industry
- ▶ Note proposals in Public Authorities and Utility Undertakings (Contract Preparation and Award Criteria) Bill 2019

“Parameters” for Creativity

- ▶ Award criteria options - money only, or money plus quality
- ▶ Reg 67:
 - ▶ *“a contracting authority shall base an award of public contracts on the **most economically advantageous tender**”*
 - ▶ *“most economically advantageous tender...shall be identified on the basis of the **price or cost**...and may include the **best price-quality ratio**, which shall be assessed on the basis of criteria...linked to the subject matter of the public contract in question”*

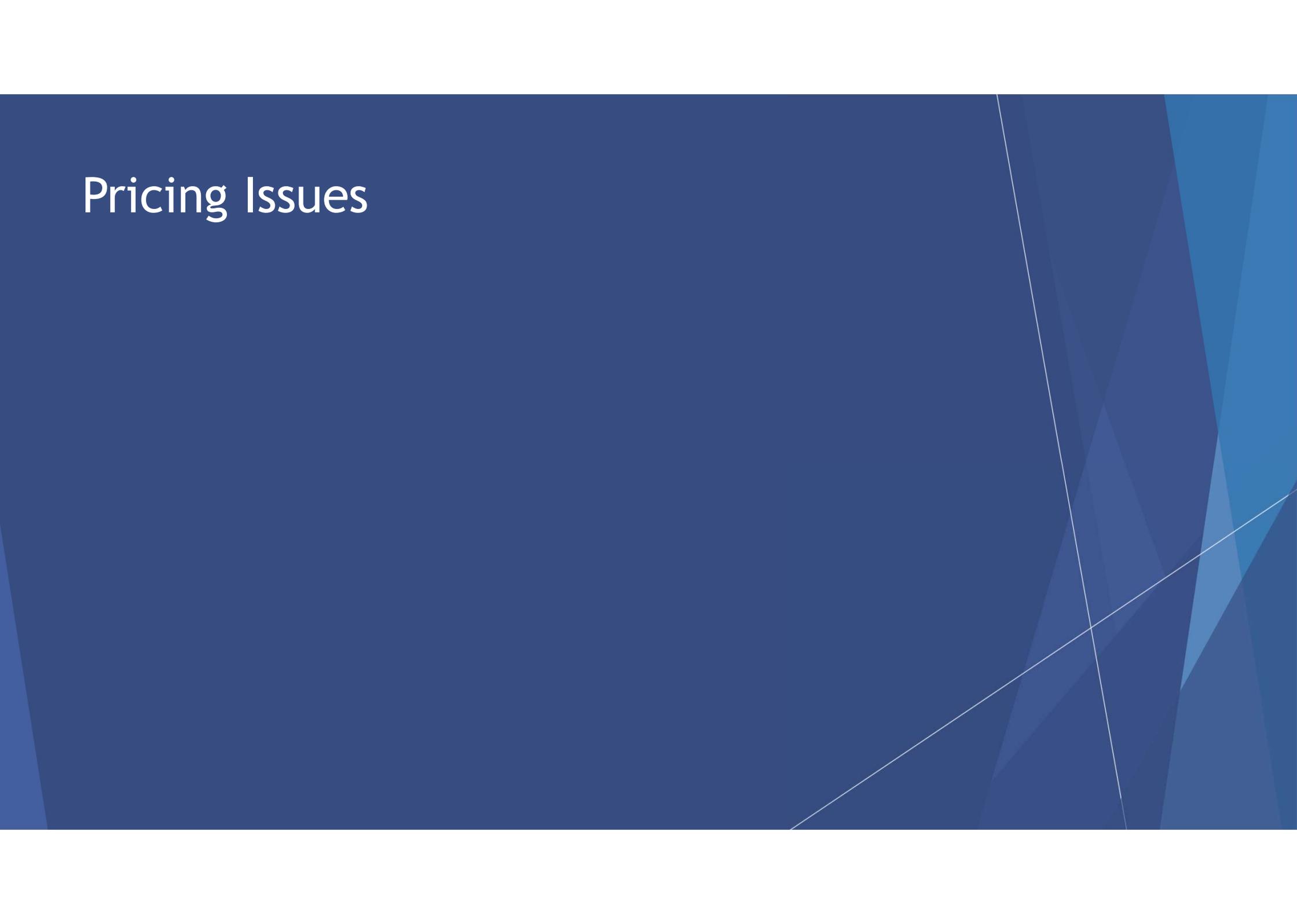
“Parameters” for Creativity (2)

- ▶ Is adding together quality and price marks a “ratio”? Arguably no but appears to be no challenge to this common method
 - ▶ Commission Guidance for Practitioners (2018)
- ▶ Can also have fixed price or cost and compete on quality only
- ▶ Criteria “*shall ensure the possibility of effective competition*”

“Parameters” for Creativity (3)

- ▶ Equal treatment another key requirement - does choice of award criteria or scoring approach breach this?
 - ▶ *AbbVie, Amplexor*
 - ▶ Critically important to consider, esp when incumbent in place

Pricing Issues

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Pricing Issues

- ▶ Basic decisions:
 - ▶ mark price or cost? (see UK Govt Outsourcing Playbook; Commission Guidance for Practitioners; note Reg 68 which has very specific provisions on life-cycle costing)
 - ▶ mark “money” on basis of total amount, or some breakdown of different amounts against different scores? (eg 60% of price marks go for lump sum element of project, 40% for rates)
 - ▶ what formula to use to award price marks?

Pricing Issues (2)

- ▶ Typical formula:
 - ▶ (lowest price/tender price) * available price marks
- ▶ Many variations on this - matter of trying dry runs with different formulae with your expected pricing to see what happens
- ▶ *Proximus SA* (T-111/17), Jan 2019
 - ▶ 4 service packages
 - ▶ Price per service package scored, each score weighted, and overall total weighted score given for price
 - ▶ Designed to encourage good pricing on all service packages and avoid “dumping” of costs from one package into another

Pricing Issues (3)

- ▶ Formula for initial (per-package) price mark

$$FSP_{subcrit} = \left(1 - 2 * \frac{F_{subcrit}^i}{\sum_{i=tenders} F_{subcrit}^i}\right) * 100$$

- ▶ Authority - deliberately multiplied by 2 to avoid not having significant differences between marks
- ▶ Court - fine, formula still gave highest marks to lowest price and amplification effect didn't affect ranking

Pricing Issues (4)

- ▶ What about formula which marks against average price, not lowest price?
 - ▶ Typically - closer to the average, the higher the mark
 - ▶ So lowest price does not get best price mark
- ▶ *Spain v Commission* (T-402/06)
 - ▶ Clawback on EU funding for projects where various formulae using this methodology applied
 - ▶ Clawback decision upheld by General Court

Pricing Issues (5)

- ▶ Problems with average price methodology:
 - ▶ Key element unknown until bids came in (the average) and knowledge would definitely have affected bid preparation
 - ▶ Led to situation of “irrational competition” where bidders incentivised to price at their best guess of the average, even if they could have bid a robust cheaper price - so not effective competition
 - ▶ All other things (ie quality) being equal, more expensive bids would score higher than cheaper bids - so formula did not identify the MEAT

Pricing Issues (6)

- ▶ Lots of “average price”-type approaches (filtering outliers, marking in bands of distance from average or pure pro-rata) but any approach must be scrutinised to ensure avoids the pitfalls of *Spain v Commission*
- ▶ Court in *Proximus* distinguished formula there from *Spain v Commission*
 - ▶ (i) did award highest marks to lowest bid at a package level
 - ▶ (ii) though key element unknown again (total of all tenders for each package) no evidence of effect on bid preparation (?) and did not lead to same situation of “irrational competition” - bidders incentivised to put best foot forward on price

Pricing Issues (7)

- ▶ Make sure any formula chosen cannot be gamed
- ▶ *Capgemini* (T-447/04)
 - ▶ Price marks broken down against various line items, all equally weighted, standard price marks formula
 - ▶ Some line items priced at 0 by winner - “included” in other line items
 - ▶ Prices of line items varied widely
 - ▶ Challenge upheld by General Court

Pricing Issues (8)

- ▶ Because packages different prices but same weight, bidders could easily manipulate outcome - prices for smaller packages hidden in larger packages to scoop all the marks on the small packages (made limited difference to the larger packages)
- ▶ No guarantee the bid that was actually MEAT had won
- ▶ GC in *Proximus* - problem in *Capgemini* was the way the approach had been applied (allowing the zero pricing) rather than the approach itself
- ▶ Note problems with formulae when 0 is any of the inputs - ensure dealt with up front in tender documents

Equal Treatment Issues

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Equal treatment issues

- ▶ Two interesting recent cases on “creative” approaches and equal treatment - *AbbVie* and *Amplexor*
- ▶ Bear in mind authority discretion to design award approach only within parameters - must have equal treatment (or objective justification of unequal treatment)
- ▶ *Amplexor* (T-211/17) (not available in English)
 - ▶ Incumbent complained that pricing rules were in breach of equal treatment
 - ▶ For initial phase, incumbent could charge 0.3% of total price, but non-incumbents could charge up to 3%

Equal treatment issues (2)

- ▶ GC - applied the long-established tests from *European Dynamics* (T-345/03) on incumbent advantage - incumbent has “de facto” advantage but obligation on authority to neutralise to extent
 - ▶ technically easy
 - ▶ economically acceptable and
 - ▶ doesn't infringe rights of tenderer or incumbent

Equal treatment issues (3)

- ▶ “Economically acceptable” test
 - ▶ Equal treatment - aim ultimately to promote effective competition
 - ▶ Funding approach here promoted competition - without it, likely others would not bid
 - ▶ So “economically acceptable” to neutralise incumbent advantage with the difference in funding, even though cost money
- ▶ “Rights of incumbent” test - right in question was to be treated equally, and authority approach put all bidders on an equal footing - so again neutralisation measures correct

Equal treatment issues (4)

- ▶ *AbbVie* [2019] EWHC 61
 - ▶ £1bn procurement for Hepatitis C treatment
 - ▶ Procurement for the whole market - but only one provider could treat all market segments
 - ▶ Authority came up with “dummy price” approach - if bidder didn’t have a product for a particular segment, it was deemed to have submitted the lowest price tendered by another bidder
 - ▶ Artificial, but allowed a “whole market” competition

Equal treatment issues (5)

- ▶ AbbVie challenged design of process during competition - said approach unfairly advantaged competitor
- ▶ Court - was this equal treatment?
 - ▶ Yes - bidders were not in the same position (some could not serve the entire market, some could) so did not have to be treated the same
 - ▶ Approach was intended to promote effective competition - otherwise would be down to one provider
 - ▶ Difference in treatment had to be directed towards identifying MEAT, and could not be arbitrary or excessive

Equal treatment issues (2)

- ▶ Even if had been breach of eq treatment - objectively justified?
 - ▶ Yes - aims were legitimate (increased competition, better VFM, better health outcomes for patients), approach was suitable to achieve them, and no less onerous way of doing so
- ▶ Fact that a particular scoring approach favours one entity is not automatically unequal treatment
- ▶ But note if AbbVie **could not** have won - position would have been different

Scoring methodologies

Scoring methodologies

- ▶ Practical as much as legal issue
- ▶ Legal issues typically around disclosure - *TNS Dimarso* (C-6/15)
 - no obligation to disclose methodology (but practically, far safer to do so)
- ▶ However in *Dimarso* - argument that methodology was so blunt it undermined the criteria weighting (50:50 price:quality)
 - ▶ Methodology allocated quality bids into high/medium/low - appears to have led to clustering such that in reality price became determinant and the true differences in quality of bids compared to price were not reflected

Scoring methodologies (2)

- ▶ CJEU sent back to national court to determine whether in practice methodology had affected the criteria weighting - if so, breach of transparency
- ▶ Minimum acceptable score? - beware of “bid bunching”
- ▶ Choice of banded or linear marking approach?
- ▶ What narrative goes against the scoring bands?
- ▶ Be very careful the narrative is not too constraining - *Woods v Milton Keynes* ([2015] EWHC 2011) - multiple scores reduced to zero when court applied methodology

Lessons from the Case Law

Lessons from the case law

- ▶ Do dry runs against guesstimated figures to check if formulae needs to be tweaked eg to amplify differences, produce the right result against the quality marks etc
 - ▶ Lots of resources online showing impact of different approaches
- ▶ Decide whether to award marks for total price, or elements
- ▶ If using anything like an “average price” approach - check it against all the issues in *Spain v Commission* (and all the arguments made in *Capgemini* and *Proximus*)
- ▶ Have clear rules about zero pricing and make sure formula will still work with 0 inputs

Lessons from the case law (2)

- ▶ Think very carefully about equal treatment, especially if project has an incumbent
 - ▶ Should some criteria be pass/fail instead of scored?
 - ▶ Can you level out financial advantages?
- ▶ Document objectives, thinking and modelling very carefully - key in *AbbVie* and noted in *Amplexor*
- ▶ *Traffic Signs* [2011] NIQB 25
- ▶ *Wilmott Dixon* [2014] EWHC 3191

And finally

- ▶ Europe has set tight parameters around award, and authority discretion to design award approach only works within those parameters
- ▶ Get the basics right at the outset
 - ▶ clear spec
 - ▶ criteria & weighting zeroing in what actually matters
 - ▶ scoring methodology that rewards what you are looking for (detail, understanding etc) and will be easy to apply
 - ▶ contract terms that drive the behaviour you want

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