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# Public Sector Wales Procurement Law Update

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11h November 2021

Bethan Lloyd & Jonathan Griffiths

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or cafe at night. They are engaged in a discussion, with laptops and coffee cups on the table. The background shows a cityscape through large windows.

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# Post Tender/Pre-contract Amendments, Completions and Clarifications

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11h November 2021

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Commercial Dispute Resolution

# Introduction

Addressing errors, inaccuracies, omissions and ambiguities can be a difficult exercise, as it involves achieving a balance between seeking **Competition/Value for Money** and observing the requirements of **Fairness and Transparency**

# Correction of errors and ambiguities

## UNCERTAINTY PERSISTS!

The extent to which adjustments and additions are permitted to a tender response after submission but before selection remains a grey area.

NB Contract law considerations

- ISSUES
  - Is there a duty to allow correction of errors?
  - Is there a discretion?

# But not negotiations

- Generally prohibited in standard procurement processes, even if permitted in the tender documents – see *Slovensko v Urad*

*“the restricted public procurement procedure means that, once the tenderers have been selected and once their respective tenders been submitted, in principle those tenders can no longer be amended either at the request of the contracting authorities or at the request of the tenderers. The principle of equal treatment of tenderers and the obligation of transparency resulting therefrom preclude, in that procedure, any negotiations between the contracting authority and one or other of the tenderers.”*

NB Competitive Dialogue and Competitive Procedure with Negotiation provide flexible alternatives

# Is there duty to allow correction of an error?

**There is no general duty to allow a tenderer to correct an error**

*Leadbitter v Devon County Council* – tenderers can not insist on being allowed to correct an apparent error.

*Slovensko* – the correction or amplification of details of a tender is permitted **on an exception basis**, particularly where mere clarification or correction of an obvious material error, provided that such amendment does not in reality lead to the submission of a new tender.

## **Exceptions:**

- Proportionality
- Error by contracting authority

# Proportionality

- The duty arises where failing to allow a correction would have adverse consequences for competition but without promoting any significant objective of procurement policy which could not be achieved in other ways.
- *Tideland Signal v Commission*

# Proportionality Test

- It is clear from the tender that an error has been made
- The error is known by the contracting authority
- It can be established from the tender what the correct content should be – [or at least from clear external evidence]
- The error does not affect the merits of the tender (e.g. price/quality)



# Is there a general duty to correct where the merits of the tender are not affected?

- Possibly – e.g. Tideland/Manova
- But only if no advantage to be gained (e.g. extra time)

# Can there be a general duty to correct if the merits of the tender are affected?

**Possibly**– if the intended content of the tender can be established with certainty from the tender itself - but beware!

See *Antwerpse Bouwwerken v European Commission* (a simple (clerical) error?)

NB. Leadbitter case rejected verifiable external information

# Error by contracting authority

- There could be a duty to contact tenderers for clarification if the problem is due to a lack of clarity in the tender specification.
- The principle is supported by comments in Leadbitter and Jones

NB – duty on tenderer to exercise due diligence by seeking clarification - Slovensko

# A discretion to allow or make corrections?

There can be advantages to allowing corrections where permissible e.g. limited competition or where refusal would be harsh

- PCR 56(4) – the contracting authority may request missing, incomplete or erroneous information or documentation where such requests are in compliance with the principles of equal treatment and transparency.

# A discretion to allow or make corrections?

Permissible examples where the correction does not affect the merits of the tender or give the tenderers an advantage

- Request a missing document where the content was established before the tender – e.g. Manova
- Allow a tenderer to accept a mandatory condition
- Correct a clerical error which resulted in naming a product which does not comply with specification

# Where correction does affect the merits of the tender

- Whether there is a **duty** in these circumstances is arguable - Antwerpse Bouwwerken
- No reason not to allow correction where the intended content is clear from the tender – Slovensko
- *Resource Management Services v Westminster City Council*

## What if an ambiguity and/or the intended content (e.g. two different figures for total price) is not clear from the tender?

- Both are possibly ruled out by Slovensko (which only approves corrections of **obvious errors** which do not amount to a **new tender**) and Jones.
- It is though arguable that the available case law does not clearly distinguish between a duty and a discretion. If available, a discretion to correct a non obvious error would have to be allowed to all tenderers in similar situations.

# Miscellaneous

- A contracting authority can not exclude a duty to correct in its tender documents but can specify how any discretion to correct will be exercised.
- Amendments and corrections allowed by law could be permitted during the standstill period – *McConnell Archive Storage v Belfast City Council*

NB A contracting authority is of course able to seek clarification of bids where there is no error, provided that this does not involve discrimination

- Slovensko
- Natural Wood Products v ARC





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# Recent policy developments

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Bethan Lloyd, Partner  
Public Law (Wales)

11h November 2021

# WPPN 05/21 Guidance on reserving below threshold procurements for Welsh public sector contracting authorities (July 2021)

- Builds on UK PPN 11/20
- Takes advantage of EU Treaty Principles falling away
- Options for reserving contracts for SMEs or VCSEs (voluntary, community and social enterprises)
- Option to reserve contracts for suppliers in a specific geographic location (NB local authority cannot do this – s17(5)(e) Local Government Act 1988)
- Or both in combination – e.g. procurement reserved to SMEs in Rhondda Cynon Taff

# WPPN 05/21 Reserving by supplier location

- Under UK PPN, reservation must be by single county or UK wide
- WPPN also allows reservation to suppliers operating within a single UK region (provided geographic area is clearly defined)
- WPPN reiterates PPN policy that you cannot reserve to Wales or to multiple counties – so query how else one could define a UK region with sufficient clarity (within a 50 mile radius of Cardiff Central Train Station???)
- Reservation by geography must be based on policy objectives – e.g. supporting domestic supply chains, promoting resilience and capacity, tackling economic inequality, supporting local recruitment, training, skills and investment
- Eligibility must be based on where a bidder is based or established and has business operations – i.e. not just a registered office presence
- Checks (e.g. Companies House check, site visit) to spot any false claims as to geographic location

# WPPN 05/21 Reserving to SME/VCSE

- Include the standardised definitions of SME or VCSE (see guide accompanying the PPN)
- SME: fewer than 250 employees and either an annual turnover <£45m or a total balance sheet <£40m
- VCSE: organisation (incorporated or not) with a social purpose: ranges from small community based groups / schemes, through to larger registered charities and social enterprises, public service mutuels and cooperatives that operate locally, regionally and nationally

# WPPN 05/21

- Reference to Quick Quote function on Sell2Wales as a means of requesting selected suppliers registered on Sell2Wales to submit a response
- PPN 11/20 says you should not use the policy to make direct awards but this not mentioned in the WPPN
- Need to follow your organisation's own procurement policy too – so update it if you wish to permit the reservation of below threshold contracts

## WPPN 06/21 Decarbonisation through procurement – Taking account of Carbon Reduction Plans (Sept 2021)

- Adopts UK PPN 06/21
- Applies to procurements commenced on or after 30-9-21
- Where average annual value of contract is more than £5m
- In the case of a framework or DPS, you look at the value of the individual contracts which could be awarded

# WPPN 06/21

- Selection criterion requiring bidders to provide a Carbon Reduction Plan (CRP) which meets the following requirements:
  - Bidder commits to achieving net zero status by 2050
  - Prescribed information on bidder's current emissions
  - Details environmental management measures bidder will take – e.g. certification schemes and specific carbon reduction measures
  - CRP signed off at director/senior level to signal organisational commitment
  - Commitment to publish CRP on bidder's website and update at least annually
  - CRP complies with the published template and the technical guidance

# WPPN 06/21

- Selection criterion on CRP to be used only if related and proportionate to the contract
- Guidance says that environmental considerations and carbon reduction always relevant where:
  - Delivery of contract impacts on environment
  - Staff delivering contract will be using a building
  - Contract requires transportation of goods or people
  - Contract requires use of natural resources
- Hard to think of something which wouldn't be covered!



# WPPN 06/21

- Selection criterion assessed on a pass/fail basis
- Must not compare one bidder's CRP against another
- CRP must be specific to the bidding entity (i.e. not a group policy)
- If trading <12 months, bidder must commit to achieving net zero by 2050 and to publishing a full CRP as soon as possible
- A CRP required from each member of a consortium
- Can still address decarbonisation in your social value question at award stage – emphasis then on specific delivery and themes most appropriate to the contract

# WPPN 07/21 – SME-friendly procurement (Oct 2021)

- Reinforces existing principles and commitments
- Supplier engagement
- Keep procurements as simple as possible
- Consider splitting requirements into lots – including regional lots
- Not mentioned specifically – but don't forget the small lots exception (reg 6(14)-(15))

# WPPN 08/21 Cyber Essentials (Oct 2021)

- Adopts UK PPN 09/14 – Use of Cyber Essentials Scheme Certification and updates the former Procurement Advice Note on Cyber Essentials (2014)
- Cyber Essentials strongly encouraged (and mandatory for WG) for particular types of contract
  - Personal data handled by supplier
  - Personal data of government employees handled by supplier
  - ICT systems handling OFFICIAL data
  - Contracts with an identified cyber risk where Cyber Essentials would be a relevant and proportionate way to manage this risk
- May require Cyber Essentials Plus depending on the level of assurance required – or even ISO27000 series or similar
- ISO27001 trumps Cyber Essentials and Cyber Essentials Plus
- Contracts may be exempt if requiring Cyber Essentials would be clearly disproportionate – e.g. where cyber security risk is very low – keep audit trail where you decide not to require it

# WPPN 09/21 Sourcing building materials for construction projects in Wales (Oct 2021)

- Advice on managing and mitigating market pressures around availability and affordability of building materials
- Not a definitive position – assess on case by case basis
- WPPN does not apply where the contract is designed to avoid such macro-economic risks (e.g. MIM)
- Consider applying WPPN measures if market volatility and delays could impact on construction projects which support public services

# WPPN 09/21

- Supply issues with existing construction works
  - Where compelling evidence on open book basis of a significant delay – work together in spirit of mutual trust and cooperation to agree substitute materials or agree change to completion date or change to a KPI
  - Suggestion contracting authority should be proactive and consider early warnings of a delay and seek to minimise it
- Future contracts
  - Seek to design a realistic specification and timetable, factoring in material availability and estimated delivery times
  - Consider alternatives where significant impact on critical path for delivery
  - Consider allocation of risk – allocation of risks can impact on tender prices and successful delivery of contract, should avoid wholesale transfer of risk along supply chain, as could mean SMEs are saddled with the risk

# WPPN 09/21

- Managing volatile material prices
  - Contractors should absorb price fluctuations within moderate tolerances
  - Consider varying contract where these tolerances are exceeded
  - Suggests reliance on regulation 72(1)(c) – change needed due to unforeseen circumstances, increase must not exceed 50% of original contract value
  - Bear in mind the pricing structure in the form of contract used as this may already have allocated the risk of price volatility in a particular way which limits its impact
  - Nevertheless, if compelling evidence inflation is higher on specific elements of the contract than could have been reasonably anticipated, consider making a price adjustment, and ensure it flows down the supply chain. NB No mark up of any amount representing profit, overheads or other fee, only mark up the defined costs which have inflated.

# WPPN 09/21

- Future contracts
  - Plan for material shortages within project programme and budget
  - Complete evaluation and award quickly to avoid unnecessary delays
  - Minimise time between award and commencement of works
  - Don't expect bidders to keep bids open for acceptance for long periods after tender deadline
  - Consider including a price adjustment for inflation (with base date on tender deadline date) and ensure this is mirrored throughout the supply chain

# WPPN 09/21

- Importance of transparency around price adjustments
  - Suppliers must agree to work on an open book basis so as to demonstrate the impact of inflation, and show that relevant sums have been passed down the supply chain as quickly as possible
  - Keep records of decisions and agreements made and require suppliers to keep records too
  - Suppliers should not make profits on a payment received as a result of a price adjustment
  - Payments should be recovered where supplier is found to be taking undue advantage or failing to act transparently and with integrity
  - If supplier acts fraudulently, may be excluded from future procurements on grounds of grave professional misconduct
  - Benchmark cost volatility of materials using publicly available indices – WG procurement team has data from various sources



# New procurement thresholds from 1-1-22

- Public works contract: £5,336,937
- Public supply contracts and public services contracts:
  - Central government authorities - £138,760
  - Sub-central contracting authorities - £213,477
- Concession contracts - £5,336,937
- These figures will be inclusive of VAT
- Applies to procurements commenced on or after 1-1-22

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# Thank You

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