

A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or meeting room at night. They are looking at laptops and talking. The room has large windows showing a city view at night. The lighting is warm and focused on the people.

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The Past, Present and Future of Procurement Evaluation Challenges

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Programme

- Preparing an evaluation process
- Evaluation criteria and methodology
- Challenges
- Case Law

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How advanced are your authority's preparations for the Procurement Act 2023?

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Has your authority developed its approach to use of the competitive flexible procedure?

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Scenario

ABC Council is intending to procure a service provider to manage several leisure facilities in its area. The Council has read reports about the collapse of businesses who had contracts with local authorities and needs to be satisfied that it will procure a contractor who is sufficiently stable to meet the Council's requirements throughout the contract. The Council also wants to be sure that its appointed contractor will understand local issues sufficiently to provide a high quality service to the local community.

Evaluation Process

- Process to determine most economically advantageous tender by assessing bids against published award criteria
- Process must be documented and robust enough to stand up to internal and external scrutiny

Preparing an evaluation process

- Plan the timetable
 - Identify resources
 - Develop and test evaluation criteria and scoring mechanism
 - Issue documents
 - Clarifications with bidders
 - Moderation
- Identify resources – evaluators, moderators, training
- Arrangements for record keeping

Evaluation Criteria

- Pass/Fail Criteria – Use when appropriate and proportionate
- Appropriate balance between price and quality criteria
- Qualitative Criteria
 - Should be proportionate and appropriate to the subject
 - Should be clear and unambiguous

Preparation for Procurement Act 2023 evaluating deliverability

- Evaluation should consider deliverability of a bidder's solution
- Contracting authority may evaluate risk within quality evaluation or
- Have a separate scored and weighted section on risk

Evaluation Criteria – Public Contracts Regulations 2015

- Regulation 67
- Most economically advantageous tender may be identified on the basis of price or cost and may include best cost-price ratio assessed on the basis of criteria
- Award criteria must
 - Ensure the possibility of effective competition
 - Be accompanied by specification that allows information provided by tenderers to be independently verified
- Contracting authority must specify the relative weighting which it gives to each criterion

Evaluation Criteria - Procurement Act 2023

- Section 23
- Award criteria must
 - Relate to contract subject matter
 - Be clear, measurable and specific
 - Not break rules on technical specifications
 - Be a proportionate means of assessing tenders
- Contracting authority must
 - Describe how tenders must be assessed
 - Indicate relative importance of criteria

Evaluation Criteria – ABC Council

- What Pass/Fail criteria do you suggest that ABC Council should apply?
- What evidence could ABC Council require to ensure that it appoints a contractor who will deliver services appropriate to local needs?

Evaluation methodology

- Evaluation methodology must be disclosed to bidders, including evaluation criteria, sub-criteria and weightings
- Methodology should be tested

Application of Evaluation

- Bids must be evaluated in accordance with published evaluation criteria and methodology
- Contracting authority may seek clarification but this is not an opportunity for bidders to change their bids

Moderation

- Review of evaluator's scores and reports by moderator
- Moderation meeting
- Moderation should lead to single consensus score

Notification and award

- Notification
- Standstill
- Feedback
- Award
- Evaluation report

Resources

- Government Commercial Function – Bid Evaluation Guidance Note - [Bid evaluation guidance note - GOV.UK](#)
- Template Assessment summary - [The Procurement Pathway | Procurement Pathway](#)

Challenges - Overview

- Common areas of challenge under the PCR 2015 and how to minimise the risk of challenge
- Will such challenges be dealt with differently under the PA 2023?
- Are new types of challenges likely to become prevalent under the PA

Known unknowns

- [What will the National Procurement Policy Statement say?]
- How applicable is existing PCR case law?
- New terminology – style v substance

Common Challenges under the PCR 2015

- Inadequate feedback
- Manifest scoring errors
- Hidden evaluation criteria
- Not following the published evaluation methodology

Reasons - PCR

- Standstill Letters - PCR reg. 86 (2) – “**reasons**” – including “*characteristics and relative advantages of the successful tender.*”
- Feedback needs to comply with the general duty of transparency (PCR reg. 18)

Reasons – Past History

- 2003 – *“the bidder ranked highly on quality but was unsuccessful because of its price”* [Strabag Benelux]
- 2008 - *“scores and a brief narrative should be sufficient”* [Evropaiki Dynamiki]
- 2014 – *an emphasis on reasons and reasoning* [Healthcare at Home]
- *“ ..full breakdown of scores against each criterion and sub-criterion, and support this with a narrative explanation of why the winner scored more heavily in the relevant areas.”* [Crown Commercial Services]

Reasons – the Present

- Lancashire NHS Foundation Trust
- Not enough to simply list factors (e.g. negative and positive points)
- Must give a full and transparent account of the **reasons** for particular scores
- Where a panel of markers reach consensus scores, the stated reasons should explain the reasons for panel consensus

Reasons – the Present

- *“a procurement in which the [CA] cannot explain why it has awarded the scores it did fails the most basic standard of transparency.”*

BUT

- No requirement to provide a detailed summary of how each detail of a tender was taken into account when the tender was evaluated or a detailed comparative analysis of the successful tender and the unsuccessful tender [*European Dynamics*]

Assessment Summaries – a change of emphasis

- PR 2024 s.31(2) and (3) – how the tender was assessed against the award criteria by reference to scores including:
 - The scores for each award criterion
 - An explanation for that score and any sub-score by reference to relevant information in the tender
 - Total score and sub-total scores
 - The same information for the successful bidder

No equivalent express duty of transparency within PA but

- Section 12(1)(c) & (d)

In carrying out a covered procurement, a contracting authority must have regard to the importance of...

(c) sharing information for the purposes of allowing suppliers and others to understand the authority's procurement policies and decisions:(d) acting, and being seen to act, with integrity

Cabinet Office Guidance

- *“The aim of the assessment summary is to ensure that a supplier that submitted an assessed tender...can understand why its tender was either successful or unsuccessful.”*
- *“Contracting Authorities are not required to include ... a direct comparison between the successful supplier’s assessed tender and an unsuccessful supplier’s assessed tender.”*

PCR – Manifest Scoring errors

- “Manifest error not established merely because on mature reflection, a different mark might have been awarded [*Letting International*]
- Courts recognise the competence of evaluators, particularly subject matter experts [Bechtel]
- in matters of judgment, evaluators are generally allowed a margin of appreciation and the court only intervenes if there has been a “manifest error” (a high bar)
- Must show that the manifest error impacted the result of the procurement

PA – irrational scoring

- PA s.19(2) - contracting authority must identify what it considers to be the “*most advantageous tender*”
- that exercise is subject to ordinary public law duties (e.g. rationally) - margin of discretion
- “*The test for manifest error is a high one, broadly equivalent to Wednesbury irrationality? [Woods v Milton Keynes]*”

Hidden evaluation criteria and failure to follow published evaluation methodology

- PCR Reg. 18 – general duty of transparency
 - *“A contracting authority that has set rules for [assessing bids] must follow them..” [Energy Solutions]*

PA

- See section 12(1) (c) & (d) – “*understand decisions*” and “*integrity*”
- Public law duties
 - Irrationality – relevant and irrelevant considerations

Minimising the risk of challenge to evaluation under the PCR and the PA

- Importance of the 3 Ps
- The evaluating meeting is key to preventing disputes
- Structured approach to evaluating consensus scoring
- All scoring must be undertaken by reference to the criteria and methodology in the ITT [Reasons match the scoring criteria and match the tender response]
- Ensure that the reasons given to bidders provide a clear rationale for the scores given

Who can sue?

- PCR – economic operators – [IGT v Gambling Commission]
– [sub-contractors/parent companies]
- PA “*suppliers*” (undefined) – does this include sub-contractors?

Timing of standstill periods

- PCR – standstill letters – minimum 10 calendar days standstill period
- PA – Contract Award Notice – standstill period of a minimum of 8 working days beginning on the day on which the CAN is published

Timing of the automatic suspension

- PCR [reg. 95]– CA must refrain from entering a contract if notification has been received that a claim form has been issued and a contract has not been entered into
- PA [s.51] – CA is prevented from entering a contract if a claim is started and notification is received before the end of the standstill period
- How might Assessment Summaries and Contract Award Notices be timed? Close result or contentious tenderers?

Other likely areas of challenge under the PA

- PCR - Other than challenges to modifications [PCR 72], post award decisions are matters of private law
- PA - Will the drive for greater accountability for the performance of public contract create fertile grounds for disputes?
- Significant (new) emphasis on the management of public contracts [s1 – “*covered procurement means... management of the contract.*”]
- Post award management decisions are likely to be subject to challenge

Summary and Conclusions

- Challenges to evaluation outcomes – mostly more of the same
- Will new areas of challenge emerge in the contract management phase of the process?

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