PROCUREMENT LAWYERS' ASSOCIATION

ISSUES IN EVALUATING PUBLIC SECTOR TENDERS

JUNE 2010

ABOUT THIS PAPER

The Procurement Lawyers' Association (PLA) is an organisation which exists to bring together all procurement lawyers, whether in private practice or in-house, public or private sector and including solicitors, barristers and academics based in the UK and elsewhere.

The PLA aims to represent, promote and strengthen procurement law expertise in a number of ways, including through in-depth discussion of procurement law issues.

A wide range of contracting authority requirements are subject to public procurement and economic operators bidding for public contracts operate in a variety of economic markets. Reflecting this and also the breadth of discretion available to contracting authorities in administrative law terms, there is a broad variation in the approaches taken by UK contracting authorities to the evaluation of bids in public procurements.

The PLA has prepared this paper to comment on matters such as lawfully establishing and applying evaluation criteria, most economic advantageousness in tenders, the evaluation of pricing proposals and risk adjustment. Given the importance of transparency to ensuring fairness in public procurement, it also considers what information should be disclosed to bidders. This paper does not, however, consider the current position on social criteria as this topic is under review by the European Commission. If appropriate, once the results of that review have been published, the PLA may issue an addendum to this paper or may convene a separate working group to consider relevant issues.

The PLA hopes this Paper clarifies some areas of legal uncertainty in relation to evaluation and assists in the development of best practice across public procurements and promotion of effective and fair competition for public contracts.

1. INTRODUCTION TO EVALUATION

Evaluation of bids is arguably the most complex and significant part of any procurement process and central to evaluation is the formulation and application of suitable award criteria. The proliferation of complaints, both formal and informal, from bidders reflects the importance of award criteria and the difficulties they frequently produce. Contracting authorities face a delicate balancing act when weighing up the need to ensure legal compliance, particularly the requirements of transparency and non-discrimination, with the need to retain sufficient discretion to achieve the best outcome for their organisation. The ECJ's decision in the *Lianakis* case[1], which is discussed in more detail later in this paper, brought these competing tensions into sharp focus, and many contracting authorities find it problematic to formulate criteria which will best reflect the complexities and risks of procurement in the twenty-first century.

This paper examines some of the key issues in this difficult area. Whilst it is recognised that the use of selection criteria (that is, criteria used to select bidders to invite to tender) also poses difficult questions, to limit the scope of the paper we focus primarily on award criteria. The terms "evaluation" and "award" are used interchangeably throughout this paper.

1.1 What are "award criteria"?

A sensible and straight-forward interpretation of the term is that the "award criteria" are the basis for awarding a contract, which are founded on the purchaser's objectives in carrying out the procurement.

Despite the fact that evaluation criteria are a crucial element of the procurement process, there is no clear definition of the term either in the procurement Directives or the Public Contracts Regulations 2006[2]. Nonetheless, taking the Directives and Regulations as a logical starting point, Directive 2004/18 states that:

> "*Contracts should be awarded on the basis of objective criteria which ensure compliance with the principles of transparency, non-discrimination and equal treatment and which guarantee that tenders are assessed in conditions of effective competition.*"[3]

The Regulations allow for two bases of award: lowest price or most economically advantageous tender from the point of view of the contracting authority. The latter is commonly referred to as "MEAT". For the 'most economically advantageous tender' basis of award[4] the Regulations implement Article 53(1) of Directive 2004/18 and require contracting authorities to use:

---

[1] *Lianakis v Dimos Alexandroupolis* (Case C-532/06)

[2] In the interests of simplicity all references in this paper are to the Public Contracts Regulations 2006 as applicable to England, Wales and Northern Ireland. However the issues discussed apply equally to the procurement regime in Scotland under the Public Contracts (Scotland) Regulations 2006.

[3] Recital 46 to Directive 2004/18/EC and Recital 55 to Directive 2004/17/EC

[4] This paper assumes the MEAT basis of award to be the favoured approach in the majority of procurements where issues regarding evaluation criteria arise.

"*…criteria linked to the subject matter of the contract to determine that an offer is the most economically advantageous including quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after-sales service, technical assistance, delivery date and delivery period and period of completion*."[5]

For a tender applying the MEAT criteria, this list is not exhaustive, as has been confirmed by case law. Nonetheless contracting authorities must only apply criteria which go to evaluating which tender is the most economically advantageous. Case law confirms that, provided they meet the restrictions in the Directive and the requirements of the general principles under the Treaty on the Functioning of the European Union (the "Treaty"), contracting authorities have discretion to choose those criteria they wish to apply and that they may validly assess issues which go beyond the purely economic. As the court noted in *McLaughlin & Harvey*[6], the language of Article 53(1)(a) (and therefore Regulation 30(2)) indicate that the list set out therein is by way of example, and so not every type of criterion need be used in every tender.

Award criteria should be objective: if interpreted strictly, it is likely that the only permissible award criteria would be quantitative (e.g. technical compatibility, price) whereas it is common to see qualitative award criteria applied (e.g. cultural fit, compliance with the authority's strategic aims or environmental objectives). Whilst it is possible to evaluate these qualitative criteria objectively, it is undeniable that to do so can be problematic.

The well-known *Lianakis* case stresses the distinction between selection and award criteria, emphasising that award criteria must be used to look at the tender, not the tenderer and that (unless evaluating by reference to lowest price) award criteria should be used to identify the most economically advantageous tender. Section 3.1.2 of this paper discusses the issue of experience as a criterion in greater depth.

Unsurprisingly then, it is clear that the definition and use of criteria must be considered within the framework of the overarching Treaty principles and that a nexus between the criteria and the contract in hand is essential.

Perhaps the most succinct comment on the meaning of award criteria can be found in paragraph 42 of *McLaughlin & Harvey*, paraphrased below:

"*In the absence of any definition of criteria or sub criteria in either the European Directive or the 2006 Regulations one looks to the ordinary meaning of the word. According to Chambers 20th Century dictionary a criterion is a means or standard of judging; a test; a rule, standard or canon…The Shorter Oxford Dictionary defines it as a canon or standard by which anything is judged or estimated or, a characteristic attaching to a thing, by which it can be judged or estimated.…They are being used to evaluate the tender bids i.e. to judge them*."

---

[5] Regulation 30(2) of the Regulations and 30(2) of the Utilities Contracts Regulations 2006

[6] *McLaughlin & Harvey Ltd v Department of Finance & Personnel,* [2008] NIQB 91

2. EVALUATION OF LOWEST PRICE AND PRICE ASPECTS OF MEAT

2.1 In terms of a lowest price evaluation, what should be evaluated?

When evaluating tenders on the basis of lowest price, contracting authorities should award the contract to the tenderer offering the lowest tender price(s) for a compliant bid (subject to rules on abnormally low bids, noted below). The "lowest tender price" refers to the prices set out in the tender, rather than the actual cost of those prices to the contracting authority.

Therefore, in the event that the contracting authority is intending to apply an "affordability model" or similar to the tendered prices, (e.g. feed the tendered prices into a model setting out the likely volume of works), then this should be stated clearly in the documents and we would recommend that the model is provided to the tenderers in order to allow them to price their tender in line with the likely volumes and assumptions made by the contracting authority.

In *Clyde Solway v Scottish Ministers*[7], the contracting authority required bidders to price a number of quantities. The contracting authority then applied "sensitivity analysis" to eliminate possible distortions from the pricing of individual items in tenders. The failure to disclose that this was how price was to be evaluated is no longer consistent with the current Regulations. However, the case does confirm the principle that a contracting authority has a wide discretion over how it assesses price, as long as that discretion is exercised "fairly".

The complexities of how to evaluate price set out in the paragraph above are illustrated in *Siac v. Mayo*[8]. Here the contracting authority's consulting engineer advised that Siac's pricing method gave too much room for uncertainty and was likely to result in poorer value for money than the alternative tender which was accepted. The Irish Supreme Court confirmed that this was permissible, as long as:

- the lowest ultimate cost was clearly identified as an award criterion; and
- the assessment of lowest overall cost was based on objective factors that are regarded in professional practice as relevant and appropriate to the assessment made.

In line with current case law, the criteria used to identify how the contracting authority will assess which tender offers "lowest overall cost" must now be disclosed in the invitation to tender.

2.2 How should abnormally low bids be treated?

Regulation 30 allows a contracting authority to reject abnormally low bids. An abnormally low bid is one that raises a suspicion with the contracting authority that the tenderer will not be able to perform the contract as proposed, due to the price or terms offered. Furthermore, the contracting authority may also reject tenderers that are low because the tenderer has received unlawful state aid.

---

[7] *Clyde Solway v. The Scottish Ministers* [2002] SLT 1455

[8] *Siac Construction Limited v. County Council of the County of Mayo* (Case C-19/00)

Notwithstanding the right to reject an abnormally low bid, before it does so, the contracting authority must follow a process that allows the bidder to provide explanations as to the facts behind its bid. This was supported by the ECJ in *Impresa Lombardini*[9] where it ruled that an *inter partes* procedure must be run to establish the facts prior to rejection. It went on to provide that such a procedure must involve a "proper exchange of views" and that the contracting authority should ensure that the explanations provided by the tenderer are useful and complete so that it has the full facts in front of it when deciding whether the tender is abnormally low. The ECJ has confirmed that this investigative process needs to be followed in all circumstances, and a contracting authority should not reject a bid for being abnormally low even if the tendered prices are so low as to be absurd.

Details of the *inter partes* procedure are set out at Regulations 30(6) and (7). Under the required process, the contracting authority must write to the tenderer, requesting an "explanation of the offer or of those parts [of the offer] which it considers contribute to the offer being abnormally low". This means that even if part or parts of the prices do not give rise to a suspicion that they are abnormally low, the contracting authority must investigate those parts that do (and those abnormally low prices often skew the tender prices overall). Therefore, if the contracting authority has asked the tenderers to price a financial model which breaks down the overall contract sum, the contracting authority may investigate some of those rates (in the event that such rates seem abnormally low) even if, overall, the tendered sum is not deemed to be abnormally low.

When a contracting authority requests an explanation of the abnormally low price, it may request the information set out in Regulation 30(7), e.g. the economics of the methods of construction, exceptionally favourable conditions available to the tenderer for the provision of services/supplies/carrying out of works and so on. The list set out in Regulation 30(7) is not exhaustive and a contracting authority is able to ask for procurement–specific information in order to obtain the fullest explanation possible. Such requests should be made in writing. Only after the contracting authority has taken account of the information provided and verified that, in light of such information, the bid (or those parts of the bid that it has investigated) remains abnormally low, can the contracting authority proceed to reject that bid.

Regulation 30(8) sets out the *inter partes* procedure to follow in respect of those bids that are deemed to be abnormally low due to the presence of illegal state aid.

2.3 Must price always be an award criterion when evaluating tenders on the basis of MEAT?

Our conclusion is that price should be an award criterion when evaluating MEAT on the basis of judicial comment as follows:

In *Henry Brothers (No 2)*[10], Coughlin J. said

> "*It seems to me that, unless the cost or price of the relevant goods or services is fixed…, it would be very difficult to reach any objective determination of what was or was not economically*

[9] Case C-286/99

[10] *Henry Brothers v Department of Education for Northern Ireland (No. 2)* [2008] NIQB 105

advantageous without some reasonably reliable indication of price or cost in relation to which other non price advantages might be taken into account".

He quoted HH Judge Humphrey Lloyd QC in Harmon[11] where he said that "*Price is the starting point for the exercise*".

Henry Brothers concerned a framework agreement for building and modernising schools. In evaluating price, the authority considered just a contractor's preliminaries (overheads costs) and profit percentages, based on different sizes of project. The cost of the actual work for each project was to be established as and when individual projects were identified and let through the framework agreement. The judge said that this was a breach of the Regulations. There had to be some means of establishing the expected overall amount payable under each tender, for example by getting contractors to price an "example project".

We understand that *Henry Brothers* is subject to appeal. However, Coughlin's comments here seem logical. It is difficult to see how it is possible to judge the most economically advantageous tender without balancing the quality and delivery elements of the tender against the cost/economic value of such elements.

In most cases, this will involve assessing and evaluating price alongside the other award criteria, but this is not the only way in which price can be taken into account. It is also possible for a contracting authority to fix a price and invite tenderers to bid what they can provide in return for that price. In this case the price will be fixed across all tenderers, so will not form part of the award criteria. Outside of this specific situation though, which will be rare, price should always form part of the award criteria in a MEAT competition.

2.4 Methods of evaluating price

There are many different types of "price". Examples include:

- a schedule of rates contract with a large number of individual prices for different jobs;
- a target cost contract, where it is the target and the pain/gain sharing mechanism that are evaluated; and
- a PFI contract where "availability" and "performance" payments are evaluated within an overall payment mechanism.

Price can also involve a number of different aspects. These could include price certainty, internal costs and the other elements of price set out in paragraph 2.5 below. For this reason, there is no single means of evaluating price. There are a number of different models in use in the UK, and many attribute the highest score to the lowest price. The aim of this paper is not to advocate any particular method of evaluation and therefore we have only included three different price evaluation models below to provide a flavour of those in use as at today's date and to address some of the likely issues in

---

[11] *Harmon CFEM Facades Ltd v Corporate Officer of the House of Commons* [1999] All ER 1178

relation to the same.

2.4.1 The "standard differential" method

A common way in the UK of evaluating price is via the use of a "standard differential" method. This assumes that the lowest price (excluding abnormally low bids) will attract full marks. The other bids are then ranked comparatively to that lowest bid.

There are a number of options in UK procurement practice for implementation of this method. The most common options are:

- to give each tenderer 100% of the available marks less the percentage by which their tender is more expensive than the lowest (e.g. if the lowest bid is £100,000 and the next lowest bid £108,000 that bid would score 92% of the available marks);
- to give a fixed percentage of the available marks to each ranked bid (e.g. 100% for the lowest bid, 80% for the second lowest bid, 60% for the third lowest bid, 40% for the fourth lowest bid etc); or
- to give a fixed percentage of the available marks for tenders within a specified percentage of the cheapest (e.g. if the lowest tender is £100,000, tenders within 5% of that score 90%, and within 10% of that score 70%, so that bids at £102,000 and £104,000 both score 90% and one at £106,000 scores 70%).

We understand that the second and third methodologies are currently the subject of a challenge. Furthermore, some commentators criticise this method as being non-transparent, as the scores for each bidder will depend on a price that has not been identified at the point of tender (i.e. the lowest price).

2.4.2 The "mean average" method

A further method is the "mean average" method that is implemented as follows:

The price element of the quotation will be scored as follows:

(a) Calculate the mean price of the bidding suppliers (e.g. sum of three year prices).

(b) Calculate the % difference between the actual price and mean (e.g. Three Year Price – Mean Price x 100).

(c) The mean is given the value of 50.

(d) One point is deducted from the score of each bidder for each percentage point above the mean.

(e) One point is added to the score of each bidder for each percentage point below the mean (e.g. % Difference x –1 (Round

to nearest whole number) + Mean Value (50)).

(f) Multiply price score by the agreed weighting for price (eg. Points Score x [30]%)

However, you will see at step (e) that the lowest price will attract the most marks and therefore in this example the differential is benchmarked from the mean score rather than the lowest price, but is likely to achieve the same result (ie the lowest price will receive the highest number of points). It is our view that this method of evaluation is subject to the same criticisms as those in paragraph 2.4.1, in that the number of marks depends on the spread of bids received by the contracting authority.

2.4.3 "Fit to the budget" method

The “fit to the budget” method is based on the maximum price the contracting authority is willing to pay for a particular contract. The contracting authority should come up with this maximum price after having estimated the market price for the works, services or supplies involved, taking into account the contractual conditions attached (e.g. delivery date, quality, warranty features, etc) and its own budgetary constraints.

This method is considered to be very transparent, not only because the scores of each bidder will depend on a price that has been identified and already disclosed by the contracting authority (i.e. will not depend on future unforeseen tender elements, such as the lowest price), but also because the maximum price the contracting authority is willing to pay gives bidders an additional indication of the relative importance of price as an award criterion when evaluating MEAT.

If the contracting authority sets a maximum price which is higher than the prevailing market price, that means it is willing to pay more than the “average price” for that particular contract, which should be the result of giving a relative higher importance to other criteria such as quality. On the other hand, if the contracting authority sets a maximum price which is lower than the prevailing market price, that means it is only willing to pay a relatively smaller amount for that particular contract, which should be the result of considering price the most important of the MEAT criteria.

This method assumes that the maximum price will attract zero marks and all bids above this maximum price shall be excluded. Indeed, this maximum price acts as a “competition cap”: bidders compete with each other for the best price score below that cap, i.e. bids are ranked comparatively to that maximum price. The ranking system can be implemented in many different ways, for example by inverting the “standard differential” method mentioned at paragraph 2.4.1 above: using the maximum price instead of the lowest price and 0 marks instead of 100.

The maximum price can also be combined with the optimal price that the contracting authority considers to be ideal for a particular contract, which puts pressure on the bidders to make an effort to reach that optimal price. In this case, a simple equation is usually used: Si = (Mp – Bp / Mp – Op) x 100,

where

Si = the score each bid will be given

Mp = maximum price (previously disclosed)

Bp = bid price

Op = optimal price (previously disclosed)

100 = 0 to 100 scoring scale

This means that that the maximum price will attract zero marks and the optimal price will attract 100 marks. Furthermore, the contracting authority may decide whether to give 100 or +100 marks to bids whose prices are even lower than the optimal price.

2.5 What other elements of price can you take into account?

In terms of arriving at a price or prices, a contracting authority may ask bidders to provide additional information, over and above unit rates or a total contract sum, as follows:

- Volume discounts (either inter-lots, or over a specific duration of time for repeat work/orders etc.).
- Whole life costings (which should be considered alongside original construction or implementation costs to provide a complete picture of the cost of the procurement to the client.) In *Firebuy*[12] the court held that it is possible to judge the overall cost to the contracting authority when assessing price, as long as this is made clear in the tender documentation. This could also include potential TUPE costs[13].
- The cost of any likely variations and the tenderer's approach to elements that are incapable of being costed at the point of tender (i.e. because they have not been designed or fully specified).
- In the event that the level of inflation for the duration of the contract is not fixed under the contract terms, the cost of any inflationary increases or decreases may be evaluated at the point of tender in order to assess the impact of such factors.

2.6 Transparency obligations

Notwithstanding the elements of price that a contracting authority chooses to evaluate, it must ensure that its preferred method is set out in the tender documents and described to bidders in sufficient detail to allow each bidder to interpret it in the same way and to allow them to take it into account when preparing their bids. This includes any "reality" checks or "affordability" calculations that may affect the outcomes of the evaluation process. In other words, a contracting authority needs to ensure that it sets out clearly in the tender documents any assumptions or models that it intends to use in the

---

[12] *Lion Apparel Systems Ltd v Firebuy limited* [2007] EQHC 2179

[13] See *R v Portsmouth Council ex Bonaco Builders* (81 BLR 1, Judgment of 6 June 1995) which related to redundancy costs and *Europáikì Dynamikì v Commission* (Case T-345/03)

evaluation process that could have the effect of altering a bidder's approach to the pricing of its bid.

So overall, we can conclude as follows:

- The "lowest tender price" refers to the prices set out in the tender, rather than the actual cost of those prices to the contracting authority.

- Contracting authorities should undertake an investigation of abnormally low prices prior to rejecting them in order.

- Evaluation of MEAT criteria should include an evaluation of price and should not be limited to quality/non financial criteria.

- There are different methods available to contracting authorities in order to evaluate price and different elements of pricing information that may be taken into account. The public procurement Regulations do not prescribe any particular method.

- Nevertheless, we would recommend that a contracting authority provides a comprehensive and clear description of the methodology it is seeking to adopt for the evaluation of bid pricing information and sets out in the tender documents any assumptions or models that it intends to use in the evaluation process that could have the effect of altering the bidder's approach to the pricing of its bid.

3. EVALUATION OF NON-PRICE ELEMENTS OF MOST ECONOMICALLY ADVANTAGEOUS TENDERS

3.1 What may be taken into account in setting MEAT criteria?

3.1.1 Compliant criteria

The first point of clarification of what may constitute the MEAT criteria is set out in Recital 46 to the Directive. This states that:

> "…*Where the contracting authorities choose to award a contract to the most economically advantageous tender, they shall assess the tenders in order to determine which offers the best value for money. In order to do this, they shall determine the economic and quality criteria which, taken as a whole, must make it possible to determine the most economically advantageous tender for the contracting authority. The determination of these criteria depends on the object of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the object of the contract, as defined in the technical specifications, and the value for money of each tender to be measured.*
>
> *In order to guarantee equal treatment, the criteria for the award of the contract should enable tenders to be compared and assessed objectively. If these conditions are fulfilled, economic and qualitative criteria for the award of the contract, such as meeting environmental requirements, may enable the contracting authority to meet the needs of the public concerned, as expressed in the specifications of the contract*…"

As we have seen (see paragraph 1.1 above) the Directive goes on to provide that there are two bases for a contract award – lowest price or MEAT (Article 53(1)). This is reiterated in very similar terms in Regulation 30(1) and (2) of the Regulations.

Neither the Directive nor the Regulations contains an exhaustive list of the types of factors that may constitute MEAT criteria. As is clear from the wording, the relevant factors will differ from contract to contract, depending on the object of the particular procurement in question. A contracting authority therefore has a degree of discretion in selecting the relevant criteria (on discretion, see paragraph 3.3.4 below). However, the fact that the list of criteria provided in the Directive and the Regulations is not exhaustive does not mean that every criterion is acceptable/permitted. The Directive, which dates from 2004, encapsulates the principles emanating from the prior jurisprudence of the ECJ[14] on the subject.

[14] *Gebroeders Beentjes B.V. v. The State (Netherlands)* (Case 31/87); *Siac Construction Limited v. County Council of the County of Mayo* (Case C-19/00); *Concordia Bus Finland Oy Ab v. Helsingin Kaupunki and Hkl-Bussiliikenne* (Case C-513/99); *EVN AG and Another v. Austria (Stadtwerke Klagenfurth AG and Another, intervening)* (Case C-448/01)

Those principles can be summarised as follows:

- The MEAT criteria do not have to be purely economic, but must be linked to the subject matter of the contract (*Concordia Bus).* In other words, the criteria must be directly related and proportionate to one or more contractual requirements;

- Criteria must assist in identifying the offer which is the most economically advantageous from the contracting authority's point of view (*Siac*). This comprises two main ideas:

    - selection/qualification criteria should not be taken into account when evaluating the merits of the tenders (as opposed to the qualities of the tenderers – see further below) and

    - the contracting authority has a limited discretion ("margin of appreciation") in choosing criteria which identify the most economically advantageous tender (e.g. in some circumstances the contracting authority may include environmental criteria which are not economic in nature and whose direct benefit to that authority might not be apparent);

- The criteria may not confer an unrestricted freedom of choice on the contracting authority as regards the tenderer to whom the contract should be awarded (*Beentjes, Siac, Concordia Bus, EVN).* This is in order to ensure transparency and non-discrimination.

- The requirements of transparency also mean that the criteria must be formulated to allow all "reasonably well informed and normally diligent tenderers" to interpret them in the same way and be such that contracting authority is able to verify whether a tender complies with them (*Siac*).

It is clear that these general principles leave a number of matters to be decided on a case by case basis. For example, whether a criterion is really related to the subject matter of the contract in question can only be determined once the scope and aims of the procurement are clear. So we can say that the general principles are only a starting point, and we must consider a wide range of factors in order to be able to determine whether a particular criterion is, in fact, lawful.

3.1.2 Experience as a criterion: can it ever be justified?

Whether or not a tenderer has sufficient experience to undertake the work cannot ever form part of the award criteria. Instead, this must be tested at the prequalification and selection stage. This was established back in 1998, in the ECJ's decision in *Beentjes*. Here the Court made it clear that:

> "*Even though the directive…does not rule out the possibility that examination of the tenderer's suitability and the award of the contract*

may take place simultaneously, the two procedures are governed by different rules".

(Paragraph 16 of the judgment)

This principle was confirmed in the *Lianakis* case in 2008. The case was actually about whether weighting factors and sub-criteria could be added later to the award criteria set out in the OJEU notice or contract documents. However, the Commission also argued that the Directive prevented a contracting authority from evaluating the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline as part of the award criteria. The ECJ cited *Beentjes,* before going on to conclude that:

"*'award criteria' do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers' ability to perform the contract in question."*

The decision was surprising for a number of reasons: the referring court had not raised this as an issue and there was no oral hearing or Advocate General's Opinion to discuss the point. Furthermore, the ECJ dismissed the idea that "ability to perform the contract by an anticipated deadline" could be an award criterion, even though the relevant Directive (Directive 92/5) explicitly lists "delivery date, delivery period or period of completion" as examples of possible award criteria. However, the decision does not deal expressly with whether "comparative experience" can still be regarded as an indicator of economic advantage, compared to "adequate experience".

Lianakis was followed in 2009 by *Commission v. Greece*[15]. It is worth noting that in *Commission v. Greece* the "experience" criterion referred to "*specific and general experience, in particular design work on similar projects either by consultancy firms or consultants and their scientific staff*", which was broader than in the *Lianakis* case: "*the proven experience of the expert on projects carried out over the last three years".* In *Commission v. Greece* the ECJ also decided that the criterion "*real capacity to conduct a study within the timescale planned together with obligations assumed regarding the carrying-out of other studies and the specific scientific and operational staff proposed to conduct the study in question as well as the equipment in relation to the object of the study"* failed to comply with the distinction between selection/qualification criteria and award criteria. Again, though, these are all aspects of "adequate experience" rather than "comparative experience".

This decision may be evidence of the ECJ's lack of willingness to allow any justification for the use of experience, even if linked to the subject matter of the contract. However, there is currently no decision on whether comparative experience can be used as part of the award criteria. It may be possible to argue that it should be. For example, a contracting authority may be prepared to pay a higher price for its work to be carried out by a tenderer with greater experience (especially, for example in a contract for professional services). This does not necessarily mean that a less experienced professional would fail to meet its minimum requirements for experience, just that a more

[15] Case C-199/07

experienced professional may perform better.

These kinds of judgements are the kinds of issues that ought properly to be able to be considered at contract award. It is hoped that the ECJ will clarify soon whether comparative experience may properly be considered at contract award. Clearly, this would only be appropriate where there is a genuine economic advantage to the contracting authority from employing a tenderer with more experience than the minimum experience requirements the contracting authority set for prequalification and selection. Until the ECJ has done so, it is an open question whether, and to what extent, comparative experience may properly be regarded as an aspect of economic advantage and so something that may properly be evaluated through the award criteria.

Comparative experience may also form part of the answer to questions designed to test things such as technical merit. For example, in a contract for surveying the sea bed, a question concerning the accuracy and reliability of the results might be answered by reference to the qualities and experience of the divers and other staff, as well as the qualities of the boat and other equipment. In this case the contracting authority would have directed its mind to the technical merit of the tenderer's proposals, rather than whether the tenderer has adequate experience to undertake the work.

It may also be argued that the case law does not stop a contracting authority considering the experience of the individual or team proposed for the contract in question at the award stage. This may be an important question where the ability of the proposed team member(s) may affect the value of the offer that is being put forward.

So we can conclude that:

- "Sufficient" experience can never be used as an award criterion, but may only be considered at the prequalification and selection stage;

- There are a number of scenarios in which comparative experience may nonetheless be considered relevant to the subject matter of the contract and could possibly affect the value of the offer being made by the tenderers; and

- Whether or not a court would permit comparative experience to be used in such a case is an open question.

3.1.3 References, interviews and site visits as award criteria

It is not uncommon for contracting authorities to list references, interviews and/or site visits as award criteria. But as we consider below, there is a significant distinction between award criteria and aids to evaluation. So the question arises – may such factors ever legitimately be used as award criteria rather than as aids to evaluation?

Based on the case law and general principles stated above, references, interviews and site visits may all easily be linked to the subject matter of the

contract and may well assist in identifying the offer that is most economically advantageous. However, in and of themselves, each of them, as award criteria, could be said to confer an unrestricted freedom of choice on the contracting authority.

Take, for example, an interview. If the award criterion is simply stated as "interview", and there are no sub-criteria or no disclosed marking scheme, then how may a tenderer know how its interview is to be assessed? Put another way, if a contracting authority wishes, unlawfully, to favour a particular tenderer, then the award criterion "interview" (or "performance at interview") could enable it to do so as there are no qualitative or quantitative aspects of the criterion that can be judged. Bear in mind also that the award criteria must be formulated to allow all "reasonably well informed and normally diligent tenderers" to interpret them in the same way. "Interview" as an award criterion could have a very wide range of interpretations – from simply turning up at an interview, through presenting the written bid at the interview, to amplifying, building on or otherwise improving the written bid at interview, and much more besides.

Interviews should probably be limited to cases in which they are necessary to be assessed as a separate qualitative criteria or where criteria can only be assessed by means of interview. For example, ability to work with the contracting authority may be thought to require testing in an interview where architectural services (Part A) or legal or health (Part B) services are being procured. Here, the content of the interview could be tailored to the evaluation of a particular criterion in the tender, but in this case the interview is an aid to evaluation, rather than a criterion itself (see further below). In order to assure transparency and non-discrimination, both a timely disclosure of the interview questions and keeping a record of the interviews (e.g. on tape) are recommended. In particular, the former may help to ensure equal treatment by assisting all bidders to identify the precise requirement(s) to which the interview is designed a response. Where the interview forms part of the assessment of criteria, separate marks should be identified with a scoring mechanism.

References in particular are likely to seek to determine the experience of the tenderers, rather than casting light on which offer is the most economically advantageous bid for the contracting authority. Site visits too may include at least some consideration of how the site has been used in the past or how the tenderer has performed a similar project at another contracting authority's site (i.e. experience) rather than illustrating the tenderer's proposals for the contract for which it is bidding. In light of this, in principle, references should generally be assessed at the selection/qualification stage, namely as confirmation of the bidders' experience related to the particular contract. It may occasionally be the case that references can be used as evidence of something put forward in a bid, such as the manner of delivering a particular service. If a bidder is delivering that service elsewhere a reference will back up the bidder's assertion that it can do the same in the context of the present contract. Thus, whenever they are used, references should be required solely for the verification of the technical merits of the bid. For example they may assist the contracting authority to understand how in practice what a bidder is proposing is being delivered under a similar contract elsewhere, in which case marking could be facilitated by asking referees to fill in pro-formas. In this

case, references act as evidence to support the written declarations of the bidders. So, references should not be regarded as criteria themselves, but as data provided by bidders at the request of the contracting authority to evaluate their technical ability in the light of a particular selection/qualification criterion.

Before a contracting authority considers the use of site visits in procurement the authority must consider why it wants them. This seems an obvious point but one that can be easily overlooked. It may be to verify what is said in bid documents or it may be to evaluate a criterion that cannot be easily demonstrated in a document. Again all bidders must be treated equally and so if any site visits are to be used then all bidders' sites must be visited. One possible exception may be the verification of a winning bid. In that case it may be possible to set out in the ITT that only the winning bid will be verified by a site visit. If, as a result the bid is excluded or the bids marks reduced so that the second placed bidder is now in first place, then that bid will then be verified and so on.

To summarise:

- References, interviews and site visits may well not meet the requirements of the case law to be considered as valid and discrete award criteria.
- In most situations, they may be more usefully employed as aids to evaluation provided that their use is transparent and equal treatment is facilitated.

3.1.4 Minimum standards

There is nothing in either the legislation or the case law to indicate that a contracting authority is prohibited from specifying that one or more of its award criteria are minimum standards or requiring a minimum score to be obtained in respect of one or more criteria – in other words, if a bid does not meet that standard or exceed that minimum score, it will fail and cannot win the contract. Generally, however, pass/fail criteria should only be used where the need for the criteria in question is proportionate to the performance of the contract, such as whether or not the tenderer has (or can obtain) the licence required to perform that contract.

Federal Security Services Limited v. The Northern Ireland Court Service[16] is relevant in this respect. It involved a contract for provision of ‘security and ancillary services’ and stated that ‘tenders must be fully compliant with the requirements detailed in the tender documentation’. These included holding a valid statutory security licence to provide security services, which had to be submitted with the tender submission. Although this was referred to as a "mandatory" requirement, "mandatory" was not defined; the terminology which went alongside the "mandatory" requirements was unclear as it asked tenderers to state ‘how and to what extent the mandatory requirements will be met’; and the 'mandatory' requirements were to be subjected to a variable scoring exercise and a weighting exercise.

The court found that the contract award criteria were not expressed in such a manner as to allow all reasonably well informed and normally diligent

[16] [2009] NIQB 15

tenderers to interpret them uniformly as regards the requirement for a security licence. The contract documents could have failed to convey to the tenderers that the 'mandatory' requirements were of an absolute nature. The judge stated that:

> "*if the requirement of possession of a valid, current security services licence had been expressed unambiguously as an absolute standard, a precondition to further evaluation of tenders, without which a tenderer would be disqualified or declared ineligible, this* could *have affected the terms in which tenders were formulated*".

(Paragraph 54 of the judgment)

The case and judgment are interesting in that the licence required was requested at ITT stage, not at pre-qualification stage, but the judge considered that the licence should have been required as a precondition to further evaluation of tenders. So the judge considered that mandatory award criteria should be applied first, to rule out non-compliant bids, before applying the remaining award criteria to the remaining (compliant) bids. This could imply that the requirement for the licence was actually more in the nature of a selection criterion (going to the ability of the tenderer) rather than an award criterion. If this is so, then the question arises as to whether pass/fail criteria may ever be used at the award stage, or whether, in practice, they will only ever be relevant at the pre-qualification stage.

The answer may depend on the precise criterion in question. Any sort of criterion which goes to ability to perform cannot be used at award stage. But it is acceptable for a contracting authority to conceive of some minimum standard for the bid itself (not the bidder) – for example, any bid which costs greater than £x fails to meet the minimum standard. In such a case, it seems clear that the criterion will be lawful, provided it is made clear in advance to all tenderers that the criterion is mandatory.

What are the options when no bidder meets the minimum standards? It is clear that a contracting authority may accept a variant bid, provided it has indicated in its OJEU notice that variants will be accepted, but what about a non-compliant bid? For reasons of equal treatment, the answer (at least on the basis of the jurisprudence) would appear to be no. In its judgment in the *Storebaelt* case[17], the ECJ stated that:

> "*observance of the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers*".

This raises the question of whether it would be permissible to disregard the mandatory or minimum criteria that all bidders have failed to meet, as in that case the contracting authority would be treating all bidders in the same way. This seems unlikely. There may have been other potential bidders who chose not to submit a tender because they knew they would not meet the minimum standards, and these would be disadvantaged by the contracting authority's subsequent disregard of the minimum criteria (unless the contracting authority

---

[17] *Commission of the European Communities v Kingdom of Denmark* (Case C-243/89)

were to re-invite them to submit a bid, or even rewind to the OJEU stage and republish an OJEU notice without including the minimum criteria). More practically, however, it is unlikely to be in a contracting authority's best interests to disregard something that it has regarded as a mandatory or minimum standard, at least without giving serious consideration to the issue and even perhaps rethinking the basis of its procurement. If, for example, the minimum standard is that the contract price shall be no more than £x, and all offers come in at greater than £x, the contracting authority may have to give thought to whether it can in fact afford what it set out to procure, or whether it should be looking for something else, rather than just accepting that it will have to pay more than it was originally willing to pay.

It may be possible to set minimum standards, any deviation from which is accommodated in the scoring. Clearly this cannot work when the minimum is a mandatory (e.g. a licence), but could work, for example, for "*minimum number of supplier's staff to be involved on the project*". This may allow the contracting authority to reduce the impact of the (relatively subjective) qualitative criteria, thereby increasing certainty and allowing a greater emphasis on price.

So, in conclusion:

- There is no prohibition on the use by a contracting authority of minimum standards at the evaluation stage;
- Contracting authorities should consider upfront whether any minimum standards are best required at PQQ stage or as part of the tender stage;
- If the minimum requirements truly relate to the tender, rather than the tenderer, the contracting authority should also consider at an early stage how it will deal with the situation that all bids fail to meet those minima;
- It is unlikely to be acceptable for a contracting authority to waive its minimum requirements once tenders have been invited, in the interests of equal treatment;
- Subsequent waiving of minimum requirements is also unlikely to be in the interests of the contracting authority.

3.1.5 Criteria, sub-criteria and sub-sub-criteria

It is clear from the case law and from practice that contracting authorities may choose to break down headline award criteria into sub-criteria and it may be the case that those sub-criteria are further broken down into sub-sub-criteria. Provided the sub-criteria and the sub-sub-criteria comply with the principles already discussed above, and provided they are disclosed to the tenderers in advance (see further below), this is perfectly legitimate.

Whether a factor constitutes a sub-(sub-)criterion or an aid to evaluation is considered further below.

3.2 What must be disclosed to bidders prior to the evaluation of bids on MEAT criteria?

3.2.1 Obligation to disclose criteria

Under both the Directive and the Regulations, a contracting authority is obliged to set out in either the OJEU notice or the contract documents (or in the case of competitive dialogue, the descriptive document) the award criteria and the weightings (or range of weightings) given to each criteria or, if weighting is not possible, the criteria in descending order of importance (Article 53 of the Directive and Regulation 30 of the Regulations). This obligation arises from the principle of transparency and equal treatment i.e. all bidders should know the basis on which their tenders are being judged and all tenders should be judged on the same transparent basis. This obligation has been stressed by the ECJ a number of times[18].

The legislation is silent, however, on the question of disclosure of sub-criteria (and even sub-sub-criteria). Logic would dictate that the same principles would apply – particularly the principle of transparency. But it may be the case that the sub-criteria are only developed after the OJEU notice has been published, or the contract documents have been sent to bidders. In those situations, what are the limits on the obligation of the contracting authority to disclose the sub-criteria?

In *Lianakis*, the ECJ was clear on this point. It stated that:

> "*According to the case law, [the Directive]….and [ ] the ensuing obligation of transparency, requires that potential tenderers should be aware of all of the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prefer their tenders…..*
>
> *Therefore a contracting authority cannot apply weighting rules or sub-criteria in respect of the award criteria which it has not previously brought to the tenderers' attention.*"

(Paragraphs 36-38 of the judgment).

Therefore it is clear that if a contracting authority is going to measure a tender by reference to any sub-criteria, those sub-criteria must be disclosed before tenders are prepared.

What about sub-sub-criteria? Here, the distinction between award criteria and aids to evaluation may become blurred. If a sub-criterion is broken down still further, and the sub-elements are all yardsticks by which the tenders are to be measured, then it would appear that they should be disclosed as award criteria. If, however, a sub-criterion is broken down but the elements into which it is broken are not yardsticks for judging, but simply ways to help interpret the meaning of the sub-criterion in question, then arguably they are marking schemes or aids to evaluation, rather than award criteria. On whether these need to be disclosed, see further below.

[18] See for example the *Beentjes* and *Concordia Bus* cases.

Some criteria may be disclosed but may be ambiguous. If it becomes apparent that criteria have not been understood in the same way by all tenderers, and that the apparent ambiguity was reasonable, the contracting authority should issue clarification and allow corrections to be made to all bids that have already been submitted. The matter should ultimately be determined by reference to the basic principles of fairness and transparency and how they apply to the particular facts.

3.2.2 Obligation to disclose weightings

As we have already seen, the Directive and Regulations impose an obligation to disclose the weightings (or range of weightings) attached to the award criteria in the OJEU notice or contract documents, where weighting is possible. It is clear also that a contracting authority is free to determine the weighting (or range of weightings) attached to each criterion (provided that it is able to make an overall evaluation of the criteria in order to identify the most economically advantageous tender)[19]. In the *ATI* case[20], the ECJ considered the situation where weightings were applied after tenders were submitted but before they were opened. It considered that where:

- the decision applying such weighting altered the criteria for the award of the contract set out in the contract documents or the contract notice; or

- the decision contains elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; or

- the panel evaluating the tenders adopted the decision to apply weighting on the basis of matters likely to give rise to discrimination against one of the tenderers,

this would be unlawful.

The court in *Letting International*[21] subsequently built on this, stating that weightings for sub-criteria did not only have to be disclosed if knowledge of the weightings *would* affect the drawing up of the tenders, but also if such knowledge *could* affect it. So the threshold is very easily met. It is hard to conceive of many situations in which knowledge of sub-criteria would not affect the way in which a tender were prepared. For example, if a bidder knew that "quality" were sub-divided into "number of employees dedicated to the project", "innovation in ideas" and "percentage of total weekly working hours dedicated to the project", in relation to – say – a building project, it might prepare its tender very differently than if "quality" alone was the stated criterion, which it might interpret as – say – quality of building materials, durability and value for money.

As to the question of whether criteria must be weighted in the first place, the Directive and Regulations clearly state that they must be weighted if possible in the OJEU notice or contract documents (which may include allocating a range of weightings per criterion, with a maximum and minimum), and if not then listed in descending order of importance. So the question arises as to whether, if they have not been weighted in the OJEU notice or contract

---

[19] *EVN*

[20] Case C-331/04

[21] *Letting International Ltd v. London Borough of Newham* [2008] EWHC 1583 (QB)

documents, they must subsequently be weighted in order for the bids to be evaluated and whether, if only a range was specified originally, a precise weighting must be chosen for each criterion by the award stage.

It is very difficult to imagine how a bid could be marked, if the award criteria to be applied did not themselves have weightings allocated to them. That said, it is not impossible – for example, bids could be considered against each criterion in turn and an assessment of either "fully met", "partly met" or "not met" could be applied. The bid that scored the most number of "fully met"s would be the winner. Clearly, this is a crude system and may not work for all but the simplest of procurements – however, provided it is disclosed in advance to the bidders and cannot be used by the contracting authority to unfairly rig the results of the contest, there is in principle no reason why it cannot be employed. The overarching principle therefore is that all candidates need to be able to predict how marks will be awarded by the authority in evaluating their proposal. Weightings do not therefore have to be applied if the criteria have equal relative importance, although for the avoidance of doubt it might be a good idea clearly to state that this is the case. A contracting authority which chose precise weightings when only a range was specified originally should take great care to ensure that its choice is not designed to favour a particular bidder. This can probably be achieved by finalising precise weightings as early as possible before bids are submitted and by disclosing those final weightings to all bidders.

A final question regarding weightings is whether the same criteria can be weighted differently at different stages of a tender process, particularly in the context of a competitive dialogue. OGC guidance advises that at each stage of the process, the contracting authority can evaluate the submissions using the pre-stated award criteria. No reference to changing this criteria is made, and in fact the original EC Explanatory Note on Competitive Dialogue[22] states that:

> "*It should be stressed that the award criteria (and the order of their importance) may not be changed during the award procedure (that is, at the latest after the transmission of the invitations to participate in the dialogue) for obvious reasons of equal treatment; in fact, any changes to the award criteria after this stage in the procedure would be introduced at a time when the contracting authority could have obtained knowledge of the solutions that are proposed by the different participants.*"

However, if weightings are not specified in the original OJEU notice or contract documents but listed in descending order of importance or given a range, then provided thereafter that at each stage all relevant bidders were informed of the weightings at each stage, it would be difficult to argue a breach of the Regulations. That said, it may still constitute a breach of Treaty principles if there was any indication that weightings had been manipulated at various stages to skew the result.

Allegations of discrimination may occur, as suggested in the above Explanatory Note, once into the process as solutions become clearer and the contracting authority identifies a particular solution it favours. Such

[22] CC/2005/04-rev1 of 5.10.2005

adjustment may have a disproportionate impact on bidders. As such, contracting authorities must exercise any such adjustment of weightings very carefully. They may benefit from anticipating this issue at the outset of any dialogue, and setting out in advance how they would adjust weightings subsequently, in order to avoid the allegation that weightings have been changed in favour or against a bidder. However, any consideration of making such changes should only arise where it can be clearly demonstrated that no other outcome would result in selection of the most economically advantageous tender.

On disclosure obligations, we can therefore conclude as follows:

- Award criteria must be disclosed in the OJEU notice or contract documents, ideally with their weightings, but if that is not possible then in descending order of importance;

- There is no obligation to allocate weightings or split criteria into sub-criteria, provided that this is not required to remove any ambiguity about the meaning of the stated award criteria;

- Where the knowledge of sub-criteria and weightings could affect the preparation of a tender, these should be disclosed to bidders in advance of them preparing their bids;

- The key principle is transparency, which should be borne in mind at all times by the contracting authority;

- Changing weightings in the middle of a process is probably not lawful, at least where this has not been addressed in advance of the bidding stage(s).

3.3 Evaluation methods and models and other MEAT-related issues

3.3.1 Marking schemes

There is no reference in the Directive or the Regulations to marking schemes. However, a marking scheme, or a scoring methodology, may be understood to refer to the method used by a contracting authority to evaluate bids against the pre-disclosed award criteria, using the pre-disclosed weightings. So for example, the award criteria might be price and quality, the weightings 60% and 40% respectively, and the marking scheme a text that explains what a tenderer must do to win some or all of that 60% and that 40% for its bid. The distinction between a scoring methodology and sub-criteria was considered by the court in *Letting International*. Here, the award criteria were broken down into 28 separate elements and the tenders were marked against them. As these elements were used to judge the bids, and as they were "sub-divisions of criteria" they were held by the court to be sub-criteria rather than part of the scoring mechanism. Similarly, in *McLaughlin & Harvey*, the court held that the fact that the labels "evaluation guidance" or "scoring methodology" were used should not determine the nature of the factors taken into account by the contracting authority. Here, the material used to evaluate bids were in substance criteria despite the fact that they were called "evaluation guidance".

The marking scheme may be relatively straightforward, or it may be complex and may vary between award criteria within the context of a single procurement, as was accepted by the court in the *Firebuy* case. In that case, the court acknowledged that the contracting authority has the discretion to decide what scoring methodology to apply to its procurement and would only interfere if that decision is "manifestly wrong". Using similar logic, it would seem clear that a contracting authority has no obligation to use a marking scheme or scoring methodology if it not required in a particular case (although doing so will always be useful for the purposes of providing debriefs and ensuring protection against unequal treatment).

However, if a scoring methodology is used, does it have to be disclosed? Consistent with the principle of transparency and the rules on disclosure of criteria and of weightings (see above), a scoring methodology should be disclosed which, if known in advance by tenderers, could have affected the preparation of tenders (see *Letting International*). That said, the court in *Firebuy* did not find it necessary for the contracting authority to have disclosed the scoring methodology as the methodology used did not affect the weightings that applied. The court did not refer to the principle of transparency or the possibility that disclosure could have affected the tender preparation. Perhaps these two cases can be reconciled by considering that, if all the criteria and weightings are disclosed (as they were in *Firebuy,* but not in *Letting International*), then it is a question of fact as to whether disclosure of the scoring methodology could change the way in which tenderers prepare their tenders: if so, the methodology must be disclosed.

3.3.2 Aids to evaluation

We have already considered whether interviews, references and site visits can legitimately be used as award criteria. If they are not used as criteria, can they nonetheless play a part in evaluation bids, as aids to evaluation? This would seem to be a more appropriate use. For example, to score the award criterion "Ability to work with the contracting authority", one aid that might be used is to meet the tenderers' personnel at an interview. There is no case law indicating that the manner in which aids to evaluation will be handled must be disclosed by the contracting authority, although by extension of general principles, if disclosure could alter the preparation of tenders, it can be assumed that disclosure would be required.

What should be the consequence of the submission of references which do not back up a bidder's submissions? A discounted mark or even exclusion (when there is a sufficiently serious lack of evidence) seems to be the answer. What should the contracting authority do when a referee does not provide a reference? Taking into account that this situation is out of the bidder’s control, it seems adequate for the contracting authority to accept an “equivalent” piece of evidence or, ultimately, to accept the bidder’s word (which may fall under the false declarations provision).

3.3.3 Linear and non-linear evaluation models

A linear model is one in which each of the award criteria has a linear relationship to each of the others. This means that each criterion is given a weighting or maximum number of marks, the bids are all marked against each criterion, and the total number of marks are added up to produce a single overall score for each bid. This is probably the most common way in which a contracting authority will approach the evaluation stage of its procurement, and it is perfectly legitimate. However, there are at least two potential weaknesses in using a linear model:

- Weightings alone may not adequately represent the relative importance of the award criteria to each other or the objective importance of each of them, particularly where an award criterion is only allocated a very low weighting (or number of marks). For example, where a criterion is only allocated 5% of the total marks, bids which differ wildly on that criterion cannot receive very different scores for that criterion and thus performance on this aspect will have limited impact on the overall evaluation of the bids;

- A contracting authority may be prepared to pay reasonably well for a bid that meets its requirements, but may not be prepared to pay that bit extra for an exceptional bid. A linear model does not take necessary account of this.

A non-linear model, by contrast, can permit the contracting authority to take account of the different considerations that apply to each of its award criteria and to mark bids in a slightly different manner against each criterion. *Firebuy* makes it clear that this approach is lawful and that it may well assist a contracting authority to achieve the best possible result from the procurement process.

3.3.4 Exercise of discretion

A contracting authority will have numerous opportunities to exercise its discretion throughout a procurement – for example, in setting award criteria (subject to the general principles discussed above); the format in which it requests responses; the aids to evaluation it uses and so on. The courts have made it clear that, provided that a contracting authority acts lawfully, they will only interfere in the exercise of discretion if the decision taken by the contracting authority is manifestly wrong[23].

Nonetheless, a contracting authority remains bound, when exercising its discretion to observe the general Treaty principles that underpin the procurement law regime. One question that arises as a result of trying to reconcile the ability to exercise discretion with the need to observe these principles is whether marking can ever be discretionary. For example, a contracting authority may wish to provide that a tender *may* be rejected if it scores below x on a particular aspect, but the contracting authority reserves the right not to reject that bid if it chooses. Alternatively the authority may wish to set thresholds below which bids will be rejected, but vary those thresholds downwards if it so chooses.

Allowing for the discretionary rejection of bids below a threshold, or the discretionary acceptance of a bid which fails to meet a threshold, may give rise to concern that the authority has not acted impartiality. A contracting authority which makes either of those discretionary decisions after having opened and evaluated the tenders risks unfairly favouring one/some bidders over others. It may give the contracting authority an "unrestricted freedom of choice" as to which bid is successful. On the other hand, it has been held that a contracting authority has some discretion in accepting late tenders, particularly in circumstances in which the contracting authority is itself at fault (although possibly only where the authority expressly reserves to itself this discretion, making all bidders aware it has done so). It must be accepted that contracting authorities may lack expertise in the subject matter of the procurement, and it is unlikely that some limited discretion would be held unlawful, if reasonable grounds for its exercise were set out.

3.3.5 Adjusting for risk

In sophisticated models, risk will be assessed by any of a number of standard economists' methods of trading off risk against return. In complex procurements expert advice will be available. Most complex contracts will have a "risk matrix" which should direct tenderers to the section of the assessment in which their responses will be taken into account in the financial model or otherwise. Not all procurements are, in practice, clear on this point, and there is sometimes a view expressed that a tenderer will substantially re-negotiate terms, such as inflation risk, without the obvious effect on price being taken into account. Clearly a sound procurement should not enable a tenderer to gain points by offering a "good" price in the price section by re-allocating some costs and risks to a more favourably marked risk matrix.

In simpler procurements a different approach may be required. The contracting authority has a degree of flexibility in the assessment process, and the judge is unlikely to interfere with the process unless there is "a manifest

---

[23] See, for example, *Firebuy* and *JB Leadbitter & Co Ltd v. Devon County Council* [2009] EWHC 930 (Ch)

error of assessment". The contracting authority has no discretion, however, where the general principles of transparency, fairness and non-discrimination are concerned.

The contracting authority may want to use a "risk" criterion, or include "risk" as part of the assessment of particular criteria. In that case it is for the contracting authority to consider how it is to be assessed, consistently with the general principles. For example, if the tender documents allowed for inflation at RPI, then there is no need to include risk in the assessment because all will be subject to the same risk. But what if one tenderer agrees, as a variant, to take the inflation risk for a slight increase in the fixed price? What happens if one tenderer is more likely to cause a delay in the completion of the project, leading to a further RPI increase?

In either case (or in any other case) the contracting authority must direct its mind to the effect of the increase or decrease in risk on the identification of the most economically advantageous tender. There is a trade-off between risk and return which may be difficult to evaluate with any precision, but, on the other hand, it may be relatively easy to see whether the approach is "disproportionate" in relation to the other criteria and their assessment.

A related issue is the evaluation of "legals" or terms and conditions. How should these be assessed? What impact should evaluation of terms and conditions have on other evaluation streams – for example if contract amendments make price less certain, how should this be fed into price evaluation? In theory the answer to these questions is clear by reference to the basic principles of procurement law, namely the requirement to identify the "most economically advantageous tender", the requirement to limit criteria to those relevant to the subject matter of the contract, and the principles of transparency, fairness and non-discrimination.

The major problems that appear to arise in practice concern the failure to evaluate changes in the terms and conditions using the appropriate criteria, and the failure to deal "proportionately" with changes, risking breach of the general principles. Marks awarded for compliance with contract conditions (or subtracted for changes) must therefore have an identifiable affect on the "MEAT" condition. Any marks must also, arguably, be "fair" and proportionate in relation to the differences that lead to different marks in other areas of the assessment. It may be "unfair" to penalise a tenderer for a minor change to the contract conditions, where a much more significant change, say to price or quality, has a smaller effect on the total score. This is not, of course, an exercise in comparing like with like, but the assessment of tenders is fundamentally an exercise in using judgment to combine different attributes, such as price and quality, and to do so "proportionately". Provided it is "proportionate" to do so, it is open to a contracting authority to indicate that any bidder who makes amendments to the proposed contract will have their bid rejected as non-compliant. Generally it should be legitimate for an authority to decide that it would prefer to work with a bidder who is prepared to accept the contract with only minor amendments to consider that this is more economically advantageous than bids with heavy mark-ups, as the latter may well change the economic balance of the contract to the detriment of the authority.

Complex procurements

Any deviation from the contract conditions proposed, if it results in an increase in the costs or risks of the project, should be taken into account directly and solely in the other areas of evaluation, and affect the scores accordingly.

If the scores of the criteria to which the desired contract changes relate are not amended accordingly, MEAT is not satisfied, and fairness undermined. For example, if the contracting authority takes the risk of a price increase in an input during the currency of the contract, which was not originally set out in the ITT, then clearly that should be reflected in the scores for price and risk. In a complex contract external advisers will have designed a model that assesses the price and the risk together to derive a final score. The model should accommodate the possibility of changes to the terms and conditions that affect either the price or the risk.

It may be that some changes are so minor that they have no significant effect on the outcome of the model, and it is important that the contracting authority checks whether this is because the change is of no material significance or whether it is an inevitable, if undesirable, consequence of the particular model used. In the former case the contracting authority may spend a disproportionate amount of time attempting to avoid an insignificant change to the contract conditions at the expense of something of greater materiality to the outcome of the project. In the latter case, a change that appears to be of significance, but fails to reveal what would seem to be an appropriate change to the scores, may result from the contracting authority having failed to give as much weight to price as opposed to the qualitative criteria as finally seems to be appropriate.

Exceptionally, there may be risks that do not fit into other categories, such as termination or force majeure provisions. Any marking of a separate criterion of "terms and conditions" that results from changes to such criteria should reflect the contracting authority's best estimate of the change to the "value" of the contract that results from the proposed change. This is not necessarily easy, but it is at least possible to address the issue by reference to the basic principles set out above.

If the contracting authority were to penalise a tenderer for their failure to accept conditions that do not affect the likely outcome of the contract, they would arguably be applying criteria unrelated to the subject matter of the contract, acting unlawfully, and using criteria that do not identify the most economically advantageous tender. This may be an aspect of the "battle of the forms" in which the parties may simply favour or be familiar with different versions of terms and conditions that are of little practical difference in the context of the particular contract. Whilst the contracting authority is, on one argument, entitled to specify the contract terms, to do so could be oppressive and unfair if the contracting authority is a "dominant" purchaser. No doubt some contracting authorities are "undertakings" and subject to the Competition Act and Articles 101 and 102 of the Treaty.

Most assessments, other than for price, require a contracting authority to mark a tender on each separate criterion or sub-criterion from, say, 0 to 10. In the case of terms and conditions, where any changes are not more properly taken into account in the other criteria, it may well be appropriate to start by giving the tenderer full marks, and only deducting marks for any shortcomings on some "proportionate" basis.

It is possible that, for example, one tenderer may accept all the terms and conditions, and another may submit a few relatively minor changes. It may not be "unfair" to give both full marks. For example, on a "proportionate" basis, the changes may suggest that, rather than giving the relevant tenderer full marks of 5, a score of 4.75 is indicated. That rounds up to 5. There is nothing intrinsically unusual or unfair about such a result when compared with the nature of the approximation involved in scoring the typical qualitative criteria, where equivalent marks may cover very different submissions.

Simpler procurements

In a simple procurement, such as grounds maintenance services, there will be no sophisticated model into which changes in some of the terms and conditions can be inserted. The contracting authority will easily have calculated the total cost of the contract, and the qualitative criteria will be unrelated to the subject matter of the terms and conditions.

In that case there may arguably be greater scope for the use of a section on “terms and conditions” encompassing risks, such as delay or inflation that have been varied by a tenderer but which cannot be inserted into a model. However, for the reasons given above, the scoring should be "proportionate" so that, for example, the cheaper supplier is not rejected simply because it was unable to supply as high professional liability insurance as set out in the terms and conditions, unless that failure is really "material" to the contract.

3.3.6 Modelling the evaluation process

What is the value of modelling the evaluation process? By modelling, we mean the process of preparing a spreadsheet or other mechanistic instrument whereby input evaluation scores can have weightings applied and weighted scores can be aggregated to produce a quantitative evaluation score, or similar mechanistic exercise. First and foremost, the benefit of modelling in evaluation may be to aid/ensure consistency in application of evaluation criteria to bids. A well-prepared model may assist the contracting authority in avoiding mistakes, in communicating a contract award decision, and during standstill. That said, it is important to appreciate that modelling may be better suited to quantitative than qualitative assessment i.e. to things that can be reduced to formulae or other mechanistic methods, rather than award criteria that require a degree of "touch and feel".

Another benefit of modelling the evaluation process and running the model in advance to ensure that it works is that it helps to avoid unforeseen problems in evaluation such as bids that are unacceptable when read in the round but which are not knocked out by the application of the evaluation criteria. This

may result when award criteria have been set without proper consideration of the possible outcomes of applying those criteria. By modelling in advance, and thereby avoiding the problem, a contracting authority avoids the difficult questions that it might otherwise have to face – for example, whether it needs to cancel the procurement and re-run it in full or in part; whether – and to what extent – the criteria can be revised mid-procurement; and whether further clarification can be requested from certain bidders without giving those bidders a second bite of the cherry.

Modelling may also avoid the situation whereby a contracting authority arrives at the end of a procurement process only to discover that two or more bidders have very similar scores with barely a hair's breadth between them. This may be addressed by setting evaluation criteria which provide a reasonable level of demarcation between different bids. This raises issues of sensitivity of the criteria and particularly relative sensitivity of different criteria. If the criteria are not very sensitive one may end up with a number of very closely scored bids and a choice between them being fairly arbitrary. An example is where criteria or sub-criteria give marks from 1 to 4. Most bids should score 3 or 4 (depending on definitions of 3 or 4), which means bidders may be very close and win or lose on a lack of concentration on a single question or a seemingly minor difference in response. On the other hand if one ends up with criteria being very sensitive, then a much greater degree of discretion and subjectivity is likely to arise in relation to allocation of marks. One route out of this may be to include a mechanism which allows evaluators to identify a group of features which make one of the leading bidders the best overall. There are issues with whether this is appropriate or transparent, or whether it can be objectively evaluated and may be very hard to formulate in a lawful manner.

However, modelling of highly complex evaluation methodologies/schemes can itself create difficulties in interpretation or communication to bidders. In particular, application of a model has the potential to go too far, so a contracting authority using a model needs to avoid the unthinking application of that model which can lead to error. If a model is created and used, then using the general principles above, if disclosure of that model could affect preparation of the tenders, the model should be disclosed to the bidders.

In summary:

- A marking scheme is the method used by a contracting authority to evaluate bids against the pre-disclosed award criteria, using the pre-disclosed weightings. It is a question of fact as to whether disclosure of the scoring methodology could change the way in which tenderers prepare their tenders: if so, the methodology must be disclosed.

- Aids to evaluation may legitimately be used. Disclosure may be required if this could change the way in which tenderers prepare their tenders.

- Both linear and non-linear evaluation models are lawful, although a non-linear model may be more appropriate for procurements where the relative importance of the award criteria cannot be properly represented by weightings alone.

- Contracting authorities have a measure of discretion when evaluating bids, which a court will only overturn if there has been a manifest error by the authority.

- Evaluating risk may be difficult, particularly in complex procurements, but the key factor is the effect of the increase or decrease in risk on the identification of the most economically advantageous tender. Marking responses on terms and conditions raises particular issues. Where any changes are not more properly taken into account in the other criteria, it may well be appropriate to start by giving the tenderer full marks, and only deducting marks for any shortcomings on some "proportionate" basis.

- Modelling the evaluation process has a number of advantages, but it is important to avoid the unthinking application of that model which can lead to error.

4. BID EVALUATION PANELS

Whatever process or procedure is being followed, bid documents will have to be evaluated by the contracting authority. This section considers the evaluation process and raises some points where problems can arise and what could be considered good practice. We begin by dealing with the relevant law before moving on to consider some specific and common issues relating to bid evaluation panels.

4.1 The relevant law

The Regulations are essentially silent as to how the bid evaluation panel should be assembled and go about its business. Of course this does not mean that the courts will stand by and let anything go.

4.1.1 Contractual obligations

The starting point is to consider whether any obligations arise out of the existence of any contract which sets out the terms by which the tender will be run. Obviously there may be express terms of such a contract, for example that the tender will be considered in a particular manner and by a panel of certain characteristics. If there is such a clause then that would be an express requirement on the contracting authority. If there is not such an express term, then are there any implied terms as to how the bid is to be evaluated?

Some guidance can be taken on this issue from the Privy Council in *Pratt*[24]. As the Privy Council noted, Pratt's reputation in New Zealand road building industry was not uncontroversial and Pratt was thought by some to practise "lowballing", that is to say, tendering a low price to obtain the contract in the expectation of being able to make a profit by aggressive claims for additional payments. At the time of tendering for the contract in question, Pratt was in dispute in relation to another road contract, the Pipiriki Contract, where Pratt was claiming $2.5m on a contract tendered at $769k. Payne Roods were the engineers on the Pipiriki contract and formed an unfavourable view of Pratt's business methods and engineering competence.

Unfortunately for Pratt, the tender evaluation team appointed to consider the tenders for the relevant scheme included Payne Roods who were involved at the Pipiriki Contract. Pratt sued the purchaser (Transit New Zealand) for damages for breach of a preliminary contract created by the invitation to tender and the submission of the tender. It was accepted that there was such a contract requiring the purchaser to comply with certain procedural obligations and to act fairly and in good faith.

The judge at first instance found that the involvement of the engineers on the Pipiriki Contract gave rise to a real risk of bias on their part. However, the Court of Appeal rejected the judge's finding of an implied term which obliged the purchaser to conduct the evaluation in a way which did not create a risk of bias. The Court of Appeal stated that this was a public law concept inappropriate to adoption in commercial dealings between parties, who were each entitled to act in their own interests. The only implied term was that the purchaser would not actually act contrary to good faith and fair dealing. The Privy Council accepted the view adopted by the Court of Appeal and which

---

[24] *Pratt Contractors Limited – v – Transit New Zealand* [2004] BLR 143

was set out by Finn J in *Hughes*[25] that the implied term:

> *"does not as such impose on [the Employer] under the guise of contract law, the obligation to avoid making its decision or otherwise conducting itself in ways which would render it amenable to judicial review of administrative action"*

The Privy Council set out its views at paragraphs 47 and 48 and it is worth quoting at length, with emphasis added:

> *47 The judge's findings of apparent bias were therefore no ground for holding Transit to have been in breach of contract. <u>It is nevertheless necessary to identify exactly what standard of conduct was required of the TET</u> [Tender Evaluation Team] in making its assessment. In their Lordships' opinion, <u>the duty of good faith and fair dealing</u> as applied to that particular function required that the evaluation <u>ought to express the views honestly held by the members of the TET</u>. The duty to act fairly meant that all <u>the tenderers had to be treated equally</u>. One tenderer could not be given a higher mark than another if their attributes were the same. But Transit was not obliged to give tenderers the same mark if it honestly thought that their attributes were different. <u>Nor did the duty of fairness mean that Transit were obliged to appoint people who came to the task without any views about the tenderers, whether favourable or adverse</u>. It would have been impossible to have a TET competent to perform its function unless it consisted of people with enough experience to have already formed opinions about the merits and demerits of roading contractors. <u>The obligation of good faith and fair dealing also did not mean that the TET had to act judicially</u>. It did not have to accord Mr Pratt a hearing or enter into debate with him about the rights and wrongs of, for example, Pipriki Contract. It would no doubt have been bad faith for a member of the TET to take steps to avoid receiving information because he strongly suspected that it might show that his opinion on some point was wrong. But that is all.*
>
> *48. Their Lordships do not consider that the Judge made any finding of bad faith on the part of Mr Taylor or any member of the two TET's. <u>There is no doubt that Mr Young was strongly of the view that Pratt's business methods and lack of competence made it unwise for Transit to engage it as a contractor. But that was no reason for him to disqualify himself from the TET.</u> Transit had paid for his expert opinion and were entitled to pay attention to it. Nor is there anything to show that the marks on which he and his colleagues agreed did not reflect a true consensus of their honestly held opinion."*

It is important to note that the *Pratt* case was argued only on contract law as the case originated in New Zealand. It therefore did not consider any obligations which may arise out of the Treaty.

[25] *Hughes Aircraft Systems International – v – Air Services Australia* [1997] 146 ALR 1

4.1.2 Fundamental Treaty obligations

The fundamental Treaty obligations include the obligation to treat all tenders equally and transparently. Also included are principles of non-discrimination, equal treatment and proportionality. Therefore in considering whether a particular process of bid evaluation or an action of a bid evaluation panel is lawful the process or action must be tested against these fundamental obligations.

4.1.3 Judicial review

Judicial review (JR) is an area of law which is of increasing relevance to public procurement practitioners. JR is the means by which the courts supervise the exercise of power by public bodies. There are three main grounds on which a JR application may be relevant to public procurement:

- Procedural irregularity;
- Irrationality; and
- Illegality

The most important ground as far as procurement is concerned is procedural irregularity.

The scope of JR is limited to reviewing the decisions of public bodies. An application must be taken promptly and in any event within three months of the date on which the aggrieved party became aware of the alleged wrong. The application must have a public law element to it, that is to say it cannot be grounded exclusively in private law areas such as contract or tort.

A procedural irregularity occurs where the statutory procedures have not been followed or where there has been a breach of "natural justice". The most basic concept of natural justice is that none may be a judge in his or her own case. This rule is applied, for example, where one of the members of the assessment panel (or a close contact) has a pecuniary interest in the outcome of a process. For example, if a public authority engineer was on an assessment panel and a firm owned by his daughter were to apply through a procurement process for work with that authority, a decision made by the engineer may be quashed.

The issue occurs not just where a member of the panel will favour a candidate but also where a panel member may be perceived to have a reason to hinder a candidate. For example, an assessment panel member who is involved in a bitter dispute with a likely tenderer would be ill-advised to place himself on the panel, despite the comments to the contrary in *Pratt*, which was argued on the implied tendering contract basis.

In the Northern Ireland case of *Watters*[26], the applicant had submitted a grant application on behalf of Belfast City Council to the respondent. The deadline was 16:00 on 28 November 2008. In the hour before the applications were to be submitted, the applicant rang the respondent on a number of occasions to advise that its computer system was causing difficulties with printing the

---

[26] *Watters v Sport NI* [2009] NIQB 71

tender documents. The respondent stated that it would not extend the deadline. In the event, the application arrived at 16:02. The application was rejected. Giving judgment, Morgan LCJ held that Sport NI had two options available to it. It could reject the application or it could allow a reduced grant. In failing to consider the latter option, Sport NI had been procedurally unfair. The decision was sent back to Sport NI for it to consider the matter afresh.

Irrationality occurs when a public body makes a decision which is taken which is "*so outrageous in its defiance of logic … that no sensible person who had applied his mind to the question to be decided could have arrived at it.*"[27]. This is a very high threshold and in practice it is very difficult to demonstrate that it has been reached. The reason for this is that very often, a decision on say the technical capacity of a tenderer will be taken by an assessment panel of suitably qualified technical professionals. Judges, trained as they are in law, are slow to intervene and overturn such a decision. It does, however, stress the importance of public authorities having suitably qualified individuals on assessment panels.

The ground of illegality, despite the dramatic overtones, contains many practical tools for those who wish to embark on a procurement challenge. For example, an assessment panel which fails to take into account relevant considerations or takes note of irrelevant considerations will likely fall foul of a judicial review challenge. This can happen all too easily. For example, in relation to a decision not to use a particular contractor, negative publicity that contractor may have received in the past will be ordinarily be irrelevant.

4.1.4 Tort of misfeasance in public office

A further, albeit less frequently used, ground for a challenge to a procurement process is the tort of misfeasance in public office. This tort is a remedy for deliberate and malicious abuse of public office and it is to be hoped that it will rarely form the basis of procurement challenges. In order to establish the tort, a decision must be shown not only to be unlawful but also that the decision maker knowingly and willingly caused damage to the aggrieved party. In practice, it is extremely difficult to prove. It is worth noting that, ordinarily, when the tort is proved against an employee or office holder, the procuring authority itself will be liable for the consequences under the doctrine of vicarious liability.

[27] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

To summarise in relation to the conduct of evaluation assessments:

A public authority when evaluating bids is under a duty to:

- act in good faith and deal fairly;
- ensure the evaluation reflects the honestly held views of the bid evaluation panel;
- treat all bidders equally;
- act in accordance with the general Treaty obligations of transparency, non-discrimination, proportionality and equality;
- ensure there are no procedural irregularities, conflicts of interest or potential for bias in the panel;
- extend a fair hearing to all tenderers;
- avoid decisions which are manifestly unfair or illogical; and
- ensure no decisions are taken in malice.

However, it does not need to act in a judicial manner, nor enter into a debate with a bidder about the rights and wrongs of its decision or ensure all members of the panel come to the exercise with no prior views about the bidders.

With that summary of the applicable law in mind we now turn to consider some specific issues that a lawyer may be asked to advise upon in a procurement process.

4.2 The members of the panel

4.2.1 Size of panel

The title here suggests there will be more than one member of the panel. Of course there is nothing in legislation that suggests that there should be more than one member of a panel. However, only having only one member adds pressure to that one person and restricts the collective knowledge of the panel to that of one person. It is not hard to see an unsuccessful bidder arguing that one score from the one specific individual involved does not give a score that truly reflects the bid.

The most common panel size in our experience is three. Certainly if a panel of three is used then the collective knowledge and experiences of the panel is more likely to give a score that fairly reflects the bid. The current draft of BS ISO 10845 on Construction Procurement provides that the minimum size of the panel is to be 3.

It is suggested that a panel should have a chairman who will ensure that notes and scores are properly recorded and kept. The chairman should also ask the panel members to confirm that they have no conflict of interest, and record the fact.

Lastly, if there is any claim of bias by a panel, then a panel made up of three individuals, instead of one, is more likely to withstand such a challenge. Particularly if the alleged bias relates to experiences of a panel member from a specific previous contract and the scores of all members are similar.

4.2.2 Qualifications and experience of panel members

The starting point must be that the panel is there to mark each bid and therefore they must be competent to mark all bids received.

Take for example a bid that contains bidders' detailed answers as to how they will programme work on a live rail track to ensure that the critical works will be completed within the specified track closures. The answers have to contain a fully resourced and logically linked electronic programme compatible with Primavera P6. Obviously there is no point even asking for such a submission unless the panel will be able to evaluate and mark the submission. Taking a separate example where a bid comprises a design for the layout of a prison; although many could try and evaluate such a design clearly it would be best practice or advisable to have prison officers involved in evaluating the layout.

However not only do the panel members need to have the specific knowledge to evaluate bids, they also have to be guided as to the rules and the scope of their permitted discretion. For example it would not be possible for panels to take into account criteria which have not previously been disclosed to bidders. Therefore all panel members must be aware of that fact and of all the criteria by which they are marking the bids. It is suggested that this is true not only of lay members, such as users, nurses, prison officers, teachers etc, but also of professional members, such as quantity surveyors, architects etc. It may be considered good practice to draft the instructions to the bid evaluation panel in advance and disclose these to the bidders.

The draft of BS ISO 10845, Construction Procurement, contains at Part 1, Section 4.2.1 a helpful Code of Conduct to which it is suggested members of a panel could subscribe.

Good practice would therefore require a panel, collectively, to have the ability and competence to evaluate and mark all bids.

4.2.3 Bias of members and conflicts of interest

There are many examples of situations that can lead to the appearance of (if not actual) bias; some are:

- Vested interests e.g. having financial or family interest in tenderers;

- Bad experience of one of the tenderers; or

- Being laid off or having been offered future employment by one of the tenderers.

As already has been discussed, all tenders must be treated equally and an decision of the bid evaluation panel could be subject to judicial review. So what can a contracting authority do to prevent a process being upset by bias or conflicts of interest?

The first rule must be that prevention is better than cure. It is suggested that all proposed members of the evaluation panel are provided with a list of bidders, including names of key personnel named in the bid documents, and asked to confirm in writing that:

- They have no known connections with any of the bidders or named individuals;

- They will not communicate with any bidder concerning the evaluation process;

- They will not accept any gifts or hospitality from any bidder; and

- They will treat any information they see as confidential.

Secondly if it is subsequently discovered (prior to award), that there does appear to be some possibility of a challenge grounded in bias, the contracting authority has a number of choices. It could:

- Consider that, on the specific facts and applying the correct test, there is no chance of bias and continue;

- Disclose the issue to all bidders and seek their agreement to continue; or

- Remove the member from the panel and if necessary remark the bids with a replacement member.

The issue of a panel member coming to the evaluation process with prior knowledge and opinions of a tenderer is considered below at paragraph 4.4.

In summary, our view on best practice for the make-up of a panel is as follows:

- A panel should be made up of a least three members.
- The panel chairman should ensure that notes and scores are properly recorded and kept and ask the panel members to confirm hat they have no conflict of interest, and record the fact.
- The panel must have the collective knowledge competently to mark all bids.
- All panel members must be aware of their role (competently to mark all bids received) and know by what criteria they are to mark the bids.
- Draft the instructions to the bid evaluation panel in advance and disclose these to the bidders.
- Proposed members of the evaluation panel are provided with a list of bidders, including names of key personnel named in the bid documents, and asked to confirm in writing that:
    - They have no actual connections with any of the bidders or named individuals;
    - They will not communicate with any bidder concerning the evaluation process;
    - They will not accept any gifts or hospitality from any bidder; and
    - They will treat any information they see as confidential.

4.3 Separate panels for separate sections

4.3.1 Some will recall times past when bids were evaluated on one criterion, price. Now of course most procurement processes involve many criteria. As we have already explored it is necessary that the bids are evaluated by panels that have the competency to do so. For a typical construction project it is not hard to imagine that competencies would be required in the following fields:

- Finance; to evaluate financial capacity including turnover, balance sheet net worth etc. This is particularly so for companies that have many divisions and trade in more than one area;
- Health & safety;
- Quality control and management systems;
- Programming;
- Quantity surveying;

- Aesthetics;
- Ease of use; and
- Environmental sustainability.

There are a number of solutions available to a contracting authority. Firstly a contracting authority could go for a large single panel that has the competency in all areas. However that has its own drawbacks, other than the length of time and cost it would take. What should panel members do when part of the bid is being considered on which they have no competency. Should they sit quietly or try to involve themselves?

The second solution is to have separate panels considering separate parts of the bid. This has the advantage that only those members with competency in a criterion are involved. A further advantage is that quality can be marked separately from price, and so the more subjective marks are awarded without the panel knowing, and possibly being influenced by, the offered price.

Even if the one large panel solution is adopted it is suggested that it is good practice for quality to be marked before price is considered.

4.4 Moderation of scores

There is more than one possible approach to the moderation of evaluation scores.

First, the panel, after working through from bid 1 to bid 15, could revert to bid 1, 5 and 10 and remark them to see if, after marking them all, they would still award the same marks or if over the course of the process they became “softer” or “harder”. Such an approach would be good practice.

Secondly, individual members of the panel could each mark separate bids and then moderate each other’s, but where this occurs then issues may arise. As a matter of good practice,the same people should mark each and every bid objectively and those scores should be incorporated into the evaluation.

Thirdly, a panel might conclude its exercise after which the marks are reviewed by a third party, who is not part of the panel. If this occurs then there is every chance of problems arising. For example, if a third party finds that marks were incorrectly allocated by the panel, does that demonstrate that the panel did not have the competency? If the panel's scores were right, then why is it necessary for a third party to get involved?

A preferable approach, where for example there is a panel, or sub-panel, of three people mark a series of bids might be that:

- Each member reads the criteria set out in the documents;
- Each member reads bid 1;
- A discussion is held on the bid, a mark is agreed and some reason for the mark are recorded, such “good on A, B and C; poor on D, E and F;

does not deal with X,Y and Z";

- Move to bid 2 and repeat;
- After the last bid is marked, return to a random selection of earlier ones and repeat exercise to see of same mark and reason apply; and
- Record marks and reasons and sign by each panel member.

4.5 Use of prior experience about specific tenderer

A problem can often arise when a member of the evaluation panel says something like:

> *"the bid document says all the right things but I KNOW that's not correct"*

Or:

> *"the bid is rubbish but I KNOW the contractor can do the work well".*

What can, or should, be done in such a situation? It all depends on what the member is actually saying.

Firstly, if he is saying it because he knows, or at least deeply suspects, the bid document to be untruthful then one set of options may be available. But often the suggestion is not that the documents are untruthful but rather that it just does not reflect the member's own experience or what he has heard the about the experience of others.

Take the untruthfulness point first. This should not be ignored. The contracting authority has the right to seek further information from a bidder and should do so to explore the allegation. This could be by use of site visits, requesting additional documents or taking up of references. Ultimately if the bidder is excluded and he then commences an action in the courts, it will be for him to show, on the balance of probabilities, that the content of his or her bid was true. If he succeeds, then the contracting authority will probably find itself liable to the bidder. This point is discussed in greater detail at point 5.1 below.

If the issue is that the bid does not represent the member's own experience or what he has heard of the experience of others, then a different approach should be taken. As before it is possible for the contracting authority to seek further documents, conduct site visits or seek references, however this is subject to the requirement for the contracting authority to ensure equalt treatment of all bidders. So it might be possible for a bidder to successfully argue that he was picked on by all this additional information being sought of him but not others. An obvious way around this is to request the information from all bidders.

It must also be borne in mind that it is not surprising that what is in a bid document might not match someone's experience. All bidders will have jobs

that ran smoothly, which may be referred to in the bid documents, and some which did not, which will not be referred to but may have given rise to the negative experience of that panel member. It must be remembered at all times that what is being evaluated is the submitted bid, based on the published criteria. Therefore if the negative experience concerns something which is not actually relevant to a criterion then it must be ignored.

In summary, where a member has reasonable grounds for believing the bid document is untruthful then the contracting authority can seek further information to explore this. The safest way to do so would be to seek the same clarification from all bidders.

In contrast, where a member simply believes the bid documents does not match his or her experience a contracting authority should be much slower to seek further information, but should mark the bid within its four corners and tell the member to put his or her experience out of mind, failing which it may be necessary for the panel member to be replaced. Undoubtedly, this is the advice any cautious adviser would give but it does not address the reality set out in the *Pratt* case, discussed above, that those involved in a particular area, by the very fact that they have experience of that area, will most likely have encountered many of the tenderers in a professional capacity in the past. This is a live area of procurement law and until such times as the courts provide further assistance any advice must reflect the current level of uncertainty.

If a problem does arise in this regard, the members of the bid evaluation panel must be reminded that they are to use their professional judgment to mark the bids against the published criteria and no matter what their previous experiences may have been, both good and bad, they must approach the task with an open mind.

Lastly, where the panel believes a bid document 'undersells' a bidder they are obliged to mark within the four corners of the bid document, and evaluate only the document.

So in conclusion we advise as follows:

- If a bid document is suspected of being untruthful the contracting authority should exercise its right to seek further information from the bidder to decide on the balance of probabilities of the bid is truthful or not. If not, it should be excluded.

- The exercise must be done in a way that treats all bidders equally.

- The bid evaluation panel must be reminded that they are to use their professional judgment to mark the bids against the published criteria and no matter what their previous experiences may have been, both good and bad, they must approach the task with an open mind.

- This is a live area of procurement law and until such times as the courts provide further assistance any advice must reflect the current level of uncertainty.

5. SPECIFIC PROBLEMS

5.1 How to deal with fraudulent or suspect claims in bids

A problem which is often faced by bid evaluation panels is what they should do if they suspect that answer information provided by bidders is simply untrue, or at best greatly exaggerated. The best answer to this, as with many procurement issues, is to think the issue through in advance of it happening.

If thought about in advance then it is possible to set out in the instructions to tender that the contracting authority reserves the right to seek further clarification or documents in relation to any submission made by a bidder. Such ability is expressly set out at Regulation 26 in relation to selection; however there is no corresponding ability expressly provided in relation to award stage. That is not to say however that such an approach would be unlawful.

The contracting authority may also build into its procedure discretion to conduct site visits, hold interviews or take up references, not for the purpose of assessing new criteria but to satisfy themselves as to the accuracy of statements made in various bid submissions.

It is submitted that the contracting authority must always bear in mind its obligation to treat all tenderers equally and therefore the safest course of action may be not to single out just the bidder over which suspicions are raised for further clarification, but to do the same for all bidders.

So we suggest that a contracting authority:

- Ensures the ITT states the contracting authority has discretion to seek further clarification or documents in relation to any submission made by a bidder, to conduct site visits, hold interviews or take up references not for the purpose of assessing new criteria but to satisfy themselves as to the accuracy of the statements made in various bid submissions; and
- Exercises this discretion in a way that treats all bidders equally.

5.2 How to deal with an incumbent bidder

Contracting authorities should have regard for the implications of one bidder under a public procurement procedure being the current service provider, supplier or works contractor. The requirements for transparency in procurement which apply generally are of particular importance where there is an incumbent bidder. Under Regulation 4(3), a contracting authority must treat economic operators equally and in a non-discriminatory way. This positive duty raises a number of considerations where there is an incumbent bidder.

There is a risk that an incumbent bidder has more information about or insight into the contracting authority's requirements and its approach to the tender

exercise than other bidders. A contracting authority should take steps to ensure the incumbent does not enjoy an unfair procurement advantage. For example, it should provide to all bidders at a sufficiently early stage all information which may assist the incumbent bidder in the pricing and preparation of bids. It should ensure all bidders adequately understand the evaluation criteria and the authority's approach to bid evaluation.

There may be difficulties obtaining and providing all such information to all bidders. For example information held by the incumbent, as an employer in relation to TUPE costs may not be available to the authority (although the contracting authority's contract with the incumbent may require such information to be provided). Further difficulties may arise in relation to mobilisation or commissioning costs which a successful bidder (other than the incumbent) would incur. The incumbent may have lower costs because there is less transitional cost for them.

The mere fact that the incumbent is better placed to win the tender does not, of itself, create a breach of the procurement rules. For example in *Europaiki Dynamiki v Commission*[28] the Commission required a 3 month "running-in period" for a new IT system during which the contractor would not be paid. This period ran alongside the last 3 months of the previous contract, for which the incumbent contractor would be paid under the current contract. The court said that this did not infringe the principle of equal treatment. There was no absolute obligation on a contracting authority to neutralise all advantages that an incumbent contractor may have. This was required only to the extent that it was technically easy, economically acceptable and did not infringe the rights of the tenderer whose advantage was being neutralised.

Where an authority wishes to take into account the overall cost, it is very important to make clear that the evaluation will consider the real cost to the authority and not just the headline price. If this is not done, a breach of public procurement law may arise due to the lack of transparency over the actual award criteria.

Equally it should be noted that the incumbent may be at a disadvantage in bidding where it has accurate knowledge of the actual staff costs, but the other bidders underestimate TUPE liabilities and so are able to bid lower prices than the incumbent (although this may lead to potential difficulties if the contract is let to them and they find they have underpriced).

To summarise:

- A contracting authority should take steps to ensure the incumbent does not enjoy an unfair procurement advantage by example by having more information about or insight into the contracting authority's requirements and its approach to the tender exercise than other bidders.

- The duty to treat all bidders equally must be given particular attention where there is an incumbent bidder.

[28] Case T-345/03

5.3 How to deal with disputes

Obviously in relation to any procurement dispute, the default forum for resolving them is the courts.

The question arises as to whether or not procedures and policies can be put in place to try and resolve disputes without the necessity of litigation. What must always be borne in mind by any contracting authority where a dispute does arise is not just its rights and obligations but also the rights and obligations of other interested parties. An obvious example is where a contracting authority has decided to award a contract to Party A and Party B wishes to challenge that decision. Any attempt to resolve the dispute with Party B will have to take into account the rights of Party A. This generally means that ADR processes such as arbitration or adjudication are unsuitable. If however, no other third parties would have any rights impacted upon, the use of ADR should be considered.

Possible methods of ADR which could be suitable for procurement disputes include;

- An agreement to abide by a QC's opinion or
- An adjudication procedure such as that set out at Annex D of the Draft BS ISO 10845-1. That adjudication process however requires that the challenger agrees to:

  "1. Waive all rights to overturn the award of the tender to another party, and

  2. Limit any compensation to the reasonable costs of preparing the tender."

Therefore it is unlikely that very many tenderers wishing to challenge a decision would be prepared to adopt such an adjudication procedure where the remedies available to it are so limited.

FURTHER INFORMATION

This paper is issued by the Procurement Lawyers Association. For further information please visit www.procurementlawyers.org or contact Rosemary Choueka at Lawrence Graham LLP, www.lg-legal.com.

The comments in this paper should not be relied upon as legal advice and readers should not act on the basis of the comments in this paper without taking appropriate advice on an individual case-by-case basis. Furthermore, this paper has been prepared by a working group of the PLA and does not represent the views of any of: the PLA as a whole, any individual member of the PLA and/or any firm or other organisation with which any individual member of the PLA is connected.

© Procurement Lawyers Association 2010