

“EVALUATION IN REGULATED PROCUREMENTS”

The main benefit of this approach was to address a catalogue of previous procurement failures such as the NHS National Programme For IT²⁶ by providing structured procurement project management methodology and setting a clear timetable expectation.

The problem with this approach is that it is paraded as a panacea but in reality is only truly beneficial to either very routine or large scale multi-faceted procurements and relies heavily on a robust and skilled workforce to implement its direction.

Therefore, the reality falls short of this underlying principle and can result in a rushed procedure with a short window for evaluation that often uncovers problems and issues overlooked due to haste. It may be appropriate to expand this guidance for particular contract values, organisation types and industry-specific procurements.

Conclusion

Over the last ten years, there has been a progressive shift of power in favour of the tenderer in the quest for greater transparency²⁷ evidenced by legal codification, the Mystery Shopper Scheme and the ineffectiveness remedy.

This has undoubtedly led to various improvements in public sector procurement. However, in some cases, this shift, in conjunction with economic and political pressures²⁸ may manifest itself in the form of an under-skilled, under-staffed, overcautious CA relying on poorly drafted specifications with a short-term ‘false economy’ price-centred scoring methodology.

Whilst evolution of public procurement is welcomed, thought should always be given to the challenges such developments present, how to address them, whether they run parri passu with the commercial reality of procuring goods and services and how to maintain the de factor power of a CA as ‘commercial-savvy public procurer’ seeking best VFM.

If this imbalance is not addressed, the next ten years could spell an increase in the number of procurement challenges, compensation pay-outs, a reduction in cost-effective procurements and an increased risk of opportunistic tenderer profiteering.

²⁴ Cabinet Office guidance titled "The LEAN Sourcing Approach Briefing & self-starter pack for procurement staff" v1 Last updated:29 June 2015

²⁵ Ongoing scrutiny from the Efficiency Reform Group and No 10 (Cabinet Office guidance titled "The LEAN Sourcing Approach Briefing & self-starter pack for procurement staff" v1 Last updated:29 June 2015)

²⁶ Source: Alastair Maughan, partner Morrison & Foerster article <http://www.computerweekly.com/opinion/Six-reasons-why-the-NHS-National-Programme-for-IT-failed>. NHS National Programme For IT which was branded a failure as a result of the huge delays and costs stemming from 'indecent haste of its procurement process and mismanagement.

²⁷ Source: Article titled "Government Continues to Push its Transparency Agenda" Paul Jones, Partner and Jane Randell, Solicitor, Farrer & Co LLP: <http://www.farrer.co.uk/Global/Government%20Continues%20to%20Push%20its%20Transparency%20Agenda.pdf>

²⁸ Political pressures including the Lean Procurement approach.

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This method is adopted by CAs as a justification of the correct application of the evaluation criteria during an evaluation process. However, in practice they are only a ‘last resort’ attempt to mitigate the risk of a procurement challenge.

As an effective way of reinforcing transparency, impartiality and non-discrimination, I would propose that this method becomes an obligatory part of all regulated procurements or those procurements considered to be highly complex such as technology and infrastructure procurements or procurements exceeding an additional value of £1,000,000 for services and £10,000,000 for works and thus, warrant the additional cost of the independent valuation.

Procedural Pressures

Regulation 53(1) Implications

The Regulations introduced a new mandatory requirement under R53(1) which states that procurement documents²¹ should be available at the point of issue of contract notice.

In principle, this change was designed to improve transparency to tenderers, save time, save money and reduce CAs from needing to adopt last minute bottoming out of the objective criteria of their specification.

On one hand, this has been well received in respect of less complex procedures (often Open or Restricted) because it requires upfront CA preparation and, therefore, reduces the likelihood of instances of ‘pulled’ procurements. On the other, Regulation 53(1) has applied the same arbitrary requirement to the reformed Competitive Procedure with Negotiation, Competitive Dialogue Procedure and the newly introduced Innovation Partnership Procedure which fails to apply sufficient concession to the ‘unknowns’ that resulted in the adoption of these chosen procedures in the first place. This can result in CAs rushing draft documentation to meet the usual pressures to procure and then being confined to the limited scope of which they are permitted to amend those original minimum requirements issued to tenderers at the procurements commencement.

Whilst my own recent exposure to a nine-month high-value procurement under the new Competitive Procedure with Negotiation provided some justification for the logic behind Regulation 53(1), it highlighted the increasing degree of onus placed on CA and the ease of challenge a tenderer can make should the procurement documents be insufficiently “precise to enable suppliers to identify the nature and scope of the requirement and decide whether to request to participate”²².

Lean Procurement

The Cabinet Office released its SOPs LEAN Sourcing drive²³ “expecting that all but the most complex procurements are completed within 120 working days”²⁴ and subject to government scrutiny²⁵.

²¹ ‘procurement document’ defined in Regulation 2(1) Public Contract Regulations 2015

²² Regulation 29(2) “CPN” and Regulations 31(2) and (3) “IPP” and Regulations 30(6) and 30(13) “CDP” respectively.

²³ LEAN procurement guidance released on 29th July 2015 (Source: <https://www.gov.uk/government/publications/lean-sourcing-guidance-for-public-sector-buyers>)

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A strengthening of the formal tenderer remedy regime was introduced by the Public Contracts (Amendment) Regulations 2009 and has since continued into the current version of the Regulations¹² and following cases like Lettings¹³ and McLaughlin¹⁴, CAs have had to improve their public procurement compliance procedures and recognise and acknowledge the limits on their discretion regarding their choice of criteria and what weighting or marks to award.

The merits and disadvantages of the ineffectiveness remedy warrant an essay in their own right but there have been important consequences for procurement evaluations since its introduction.

Firstly, automatic injunctions are forcing CAs to respond quickly to source alternative temporary arrangements until the challenge process is complete. This often means having to extend the incumbent's provision of services or considering whether or not to re-run the procurement exercise altogether – a duplicated procurement cost¹⁵, resource strain and time delay, all of which are in addition to the cost of legal challenge.

Secondly, there is a risk of disgruntled unsuccessful tenderers invoking this remedy even where damages are adequate on the basis that losing a contract may be detrimental to their business continuing to trade.

Mystery Shopper

The Mystery Shopper Scheme was launched in February 2011¹⁶ as an impartial informal remedy to “provide a clear, structured and direct route for suppliers to raise concerns”¹⁷, “take a proactive approach [to] identify areas of poor procurement practice so we can work with the contracting authority to put them right”¹⁸ and uphold TFEU principles¹⁹ and ECJ legal principles²⁰.

However, my experience with this CCS Scheme failed to live up to these expectations. The input objectively felt weighted in favour of the anonymous tenderer, did not go far enough to support and guide the CA in its application of Cabinet Office guidance and felt overly-focused on adopting a ‘tick box’ exercise for statistic and data purposes.

This scheme, in my opinion, would be better served taking a supervisory, collaborative-style interaction with CA and tenderer to improve procurement practice rather than acting as an extra opportunity to reprimand a CA.

Independent Reviews

¹² Regulation 99 (Grounds for Ineffectiveness) Public Contracts Regulations 2015

¹³ Case citation: Letting International Ltd v London Borough of Newham [2008] EWHC 1583 (QB)

¹⁴ Case citation: McLaughlin & Harvey Ltd v Department of Finance & Personnel [2008] NIQB 91

¹⁵ The average total cost of a competitive procurement process (or competition) is £45,200 (Source: Centre For Economics and Business Research <http://www.cebr.com/reports/uk-procurement-most-expensive-in-eu/>)

¹⁶ and strengthened in 2015 by the Small Business Enterprise and Employment Act to provide a statutory basis for its procurement investigations.

¹⁷ Source: Gov.UK: <https://www.gov.uk/government/publications/mystery-shopper-scope-and-remit>

¹⁸ Source: Gov.UK: <https://www.gov.uk/government/publications/mystery-shopper-scope-and-remit>

¹⁹ TFEU principles contained in the Procurement Directives 2014 include proportionality, non-discrimination, equal treatment, transparency and mutual recognition.

²⁰ Public Sector Procurement Policy dated 1st October 2015 referring to the main ECJ principles of equality of treatment, transparency, mutual recognition and proportionality. <https://www.gov.uk/guidance/public-sector-procurement-policy>

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resources are often oversubscribed to multiple projects, prone to overselling the extent of their competence, lack referencing¹⁰ and suffer fewer checks and balances on the grounds of their perceived ‘omniscient’ contractor status. Although external interim resources can bring valuable knowledge and depth of understanding, they invariably cannot replace the breadth and depth of the ancillary knowledge held across a CA. Overreliance in this way can compromise the holistic procurement aims of a CA and skew an evaluation process.

Collaboration Arrangements

Financial pressures have resulted in a natural progression towards inter-authority agreements (IAA) particularly between sub-central public bodies – the aim being to reduce costs and improve efficiency. Whilst on one hand it is clear that collaboration has many advantages, there have been added complexities and challenges to evaluations in public procurements.

Contrary to public perception, even with IAAs in place, it can be difficult for collaborating authorities to achieve a collective mentality – an ‘us and them’ attitude¹¹.

Aside the potential for ‘identity’ friction between collaborating authorities, genuine conflicts can arise when jointly procuring services with dissimilar aims and objectives which most noticeably manifest themselves during evaluations. This position can be further exacerbated when taking into account the differences in size, status and political persuasion of each collaborating authority.

By way of example, should three collaborating authorities seek to procure a new IT system infrastructure, one authority may be cash-poor which can cause friction in choice of type and calibre of system components and in deciding the split between capital expenditure and operational expenditure. One authority may need different system functionality particular to their needs. One authority may be much larger and require multiple site locations and other material requirements. Moreover, each of the collaborating authorities may be governed by different political persuasions and agendas.

It is understandable, therefore, this can also affect the approach to evaluation not just in terms of the price-to-quality split but in terms of the weighting apportioned to each requirement or group of requirements. It is also commonplace for collaborating authorities to elect a ‘lead’ authority to run a procurement(s) which could increase the risk of unintentional bias in favour of that authority.

Bidder Empowerment

The balance between procurer and tenderer has shifted in favour of the latter.

Introduction of Ineffectiveness

¹⁰ Source: Empirical evidence on secondment to a local government client who confirmed that references are often not taken within their organisation and across many public sector institutions.

¹¹ Source: My own empirical evidence working with a broad range of different types of local government institutions.

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enough to be considered ‘abnormal’ - to win an evaluation process with the aberrant intention of recouping ‘lost’ money on over-priced additional rate card services or in costly delays. The aggregate financial cost can often result in the same position (if not worse) for a CA than if they had procured a realistic and proportionate tender price with no ‘hidden’ costs included.

Organisational and Structural Challenges

The side effect of ‘squeezed’ staffing and resourcing budgets for CAs has resulted in a reduced quantity and quality of resources assigned to regulated procurements. The NHS, estimated to be the fifth largest employer in the world⁶, with its recent £3 billion cost of top-down reorganisation⁷, is an example of a public sector institution attempting to alleviate the financial pressure by streamlining the delivery of its services.

The implication of budgetary reductions has presented a real-time staffing and resourcing crisis.

Skill and Resource Dilemma

The UK population increased by nearly 500,000 in 2014⁸ along with the demand of its services but public sector employment is falling⁹. These figures including my own empirical evidence can be used to highlight the effect skillset gaps are having on public regulated procurement. Like any legal entity, a CA’s members, officers and employees make its decisions on its behalf. If those decision-makers are lacking in number and calibre of expertise, the CA increases its risk of falling foul of poor decisions, some of which have substantial and long-term cost implications both at the time of the procurement and during the contract term.

The real direct risk of this position to the evaluation of regulated procurements is two-fold:

1. In the form of substantial degradation to the quality of the specifications underpinning a procurement. The stakeholders required to ensure a comprehensive specification can be extremely extensive. A poor initial specification may require subsequent and repeat iterations, an increase in the volume of bidders’ clarification questions during the procurement phase and increased dependence on legal counsel. It, therefore, begs the question: ‘how can a CA effectively measure and evaluate a tenderer’s response against criteria which are insufficiently considered, detailed or accurate?’
2. Often as a result of the skill shortages presented in (1), the overreliance on external interim (particularly technical and strategic) resources who fill the void of missing permanent resources. From my experience, these interim

⁶ Source: <http://www.telegraph.co.uk/news/uknews/9155130/NHS-is-fifth-biggest-employer-in-world.html>

⁷ Source: <http://www.telegraph.co.uk/news/health/news/7894203/NHS-reforms-will-cost-3bn-and-will-not-work-academic.html>

⁸ Source: <http://www.bbc.co.uk/news/uk-33266792> (BBC article referring to ONS statistics). As of June 2014 there were 64,596,800 People living in the UK 491,100 more than the previous year. 259,700 added from net migration, 226,200 from natural growth, 25% of all births in 2013 were to mothers born outside the UK.

⁹ Source: ONS

<http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/publicsectorpersonnel/bulletins/publicsectoremployment/december2015>. In December 2015, total UK public sector employment was 50,000 lower than at December 2014.

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decision is formulated and ultimately “to reduce the financial impact of the wrong specification further down the line”⁵.

Failure to provide tenderers with an accurate, substantive, considered, all-encompassing specification has often been the direct cause of poor evaluation outcomes and procurement failures. In my opinion, budgetary financial pressures are an attributable indirect consequence of rushed, poorly written and misleading specifications in regulated procurements – the ultimate consequence of which is a ‘political front’ depicting ‘cheaper’ and more ‘cost-effective’ procurements but failing to highlight the ‘car-boot’ filled with timetable delays, evaluation kerfuffle, revised or rescinded procurements and even protracted procurement challenges, all of which costs money – money which is often borrowed and further exacerbating the existing national debt. The reality, therefore, creates a picture of cost-saving over a short five-to-ten-year period but arguably resulting in the same long-term outcome, but with debt interest.

If CAs applied more time and money to correctly answering the upfront question; ‘what are we procuring and how are we going to procure it?’ de facto savings may be realised.

Price v. Quality

In response to austerity, CAs are noticeably prioritising price in the price-to-quality ratio in procurement evaluations. But is this creating a false economy?

The problem of over-emphasising price is three-fold:

1. It encourages a year-on-year progression to a situation where tenderers are having to submit unrealistically low prices in order to win tenders with little margin for error, a struggle to maintain standards and subsequently more likely to engage in legal battles to recover their losses. A lower price does not always mean a better outcome. Invariably, this is where the expression ‘you get what you pay for’ often rings true.
2. The weighting applied in price-to-quality evaluation methodologies fails to marry with the commercial reality. Evaluation at its simplest form is a tool for differentiating one bid from another. Price will often play the deciding role in determining a winning tenderer even when price is weighted equally with quality (50:50). The reasons for which are caused by the very construct of the methodology. Marks attributed to quality tend in many procurements to be awarded against generic box-ticking style requirements with little weighting to innovation and efficiency. In contrast, price can vary substantially particularly in response to complex procurements which require a myriad of formulation and forecasts. In reality therefore, price in ‘real terms’ plays the decisive role.
3. Tenderers could be criticised for practices of “strategic bidding”, by, inter alia, offering a very low price on the heavily weighed “price” criterion - but not low

⁵ Source: Chartered Institute of Procurement & Supply (<https://www.cips.org/knowledge/procurement-topics-and-skills/understand-need--market-and-options-assessment/setting-kpis/>)

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Preface

The focus of this essay is to identify and assess the present-day challenges facing Contracting Authorities (CA) when evaluating tenders in light of austerity pressures, organisational difficulties, advances in bidder empowerment and procedural efficiency reforms.

My essay is primarily set on a backdrop of complex construction and technology procurements supported by both statistical and empirical evidence drawn from my experience across central and local government over the last eighteen months¹.

Whilst my focus is from a CA's perspective, I acknowledge that there have been many benefits afforded to both authority and tenderer as a result of recent changes in procurement law. These benefits are not, however, considered in detail in this essay.

Introduction

Evaluation in regulated procurements is the fundamental process by which a CA applies its evaluation methodology in conjunction with the CA's pre-defined minimum statement of requirements, to identify its preferred bidder in a manner which encompasses the underlying procurement principles² and complies with the Public Contracts Regulations 2015 (the 'Regulations').

In one regard, the evaluation process provides a CA with justification to the taxpayer of its decision to award a contract to one or more supplier(s) over another in order to obtain best value for money (VFM).

Austerity

The United Kingdom's national debt is estimated to be in excess of £1.674 trillion³ and a key justifying impetus behind the chancellor George Osborne's austerity measures to remove the deficit by “2019-20 and deliver a £10.1 billion surplus”⁴.

There has been increasing political and economic pressure to deliver more with less which has substantially affected technical specifications, the price-to-quality ratio and evaluation methodologies in procurement activities which could suffer longer-term consequences.

Specifications

There is a fundamental and intrinsic importance of a specification in providing the foundation for any procurement process, the 'yardstick' against which the evaluation

¹ From 7th July 2014 to 1st March 2016.

² Public Contracts Directive (2014/24/EU) procurement principles: Transparency, equal treatment, non-discrimination, proportionality and the freedom of establishment and the freedom to provide services.

³ Source: £1,655,139,500,874 on 29th March 2016 (source www.nationaldebtclock.co.uk), the figure supported by <http://www.telegraph.co.uk/finance/11475115/HTML-debt-clock.html>.

⁴ Source: <https://www.gov.uk/government/publications/spending-review-and-autumn-statement-2015-documents/spending-review-and-autumn-statement-2015>.