



trowers & hamblins



Presentation ——— 7 November 2018

Procurement Tool-kit

Rebecca Rees, Partner, Trowers & Hamblins LLP

— Pioneering — Bahrain — Construction — Public sector — Energy — Real estate — London — Tax — IT — Dubai — Manchester —
— Connecting — Knowledge — Pragmatic — Malaysia — Exeter — Thought leadership — Housing — Agile — Creative — Connecting — Private equity —
— Local government — Manchester — Environment — Focused — Islamic finance — Projects — Abu Dhabi — Corporate finance — Passionate — Team v
— Employment — Regulation — Procurement — Expertise — Specialist — Planning — Investment — Committed — Delivery — IT — Governance
— IP — Corporate — Infrastructure — Value — Development — Private wealth — Oman — Governance — Birmingham — Corporate finance —
— Dynamic — Pensions — Dispute resolution — Insight — Banking and finance — Arbitration — Diverse — Regeneration — Care — Communication —

Today's presentation

A quick skip through some essentials!

- Evaluation
 - Quality
 - Price
- Record-keeping
- Feedback

Purpose

- Identification of the most economically advantageous tender
- Possibly the most complex and significant part of a procurement
- Voluminous case law:
 - Award criteria
 - Feedback
 - Methodology
 - Conflicts of interest
- Tension between compliance and commerciality

Legal Framework

- Regulation 18 – general principles
- Regulation 67 – award criteria
- Regulation 68 – life-cycle costing
- Regulation 69 – Abnormally low tenders

WHO is evaluating: Tender Evaluation Panel

- Good practice to provide details of tender evaluation panel
- Ensure communication protocol is included/obligation to disclose conflicts
- Members must have requisite expertise (*Aquatron Marine*)
 - *At the heart of the problem "was that they did not possess the requisite expertise to process the tenders"*
- Pros and cons of 1 versus many panellists

WHY are we evaluating: Award Criteria

- Regulation 67: establish Most Economically Advantageous Tender (MEAT) from the point of view of the CA
- MEAT = "identified on the basis of the price or cost, using a cost-effectiveness approach... and may include the best price-quality ratio, which shall be assessed on the basis of criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question".

Award Criteria cont/d

- Must disclose award criteria, sub-criteria, weightings (where possible – otherwise list in descending order of importance)
- Must disclose minimum requirements and gateways
- Be careful that scoring guidance/model answers etc do not contain sub-criteria
- Disclose precise evaluation methodology – best practice? (*TNS Dimarso*)

HOW are we evaluating: Scoring Criteria (Example)

Comment	Judgement	Marks available
Meets the standard in all aspects and exceeds the standard in some or all of those aspects	Excellent	9-10
Meets the standard in all aspects but does not exceed it	Good	7-8
Meets the standard in the majority of aspects but fails some	Satisfactory	5-6
Fails to meet the standards in the majority of aspects but meets in some	Unsatisfactory	3-4
Significantly fails to meet the standard	Poor	1-2
Completely fails to meet the standard [in some or all respects: to discuss]	Failed	0

Scoring criteria: some comments

- Make sure range of scores assist in avoiding "bunching" (0-5 / 0-10 / 0-12)
- Does top marks = meet OR exceed standard?
- What is the standard? Guidance needed – RWIND bidder
- Is this criteria too rigid? How are the questions/requirements structured? (*Woods*)

WHAT are we evaluating: Price/Quality split (Example)

"Quality – 40%

A maximum of 40 % of the marks available will be allocated to the qualitative submissions. The criteria and weightings are set out below.

Commercial – 60%

A maximum of 60 % of marks available will be allocated according to the information submitted in the financial submission, as noted below."

- Head-line split provided
- Unless evaluating quality/commercial proposals "in the round" – sub-criteria likely to be needed

(Sub)-criteria: Quality

Can include:

- Quality: including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;
- Organisation, qualification and experience of staff assigned to perform the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or
- After-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion

Quality Sub-criteria (Example)

Tender documents should indicate:

Quality Question Number	Description	Weighting	Standard Required
1.	Method Statement for service delivery		[Guidance notes]
2.	Timetable for mobilisation		
3.	Project team (roles and responsibilities)		
4.	Health and safety		
5.	Environmental		
6.	Quality assurance systems for service		
7.	Etc.		
8.	Etc.		

Quality (sub)-criteria: some comments

- Provide guidance as to what the "standard" is – bespoke for each contract
- Disclose all sub-criteria and relevant weightings
- Ensure evaluation panel understand contract/CA requirements (*Energy Solutions*)

WHAT are we evaluating: Price

- "price is the starting point" (*Henry Bros*)
- Must be included as an award criterion
- Can be fixed (Regulation 67(4)): "*cost element may take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only*"

What methods are used to evaluate price?

- Standard differential/comparative method
 - Benchmark from the lowest price
 - Award set percentages as to cheapest/next expensive (e.g. 100%/80%)
 - Award fixed percentage for tenderers within a range of the cheapest (e.g. within 10% = 90% of marks)
 - Mean average method (Compare actual price of suppliers against the mean price of bids)
- Fit to the budget method
 - Compare tendered price against optimal price
- Price/Quality ratio

Relative Price Evaluation issues:

- Impossible to know in advance how tenders will be evaluated (transparency)
- Ranking paradox: ranking between two suppliers may depend on the tender of a 3rd
- Potential collusion/fraud
- Equal treatment: some relative methodologies penalise middle-ranked bidders

Non-intentional price preferences

- Price is often the distinguishing feature in the MEAT equation and clearly will be if allocated 51% or above (as an intentional price preference)
- But, often unintentional price preference:
- Caused by how a CA scores the quality submissions:
 - Flat score graph
 - Adding gateways
- Caused by how a CA scores the price submission
 - Relative pricing models allocate full marks to at least one of the tenders

Does reference to the price/quality ratio in the new Directive hold any solutions?

- Reflects more intuitive/personal purchasing practice/decisions
- Current / common UK practice results in a sum (ie price + quality)
- Divide quality by price to ascertain how much quality is offered per £
- Avoids relative pricing/independence from other bids
- Uses real prices without using any formulae to convert into points

Top tender evaluation tips (including lessons learnt from *Energy Solutions*):

1. Audit trail is key (Reg 84(1) and (7) and *Geodesign Barriers and Woods*)
2. Keep notes of dialogue meetings and other bidder communications
3. Ensure evaluation notes are taken/kept/comments are helpful in light of feedback
4. Undertake a dry-run of evaluation model: does it give you the result you want?
5. Consider conflicts of interest
6. Train the evaluation panel:
 - a) How to evaluate the contract in front of them
 - b) Ensure they have as much knowledge as the bidder (do they know what is in the data room?)
7. NB: Don't shred/delete/otherwise destroy!
8. Risk of focussing on potential challenges
9. Incumbent bidder advantage: don't have to neutralise completely (*Proof IT SIA v European Institute for Gender Equality* (Case T-10/17))

Litigation Risk

- Regret letters:
 - Ensure Regulation 86 requirements are complied with
 - Have you included reasons and relative advantages and characteristics?
 - Ensure correct recipient/CA contact details
 - Holiday cover/confirmation of receipt
 - Jump on any subsequent correspondence
- Subsequent correspondence:
 - Ensure consistency with previous feedback (good evaluation notes will help)
 - Query value/risk of face-to-face meeting

Litigation Risk cont

- Challenge received based CA's actions:
 - Courts will not re-mark bids (*Lettings*)
 - Will examine evaluation process for “manifest error”
 - CA has a “margin of discretion” when evaluating, but this can be reduced in effect by the Court investigating “manifest error” (*Woods*)
 - More likely when no audit trail: Court is likely to delve into detail so record-keeping is key

Litigation risk cont.

- Challenge received on undisclosed criteria:
 - Relevant test is what would a reasonably well informed normally diligent tenderer understand the evaluation criteria to mean?
 - *Leeds v Mears CC*
- NB: Other Risks
 - Costs
 - Publicity/enhanced scrutiny
 - *LB of Hammersmith & Fulham* – challenge was not successful but significant scrutiny of procurement practice
 - Risk mitigation starts pre-procurement!

Contact

Rebecca Rees
Partner

D 0207 423 8021 / 07920 492655

E rrees@towers.com

T @BecsRees

© Trowers & Hamlins LLP 2017

Trowers & Hamlins LLP is a limited liability partnership registered in England and Wales with registered number OC 337852 whose registered office is at 3 Bunhill Row, London EC1Y 8YZ. Trowers & Hamlins LLP is authorised and regulated by the Solicitors Regulation Authority. The word “partner” is used to refer to a member of Trowers & Hamlins LLP or an employee or consultant with equivalent standing and qualifications or an individual with equivalent status in one of Trowers & Hamlins LLP’s affiliated undertakings. A list of the members of Trowers & Hamlins LLP together with those non-members who are designated as partners is open to inspection at the registered office.

Trowers & Hamlins LLP has taken all reasonable precautions to ensure that information contained in this document is accurate, but stresses that the content is not intended to be legally comprehensive. Trowers & Hamlins LLP recommends that no action be taken on matters covered in this document without taking full legal advice.

(c) Copyright Trowers & Hamlins – March 2017 – All Rights Reserved. This document remains the property of Trowers & Hamlins LLP. No part of this document may be reproduced in any format without the express written consent of Trowers & Hamlins LLP.

