


# Procurement Update

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Kris Kelliher, Partner  
Devonshires

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## Topics for Today

- Tender Evaluation
- Abnormally Low Tenders
- Faraday v West Berkshire – development agreements
- Contract Modifications
- “Commercial” group companies
- Q&A

## The Evaluation Criteria & Methodology

- Invitation to Tender (ITT) must clearly set out **all** tender evaluation criteria and approach to scoring the price and quality elements
- Quality element:
  - a number of method statement questions with each question carrying a percentage weighting
  - 0 to 10 / 0 to 5 etc scoring scale utilised
  - Consensus or average based scoring?
- Pricing element:
  - Lowest price gets full marks, with more expensive bidders getting a proportionately lower mark
  - Is this always the most sensible methodology to use?

## The Evaluation Criteria & Methodology

- Disclose who the evaluation panel will be?
- When does the evaluation criteria and methodology need to be provided to bidders?
  - In the tender documents issued at the start of the procurement process
  - How much flexibility is there in this rule?

## The Evaluation Criteria & Methodology

- Site visits and interviews:
  - Will these count for a proportion of the marks and be scored, or will they be “for clarification only”
  - If scored, criteria and methodology that will be used to score them needs to be disclosed to bidders in tender documents
  - Avoid ambiguous criteria
  - If “for clarification only”, what does this actually mean??
    - Could a bidder’s scores for their written submission be adjusted as a result of their performance at the site visit / interview?
  - Ensure proper notes are taken

## Evaluating Tenders - Quality Aspects

- Establish the evaluation panel
- Panel members should:
  - be well briefed on ITT requirements and scoring matrix and methodology
  - ask questions if not sure
  - have relevant expertise and experience,
  - be “un-conflicted” and
  - as far as is possible, be consistent for each bidder

## Evaluating Tenders – Quality Aspects

- Retain records – Regulation 84(7), (8) & (9):

*(7) Contracting authorities shall document the progress of all procurement procedures*

*(8) To that end, contracting authorities shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on —*

- *communications with economic operators and internal deliberations,*
- *preparation of the procurement documents,*
- *dialogue or negotiation if any,*
- **selection and award of the contract.**

*(9) The documentation shall be kept for a period of at least 3 years from the date of award of the contract.*

## Evaluating Tenders – Quality Aspects

- Average based scoring:
  - Each panel member assesses in isolation, and an average is taken
  - Each panel member should make a note of the reasons for the score they have awarded
  - Keep a record of any moderation of an individual assessor's scores
- Consensus scoring:
  - The panel members agree on the score the bidder should be awarded
  - A coherent note of the consensus discussion needs to be made, explaining the reasons for the score given
- Any records made must be retained for at least 3 years
- Remember – all records and emails are potentially disclosable!!



## Evaluating Tenders – Price

- Price evaluation should, in theory, be less contentious
- Apply the formula set out in the ITT
- If any aspect of the bidder's price proposal is unclear – seek clarification in accordance with Regulation 56(4)
- Abnormally low tenders

## Abnormally Low Tenders

- Regulation 69
- CA has duty to seek explanation from bidder where prices or costs within its tender appear abnormally low
- No definition of “abnormally low” in Regulations. It is fitting and expedient to apply the notions of reliability, viability and genuineness when considering this concept. (*F P McCann case*).
- The CA may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.
- CA should seek explanation straight away, and must engage in proper dialogue with bidder before rejecting

## Abnormally Low Tenders

- It is an area fraught with difficulty
- In order to be able to reject, must CA have a real concern that bidder won't be able to perform the contract for the prices tendered (ie tender is not reliable or viable)?
- Or can it exclude purely because it believes that tender is not genuine – ie the bidder is “gaming”?
- This question is currently unresolved

## Faraday v West Berkshire Council

- Development Agreement for regeneration of an industrial estate between Council and St Modwen
- St Mowden had an option to draw down land for development. If it exercised option, it then had an obligation to perform works in accordance with plans approved by a steering group. If St Mowden did not draw down the land, there would be no obligation to perform works
- Council did not tender DA on basis it believed it was a land contract – as no *immediately enforceable* obligation on St Mowden to carry out works. The obligation was a contingent one
- Council issued a VEAT Notice before signing DA

## Faraday v West Berkshire Council

- Faraday challenged
- High Court ruled in Council's favour
- Faraday appealed
- On 14 November 2018 CoA overturned High Court's decision. CoA's view was that DA was a works contract
- CoA declared DA "ineffective", even though Council had issued a VEAT Notice
- CoA held that VEAT Notice was invalid as it didn't accurately describe the nature of the DA
- Case is likely to have significant implications, particularly for Local Authorities

## Contract Modifications

- Modifications are permissible without the need for a new procurement procedure in any of the following cases:
  - Where the modification has been provided for in the initial procurement documents in a clear, precise and unequivocal review clause
  - where a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs for the CA, provided that increase in price is not higher than 50 % of the value of the original contract

## Contract Modifications

- Where a new contractor replaces the original contractor as a consequence of universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency by another contractor that fulfils the criteria for qualitative selection initially established provided
- Where the value of the modification is below both of the following values:
  - the applicable OJEU threshold; and
  - 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts

## “Commercial” Group Companies

- Definition of “Bodies governed by public law” in OJEU Regs makes it clear that an entity which has a “commercial character” is not subject to OJEU
- No single definition of “commercial character”
- Case law shows that the following are indicative of commercial character:
  - Operates for profit
  - Operates in normal market conditions
  - Competes with other entities for work
  - Bears the losses resulting from the exercise of its activity
- Many RPs take the view that this applies to their “commercial” group companies, so they are not subject to OJEU.....



## “Commercial” Group Companies

- But recent case law makes it clear that if RP treats group company as its “in house” contractor, group company will itself automatically be subject to OJEU, regardless of nature of the company
- Case law also makes it clear that if group company carries out any of the RP’s usual non commercial functions, it will be subject to OJEU even if most of its activities are commercial in nature
- Each case needs to be looked at on its facts

## Q&A

