

SWALA

Evaluation and the Audit Trail

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Overview

- General principles
- A practical example
- The audit trail

General principles (1)

- TFEU principles (non-discrimination, proportionality, transparency and equal treatment) → Regulation 18
- Regulation 67:
 - MEAT:
 - Price/cost which may include price/quality based on criteria linked to the contract including:
 - Qualitative, environmental or social aspects
 - Organisation, qualification and experience of staff where this can have a significant impact on performance

General principles (2)

Regulation 67 continued:

- Award criteria must not confer unrestricted freedom of choice on the authority
- Award criteria must ensure the possibility of effective competition/specification must enable verification
- The authority must specify the relative weighting or importance it gives to each of the criteria

General principles (3)

- Sub-criteria and weightings must be disclosed in so far as they are material to the preparation of bids
- The award criteria must be formulated in such as way as to allow “all reasonably well-informed and normally diligent tenderers” to interpret them in the same way
- The RWIND tenderer test is an objective one

Scenario (1)

- Fully regulated restricted procedure for independent living supplies and services
- A Ltd 73%
- B Ltd 73%
- C Ltd 72%
- D Ltd 63%
- E Ltd 61%
- Can you interview to differentiate?
- Can you ask about staff/local labour?

Scenario (2)

Within the restricted procedure:

- Clarification of tenders is permitted but:
- Tenderers must not be permitted to improve their bids
- Questions must flow from the disclosed award criteria

Scenario (3)

- Interviewing staff:
 - NB: Segregation of selection and evaluation criteria (*Lianakis*) but:
 - Regulation 67:
 - Past experience can be lawful evaluation criteria where is it properly used to assess ability to deliver this contract
- “Local labour”: permissible provided non-discrimination, equal treatment, transparency and proportionality principles are observed

The Audit Trail (1)

- Delegate to evaluators who are:
 - Trained in general principles
 - Trained in application of criteria/scoring
 - Have no actual or apparent conflict
- Marking separately on their own, not collectively in a room together
- Consider model answers but be aware that these may need to be disclosed if introduce factors not foreseeable to a RWIND tenderer

The Audit Trail (2)

- For each question, the evaluator should record reasons related to:
 - the content of the bid;
 - the evaluation criteria; and
 - the scoring methodology.
- Avoid merely reciting scoring methodology.
- Ensure full notes of each evaluator's reasons are handed in

Scoring methodology

- as seen in *Woods Building Services v Milton Keynes Council* [2015]
EWHC 2011 (TCC)

Points	Definition
0	Response does not meet requirements and/or is unacceptable. Insufficient information to demonstrate Tenderer's ability to deliver the services
2	Response partially meets requirements but contains material weaknesses, issues or omissions and/or inconsistencies which raise serious concerns
4	Response meets requirements to a minimum acceptable standard, however contains some weaknesses, issues or omissions which raise minor concerns
6	Response generally of a good standard. No significant weaknesses, issues or omissions.
8	Response meets requirements to a high standard. Comprehensive, robust and well justified showing full understanding of requirements
10	Response meets requirements to a very high standard with clear and credible added value and/or innovation

The audit trail (3)

- Best practice entails moderation
- Different types of moderation include:
 - consensus marking (preferred method)
 - median marking (removing outliers)
 - averaging
- Full note keeping of moderation stage critical, including reasons for changing any marks
 - “*Solemn exercises of critical importance*”

Resource (NI) [2011] NIQB 121

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Our promises

- To **understand** you
- To **provide solutions** that contribute to your success
- To give you **fair pricing** and clarity on costs
- To give you the **right team**
- To **communicate clearly**
- To **care about our relationship with you**





Bevan Brittan

Lawyers for the public,
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Thank you!

Debriefing and confidentiality

Jorren Knibbe

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Debriefing obligations

- Regulation 86 PCR15 requires a contracting authority to “send to each [...] tenderer a notice communicating its decision to award the contract or conclude the framework agreement”, which must include:
 - “the reasons for the decision, including the characteristics and relative advantages of the successful tender” and “the score (if any) obtained by” the addressee and the successful tenderer (r. 86(2)(b)); and
 - the name of the winning tenderer (r. 86(2)(c))
- Background: Remedies Directive (89/665), Art. 2a; General Directive (2014/24), Art. 55 (and cf. r. 55 PCR15)

Content of the debrief

- How much detail does the authority have to give? See e.g.:
 - T-183/00 *Strabag* at 16, 56-58 (winning price “about 10%” less)
 - T-4/01 *Renco* at 26, 95 (price *rank* is sufficient)
 - C-476/08P *Evropaïki Dynamiki* at 27 (quality *rankings* sufficient)
 - T-667/11 *Veloss* at 60-61: the authority was required to disclose the winning price; this was “one of the characteristics and [...] key advantages” of the winning bid; without it, the unsuccessful bidder could not “understand why [its] offer was [...] ranked second”
- Why does the law require a debrief? *Veloss* at 42:

“to enable the persons concerned to ascertain the reasons for the measure and thereby enable them to assert their rights and, on the other, to enable the Court to exercise its power of review”

Debriefing obligations – exceptions

- Regulation 86(6) provides that the contracting authority “may withhold any information to be provided in accordance with [r. 86] where the release of such information –

[...]

(b) would prejudice the legitimate commercial interests of a particular economic operator, whether public or private; or

(c) might prejudice fair competition between economic operators.”

Confidentiality obligations

- Regulation 21(1) PCR15 prevents the authority from disclosing information “which has been forwarded to it by an economic operator and designated by that economic operator as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders”
- This is however “without prejudice to”:
 - “obligations relating to [...] the provision of information to candidates and tenderers”;
 - The Freedom of Information Act 2000; and
 - “any other requirement, or permission, for the disclosure of information”

Other confidentiality obligations

- Case C-450/06 *Varec* at 36, 49:
 - economic operators “must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging”
 - “the protection of business secrets is a general principle”
- Duty of confidence in English law
 - will arise where information “has the necessary quality of confidence” and is “imparted in circumstances importing an obligation of confidence”; breach is actionable (*Coco v Clark* [1969] RPC 41 at 47 (Megarry J))
 - is this general duty ousted by r. 21? See e.g. *Monro v HMRC* [2008] EWCA Civ 306 at 22 (Arden LJ)

Prices marked as confidential

- Does r. 86 require (or entitle) the authority to disclose a winning price which is marked as confidential?
- What is the effect of r. 86(6) and/or confidentiality obligations?

Prices not marked as confidential

- Might the authority nonetheless be under a duty to preserve confidentiality, under EU law (*Varec*) or English law (*Coco v Clark*)? See e.g.:
 - Case C-442/14 *Bayer CropScience*, Opinion of AG Kokott at 35-38 and 42-43
 - *Croft House v Durham CC* [2010] EWHC 909 at 39-40 (Ramsey J)

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