

# AVOIDING COMMON PITFALLS DURING EVALUATION

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## (1) Getting the criteria right in the ITT

- *MLS (Overseas) Limited v Secretary of State for Defence* [2017] EWHC 3389 (TCC)



## MLS: the evaluation methodology in the ITT

- Commercial evaluation on a compliant/non-compliant basis
- Technical evaluation: 40% of the final score
- Financial evaluation: 60% of the final score
- **Technical evaluation:**
  - Capability
  - Customer relationship
  - Supply Chain Management
  - Value for Money
  - **Safety**
  - Quality management
- Scoring guidance set out criteria for score of “High Confidence” “Good Confidence” “Concerns” or “Unacceptable”, but only for 5 questions out of 6
- 6<sup>th</sup> Question re Safety was just stated as pass/fail
- **“The Authority will reject any Tender if any response achieves an assessment of lower than “Good Confidence” in accordance with the evaluation criteria”**

## MLS: transparency and the RWIND test

- **Healthcare at Home v The Common Services Agency** (Scotland) [2014] UKSC 49 at [8]:  
*“...in the [Mayo case] the Court explained what the legal principle of transparency meant in the context of invitations to tender for public contracts: the award criteria must be **formulated in such a way as to allow all reasonably well informed and diligent tenderers to interpret them in the same way**”*
- ITT did not expressly indicate that “pass” score for each part of Question 6 (safe working culture throughout the supply chain) was a minimum standard that had to be met to make the tender technically compliant.
- Contracting authorities need to expressly set out:
  - consequences of any failure to pass stipulated threshold; **AND**
  - Whether consequences would be mandatory or discretionary rejection

## (2) Strict adherence to the criteria once set

- See eg *Energy Solutions EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC)
- No principle that once disqualification criteria employed they should be construed generously or leniently in favour of the bidder
- Although there is a **margin of appreciation** to be applied at point of assessment, no separate stage of “reluctance to interfere” if manifest error identified
- **Principle of proportionality** may in exceptional circumstances provide some scope to depart from rules of a procurement competition, no grounds to re-write ITT or scoring matrix

### (3) Transparency and reasons for scoring decisions

- Transparent evaluation and moderation records: *“important aspects of the evaluation process were wholly lacking in transparency...decisions about what to about scoring that could lead to a bidder being disqualified were made “off stage” and consciously so in my judgment” (NDA at [132])*
- *“the whole approach of the NDA to restricting notes in this way seems to have been designed to minimise the degree of scrutiny to which the SMEs thought processes could be subject, in the event of a challenge. A simple method of ensuring that such notes were retained – for example, by issuing numbered notebooks, and collecting them – would easily have dealt with any difficulties, real or imagined, with potential disclosure” (NDA at [217]).*
- Misuse of legal review: Claim to privilege upheld and no adverse inferences, but since witnesses referred to legal review as justification, lack of transparency as a result: *“transparent reasoning was therefore not always provided by the NDA for why a particular requirement merited a particular score’ [233].*

## Q&A

**We will now answer as many questions as possible.**

**Please feel free to continue sending any questions you may have via the chat section which can be found along the top or bottom of your screen.**

# Thank you for listening

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