

Welcome to Landmark Chambers'

**Introduction to Public Procurement 1: How to run a
lawful public procurement competition**

The recording may be accessed [here](#).

Your speakers today are...



Robert Walton QC (Chair)

Topic:
Overview of the
PCRs



James Neill

Topic:
Designing and
running a lawful
public procurement
competition under
the PCRs



Galina Ward

Topic:
Pitfalls during
evaluation

Overview of the Public Procurement Rules



Robert Walton QC

What is public procurement law?

- Law governing the award of public contracts and concessions by public bodies to third parties
- EU law based:
 - The Public Contracts Directive 2014/24/EU
 - The Concessions Directive 2014/23/EU
 - The Utilities Contracts Directive 2014/25/EU
 - EU Defence and Security Procurement Directive 2009/81/EC
 Implemented by:
 - Public Contracts Regulations 2015
 - Concession Contract Regulations 2016
 - Utilities Contracts Regulations 2016
 - Defence and Security Public Contract Regulations 2011
- Also note:
 - Other forms of public auctions/franchising: Radio spectrum auctioning, energy subsidy auctions (Low Carbon Contracts), rail franchise and competitions for major licence grants (eg National Lottery etc).

The scope of the rules

- **PCRs:**
 - **A public contract:** a contract for executions of works, supply of products, or provision of services.
 - Applies to all “**contracting authorities**”: “bodies governed by public law”
 - Detailed contract thresholds but also note the application of general TFEU principles of equal treatment, non-discrimination and transparency can still apply to sub-threshold contracts.
- **UCRs:**
 - **A utility** is a contracting authority/public undertaking/an entity which carries out a relevant activity by virtue of being granted “special and exclusive rights” to do so. But where it has been granted those rights under a compliant process run under the UCRs/PCRs/CCRs then it is not caught.
 - **Relevant activity:** Energy/water/transport, fuel extraction (see Regs 9-15)
 - Detailed thresholds/exemptions applying to in-house contracts and affiliated undertakings
- **CCRs:**
 - **A concession** is a contract for pecuniary interest between a contracting authority and economic operator where the consideration is either:
 - Where the contract gives the right to “exploit” the works / services the subject of the contract; or
 - Where the contractor has the right together with some payment from the contracting authority/utility

Who is caught by the public procurement rules (1): what is a contracting authority?

- A contracting authority is “means the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law”: Reg 2 PCRs
- What is a “commercial character”? See eg *Alstom Transport v Eurostar International Ltd* [2012] EWHC 28 (Ch):
 - *“If the body operates in normal market conditions, aims to make a profit, and bears the losses associated with the exercise of its activity, it is unlikely that the needs it aims to meet are not of an industrial or commercial nature.”*
 - Existence of competition and substantial State aid a significant but not determinative factor in showing commerciality: so finding by competition authority of dominant position in market was not decisive.

“bodies governed by public law” means bodies that have all of the following characteristics:—

- (a) they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;
- (b) they have legal personality; and
- (c) they have any of the following characteristics:—
 - (i) they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law;
 - (ii) they are subject to management supervision by those authorities or bodies; or
 - (iii) they have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law;

What kind of contracts are caught by the public procurement rules? (1) The relevant thresholds

- The relevant thresholds for 2020:

Public Contracts

Thresholds are exclusive of VAT.

	Supply, Services and Design Contracts	Works Contracts	Social and other specific services
Central Government	£122,976	£4,733,252	£663,540
	€139,000	€5,350,000	€750,000
Other Contracting Authorities	£189,330	£4,733,252	£663,540
	€214,000	€5,350,000	€750,000
Small Lots	£70,778	£884,720	n/a
	€80,000	€1,000,000	

Utility Contracts

Thresholds are exclusive of VAT.

	Supply, Services and Design Contracts	Works Contracts	Social and other specific services
Utility Authorities	£378,660	£4,733,252	£884,720
	€428,000	€5,350,000	€1,000,000

Concession Contracts

Thresholds are exclusive of VAT.

	Concession Contracts
Authorities	£4,733,252
	€5,350,000

Exclusions / Specific situations

- Complex rules on exclusions and specific situations:
- Exclusions (regs 7 – 12):
 - Utilities
 - Electronic communications
 - International rules
 - Service Contracts
 - Contracts between public sector entities
- Specific situations (regs 13 – 17): e.g. mixed procurement involving defence.

The scope of the procurement rules: three problematic areas

- Detailed/complex **aggregation rules** in Regulation 6 of the PCRs designed to prevent bypassing of the rules either through successive awards in a calendar year/artificial sub-division or use of lots
- Exemptions for “**in-house**” **public contracts** (the *Teckal* exemption) or contracts “subsidised by public bodies”
- **What is a concession?** Key features set out in Reg 3: right to exploit the services that are the subject of the contract and transfer of operating and market risk
- See Ocean Outdoor UK Limited v London Borough of Hammersmith and Fulham [2019] EWCA Civ 1642 (8 October 2019): leases on publicly owned land to support advertising structures. The services to be entrusted must be for the benefit of the contracting authority “in respect of its public obligations” and should be “in the public interest”. So mere commercial exploitation of assets absent a public service element will not be caught.

What are the primary procurement principles?

- Regulation 18 PCR:
 - (1) Contracting authorities shall treat economic operators **equally** and **without discrimination** and shall act in a **transparent** and **proportionate** manner.*
 - (2) The design of the procurement shall not be made with the intention of excluding it from the scope of this Part or of artificially narrowing competition.*
 - (3) For that purpose, competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators”*
- Similar principles at Reg 36 UCRs and Reg 8 CCRs

What are the main procurement procedures in the PCRs and UCRs?

- For all public contracts:
 - The open procedure
 - The restricted procedure
 - The competitive dialogue procedure
 - The negotiated procedure
 - An innovation partnership

- Much greater procedural flexibility for concession contracts: “*the contracting authority or utility shall have the freedom to organise the procedure leading to the choice of concessionaire subject to compliance with these Regulations*” (Reg 30). Basic requirement to advertise via a concession notice, and transparent application of objective award criteria.

Designing and running a lawful procurement competition under the PCRs



James Neill

Five key areas

- Advertising the contract correctly
- Eligibility and grounds for excluding a bidder
- Setting the criteria in the ITT correctly
- Managing the evaluation process
- The contract award notice and entering into the contract

(A) Advertising the contract correctly

- Preliminary market consultation now expressly permissible under PCR Reg 40 and 41
- The two types of call for competition under Regulation 26(2)
 - **Prior Information Notices:** Reg 48
 - **Contract Notices:** Reg 49 – “OJEU Notices”
- Critical to get right: failure to advertise correctly will lead to a risk of a declaration of ineffectiveness.
- Limited utility of Voluntary Transparency Notices (“VEAT”) notices if Reg 26(2) not complied with: see *Ministero dello Interno v Fastweb SpA C-19/13*
- Main issues arise when extending contracts and varying contracts already advertised

A.1 When do you have to advertise a modification to a contract and the *PressetText* exceptions now specified in Reg 72 PCR

- Changes anticipated in the original procurement document (test is “do not alter the overall nature of the contract”)
- Additional works or services, where change of contractor cannot be made for economic or technical reasons (max 50% of original contract)
- Unforeseen circumstances (50% threshold)
- New contractor – unequivocal review clause, corporate restructuring, insolvency
- “Safe harbour” thresholds: again, so long as overall nature of the contract not changed
- Not substantial: does not make contract “materially different” and change the “economic balance” in favour of the contractor

B. Eligibility and grounds for exclusion

- See Reg 57(1) for **mandatory** grounds for exclusion (eg fraud/money laundering/proceeds of crime). Also includes where person is a board member or has “powers of representation, decision or control” of the economic operator
- Reg 57(8): **discretionary grounds of exclusion**: including bankruptcy, conflict of interest which cannot be remedied, anti-competitive agreements, and “significant or persistent deficiencies in the performance of a substantive agreement under a prior public contract”.
- “Self-cleaning” possible under Reg 57(13) – (17) to demonstrate reliability

C. Setting lawful selection and evaluation criteria

- Important to differentiate between selection criteria and evaluation criteria (see e.g. *Lianakis Case C-532/06*):
 - **Selection criteria:** criteria that relate to the tenderer. These are used to assess the tenderer's ability to perform the contract in question, as well as its financial standing and eligibility. Can only be deployed at qualification stage.
 - Selection criteria may relate to “suitability to pursue a professional activity, economic and financial standing, technical and professional ability”, but have to be related and proportionate to subject matter of contract: Reg 58(1).
 - Note complex rules on means of proof of economic and financial standing under Reg 60.
 - **Award criteria:** criteria that relate to the tender. These are used to identify the tender that is the most economically advantageous – the “MEAT” test.

- Advance disclosure of criteria and weightings required, but not necessarily sub-criteria, so long as doing so:
 - does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;
 - does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;
 - was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (*ATI/EAC v ACTV Venezia* [2005] ECR I-10109, *J Varney & Sons Waste Management Limited v Hertfordshire County Council* [2011] EWCA Civ 708)

C.1: Setting evaluation criteria and the RWIND test

Award criteria must be “clear, precise and unequivocal, so that a **reasonably well-informed and diligent tenderer** can understand their significance and interpret them in the same way, and secondly, the contracting authority can ascertain whether tenders satisfy the relevant criteria”: see Coulson J’s summary in *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) [5] – [12]

C.2 How to deal with incumbent operator advantage in bid design?

- Differential treatment to neutralise an incumbent operator's advantage does not amount to unequal treatment, where technically feasible, economically feasible and does not infringe the rights of the existing provider: C-T-345/03 Europaiki Dynamiki v Commission.
- T-211/17 Amplexor v Cmn (3% funding allowance for new tenders to finance take over costs, 0.3% to incumbent was lawful) – another case of the ET principle neutralising a competitive advantage where to do so would encourage healthy and effective competition. Test is whether that differential treatment was “arbitrary or excessive”
- See recent example: Case T-10/17 Proof IT SA v European Institute for Gender Equality (16 October 2018). “Understanding the objective of the framework contract” was a lawful criterion.

D. The Evaluation Process itself

- Clarification of bids: discretion to seek clarification but not to allow bid to be re-written (see eg Case C-599/10 - SAG ELV Slovensko)
- Need to closely manage confidentiality and conflicts of interest: see Reg 21 and 24
- Reasons for scores and managing the audit trail to comply with duty of transparency
- What to do about abnormally low bids? See Reg 69 and SCRL Limited v NHS England [2018] EWHC 1985 TCC: no duty to reject tenders on basis of AL bid, only a power, and no general duty to investigate all bids.
- Abandonment of a procurement following evaluation: no absolute obligation to award the contract following evaluation: see Metalmecanica Fracasso SpA v. Amt de Salzburger Landesregierung [1999] ECR I-5697, [2000] 2 CMLR 1150 at [24]);

E. The Contract Award Notice and standstill period

- Standstill of 10 days if sent electronically
- A breach of the standstill gives rise to a ground for a declaration of ineffectiveness
- Extendable at the discretion of the contracting authority
- Limitation periods still apply even if standstill extended!

86.— Notices of decisions to award a contract or conclude a framework agreement

(1) Subject to paragraphs (5) and (6), a contracting authority shall send to each candidate and tenderer a notice communicating its decision to award the contract or conclude the framework agreement.

(2) *Content of notices*

Where it is to be sent to a tenderer, the notice referred to in paragraph (1) shall include—

- (a) the criteria for the award of the contract;
- (b) the reasons for the decision, including the characteristics and relative advantages of the successful tender, the score (if any) obtained by—
 - (i) the tenderer which is to receive the notice; and
 - (ii) the tenderer—
 - (aa) to be awarded the contract, or
 - (bb) to become a party to the framework agreement,
 and anything required by paragraph (3);
- (c) the name of the tenderer—
 - (i) to be awarded the contract, or
 - (ii) to become a party to the framework agreement; and
- (d) a precise statement of either—
 - (i) when, in accordance with regulation 87, the standstill period is expected to end and, if relevant, how the timing of its ending might be affected by any and, if so what, contingencies, or
 - (ii) the date before which the contracting authority will not, in conformity with regulation 87 enter into the contract or conclude the framework agreement.

AVOIDING COMMON PITFALLS DURING EVALUATION



Galina Ward

(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
- 6th 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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