

James Neill

**Designing and running a
lawful procurement competition under the PCRs**

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 PCRs

- 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.