



**Procurement challenges –
bringing and defending
them**

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Andrew Lancaster, Partner

Anthony Collins
solicitors

Overview

What issues are you facing?


Back to Basics

Unhappy Tenderer Ltd v RP Limited

Bringing Challenges

Defending Challenges

Avoiding Challenges –Some practical tips



What are the issues you are facing?

EU Procurement law;

- a minefield for Contracting Authorities and Tenderers alike
- an area for challenge

Back to Basics – the EU Treaty Principles

Transparency

Equal treatment and non-discrimination

Proportionality

Mutual recognition

Back to Basics – UK Regulations

Public Contracts Regulations 2006 (as amended)

- Duty on Contracting Authorities to comply with Regulations
- Regulation 4(3) reflects the EU Treaty
- A claim can be brought by “any economic operator which ... suffers, or risks suffering, loss or damage” as a result of breach of this duty (Regulation 47C)

Back to Basics - Obligations on Contracting Authorities

- PQQ – selection criteria
- ITT - Award criteria
 - Can choose between lowest price and ‘MEAT’
 - If ‘MEAT’, must devise award criteria for identifying MEAT
 - Award Criteria should:
 - Assess bid not ability of bidder
 - Be linked to subject matter of contract
 - Be proportionate and non-discriminatory

Unhappy Tenderer Ltd v RP Limited

Bringing Challenges – when?

Time limits

- Now 30 days from date of knowledge - when does clock start?
- *Turning Point Ltd v Norfolk CC* (2012)
- NB Time limit can expire before conclusion of tender process!
- What impact will this have on procurement challenges?

Bringing Challenges – why?

- Breach of EU Treaty Principles and UK Regulations - including Regulation 47C
- Contracting Authority refuses to remedy the breaches
- The breaches could be many and various but relate to
 - The content of the evaluation criteria
 - The evaluation methodology – how answers are scored and weighted
 - Errors in the process

Bringing Challenges – why?

- Selection criteria is too subjective and requires insufficient evidence – *Easycoach Ltd v Department for Regional Development* [2012]
- Award criteria revisits selection criteria – the award criteria should assess the bid and not the bidder – *Lianakis* [2008]
- Not linked to the subject matter of the contract and is disproportionate – ability to acquire the housing stock for a repairs contract *R v Secretary of State ex parte London Borough of Harrow* [1997]

Bringing Challenges – why?

- Site visits and interviews – awarding more than 10% of marks and being unclear about the purpose – too subjective
- Timing of a requirement to provide a local office may be discriminatory – *Contse SA & Others v Insalud (Spanish Oxygen)* [2005]
- ‘Believability’ is subjective – can’t be an award criteria in itself. However see *Evropaiki Dynamiki v Commission* (2011) – considering ‘believability’ under otherwise lawful criteria may be acceptable

Bringing Challenges – why?

- Weightings of criteria not stated
- Courts traditionally reluctant to interfere – but see *Traffic Signs* [2011]
- Weightings must be capable of objective justification
- Sub-criteria and weightings not disclosed – don’t generally need to disclose sub-criteria weightings unless would have affected how tenderers prepared their bid – *Mears* [2011]

Bringing Challenges – why?

- In house bids can seem like a ‘stitch up’
- When evaluating bids, marking sheets/methodology do not tally with information in ITT
- Failure to disclose model answers? Only disclosable if they amount to sub criteria

Bringing Challenges – how?

- Be mindful of the strict time limits that apply
- If there is time, set out the detail of the claim in a letter – usually during the standstill period but this may have to be pre award
- Regulation 47D – if a contract has not been awarded proceedings must be started at court within 30 days ‘beginning with the date when the economic operator first knew or ought to have known that grounds for starting proceedings had arisen’

Bringing Challenges – how?

- The court may extend this time limit up to a period of three months if it considers there are good reasons for doing so – but see *Turning Point and Norfolk CC* [2012]
- Under Regulation 47G when a claim is issued at court and the contracting authority is aware of this, it cannot enter into the contract until the court orders otherwise

Defending Challenges

- To defend or not to defend?; that is the question!
- Do the matters complained of breach EU Treaty Principles and UK Regulations?
- Is the tenderer out of time?
- Should the bid be disqualified for failing to comply with key terms and provisions?
- Can the breaches be remedied?

Defending Challenges

- Do the terms and conditions of the tender process allow it to be re-run or discontinued for no reason and with no costs consequences?
- Beware implied contracts.
- Is there any loss to the tenderer or risk of loss – Regulation 47C
- Regulation 32 is a critical process for defending or heading off claims.

Defending Challenges

- When a decision has been made to award a contract, notice must be sent to all bidders setting out the reasons for the decision including:
 - The characteristics and relative advantages of the successful tender
 - The score obtained by the winning bidder and the bidder receiving the letter who was unsuccessful
 - This requires more than just setting out the scores and is intended to help the losing bidders to understand why they lost and that the process was compliant.

Defending Challenges

- The regulation 32 letter requires a standstill period of 10 days
- Contracting Authorities should be willing to extend the period to address ongoing concerns

Defending Challenges

- If proceedings are issued by a bidder consideration needs to be given to the following:
 - Should the claim be defended and if so an application made to lift the automatic suspension of the contract? The courts seem more willing to do this.
 - Should an application be issued at court at the same time to strike out the claim on the basis that it has no reasonable prospect of success?
 - What are the risks of deciding to discontinue or to re-run the process? Are these greater than defending a challenge?

How to avoid claims – some practical tips

- Draft/read the ITT and the terms and conditions carefully
- CA – include the right to abandon or re-run the process at any stage and for no reason without any right of bidders to claim costs
- CA – ensure that wording of the terms and conditions do not create an implied contract that gives bidders a right to a contract if they can show they have won

How to avoid claims – some practical tips

- Bidder – read carefully and understand the terms and conditions that relate to variant bids or qualifying or caveating the bid
- Be clear about what happens if word limits are exceeded
- Always raise clarification requests if anything is unclear
- If you are not getting the answers you need, consider 'gently' suggesting that the process may be unfair and take advice on time limits

How to avoid claims – some practical tips

- Ensure that full TUPE information is provided to ensure no unfair advantage to incumbent bidders
- Beware site visits and interviews – risk of subjectivity - be clear what is being evaluated
- Consider issuing clarifications post tender submission
- Always provide as much detail as possible in standstill letters and be willing to extend period
- Beware of undisclosed sub criteria
- Beware of time limits

ANY QUESTIONS?

Andrew Lancaster
0121 212 7421
andrew.lancaster@anthonicollins.com

Anthony Collins
solicitors

Anthony Collins Solicitors LLP
134 Edmund Street
Birmingham B3 2ES
MDX 13055 Birmingham 1
Tel: 0121 200 3242
www.anthonycollins.com