

Workshop 4a

There may be trouble ahead! How to manage legal challenges effectively

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Procurement Challenges

Public Contracts Regulations 2015

Duty on Contracting Authorities to comply with Regulations

- Regulation 18 reflects the EU Treaty Principles:
 - Transparency
 - Equal treatment and non-discrimination
 - Proportionality
 - Mutual recognition
- Exemptions

Back to Basics - Procurement principles (Reg 18)

Principles of procurement

Must:

- treat economic operators equally and without discrimination
- act in a transparent and proportionate manner



- *No cheating rule*
- Must not “design” a procurement with the intention of
 - avoiding the need to tender
 - artificially narrowing competition
 - favouring or disadvantaging particular suppliers

Obligations on Contracting Authorities

- **Selection – Selection criteria**
- **ITT - Award criteria**
 - Must 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

Frequent Causes of Difficulties...

- Breach of EU Treaty Principles and UK Regulations Contracting Authority refuses to remedy 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

Frequent Causes of Difficulties...

- 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]

Frequent Causes of Difficulties ...

- 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. But ‘believability’ under otherwise lawful criteria may be acceptable - *Evropaiki Dynamiki v Commission* (2011)
- 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]
- When evaluating bids, marking sheets/methodology do not tally with information in ITT

Potential Grounds for Challenge

- Failure to follow process as set out in the tender
 - with greater flexibility comes increased risks
- Breach of UK Regulations;
- Mixing up selection and award criteria.
- Evaluation methodology – how the answers are scored and weighted
- Breach of overarching General EU Treaty Principles limited to:
 - transparency;
 - equal treatment and non-discrimination.

When a Challenge Arises

- Do the matters complained of breach EU Treaty Principles and UK Regulations?
- Is there any loss to the tenderer or risk of loss – Regulation 91(1)?
- Is the tenderer out of time?
- Should the bid be disqualified for failing to comply with key terms and provisions?

Where there is a challenge...

- Can the breaches be remedied?
- Do the terms and conditions of the tender allow it to be re-run or discontinued for no reason and with no costs consequences?
- Regulation 86 is a critical process for defending or heading off claims

Regulation 86 is a critical process for heading off challenges:

- **Standstill letter requires a standstill period of 10 days**
- **Commissioners should be willing to extend the period to address on going concerns**

Standstill

- Make sure that the Standstill letter includes:
 - 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
 - Failure to comply can put contracts at risk of being set aside as ineffective for a period of six months

Content of Standstill letter is important

- It requires more than just the scores
- It is designed to demonstrate a compliant process and to be used as a learning tool

When does the clock start ticking?

- Regulation 92(2) –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’
- Clock may “restart” on provision of further information leading to multiple claims
- Under Regulation 95 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
- A Declaration of Ineffectiveness has specific time limits, which in some instances could be up to 6 months

Top Tips

- Draft the procurement documents carefully.
 - 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
 - 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
- Ensure the evaluation panel is properly briefed and carries out the evaluation in accordance with the issued documents (and nothing else!)
- Keep all contemporaneous documents of the procurement in case of challenge
- Stick to your guns where appropriate
- Don't be afraid to consider re-running parts of the process where necessary.

Contract Disputes

Identifying the Warning Signs & Typical Problems

Warning Signs

- Unfulfilled promises
- Rumours of other work going wrong
- Complaints from other members of the project party
- Delay in responses
- Aggressive invoicing or delayed invoicing
- Business expanding too fast
- Staff turnover
- Quality deterioration
- Customer complaints

Typical Problems

- Inadequate service
- Cost problems (overruns, disputed, no value for money)
- Breakdown of relationships
- Regulatory or audit failure

Understanding the Problem

Client issues

- Unclear objectives
- Unrealistic expectations
- Unrealistic programmes
- Inadequate operational staff resources – numbers and quality
- Not managing change and variations

Contractor issues

- Cash flow management
- Prices too low
 - Disconnect between estimators and those delivering
- Inadequate staff resources
- Too much work
- Do not understand client's priorities

Other issues

- Economic situation
- Contracts remain unnecessarily complicated?
- Lack of clarity over completion
- Poor communication

Most Common Disputes

- Costs/Payment/Invoices
- Poor Performance/ Workmanship Issues
- Sometimes disputes are unavoidable.
- What can you do when a dispute arises to resolve it as quickly and as cost effectively as possible?



When a dispute arises

- Disputes can escalate quickly – so act promptly.
- Know your contract:
 - ✓ Obligations of all parties
 - ✓ Dispute escalation procedures
 - ✓ Remedies available (e.g. damages, termination)
 - ✓ Ensure the appropriate contract provisions have been followed correctly AND all required notices have been served correctly e.g. payment – pay less notices



Dispute Resolution Processes

- Litigation
- Adjudication (Construction)
- Arbitration
- Consider Alternative Dispute Resolution
 - E.g. Mediation



Dispute Resolution – Litigation

Formal Court action

Stage 1 – Pre Action Protocol:

- Specific and general protocols that must be complied with
- Purpose of the Pre-Action Protocol
- Failure to comply with protocol

Stage 2 – Formal Court Proceedings:

- Once issued a claim is allocated a “track” by the Court
- Directions given by the Court for the progression of the case
- General and specialist Courts e.g. Technology and Construction Court for most construction and procurement disputes

Dispute Resolution: Adjudication (Construction)

- Quick broad procedure
- Independent adjudicator reviews submissions made by both parties to dispute and provides a decision
- Parties must comply with decision made until it is reviewed by the Court (or arbitrator depending on contract terms)
- Where decision is not complied with an application can be made to the Court to compel compliance.
 - Applications are usually dealt with quickly

Process

- Only one dispute can be referred at a time. Multiple disputes means multiple adjudications
- One party sends the other a notice of adjudication
- Referring party serves a document setting out details of dispute, with evidence
- Responding party serves response setting out defence, with evidence
- May be opportunities to respond – but do not rely on this happening.
- Very tight timescales
- Where deadlines are missed, submissions may not be considered by the adjudicator

Dispute Resolution: Arbitration

- Can only be used where:
 - There is a compulsory arbitration clause in the contract, or
 - The parties agree to arbitrate
- Confidential process.
- Can be more costly than litigation because parties will need to pay the adjudicator as well as cover their own costs

- Governed by the Arbitration Act 1996
- Supplemented by specific contract terms
- Contract usually incorporate standard terms such as CIMAR “Construction Industry Model Arbitration Rules”.
- The rules cover things such as:
 - Appointing the arbitrator
 - The scope of their powers
 - Procedural issues
 - Evidence
 - Witness statements
 - Costs

Top Tips

- Consider potential disputes and appropriate dispute resolution clauses pre-contract
- Agree your contract and sign it before work commences
- Know your contract procedures and apply them
- Maintain a professional relationship
- Keep on top of the contract procedures
- Ensure minutes accurately reflect discussions at meetings
- Don't let disputes grow
- Keep the documentation up to date
- Record in writing any variations to the contract

Thank you.

**See you at the
conference!**