Workshop 4a

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



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NHMF Maintenance Conference 2019

Procurement Challenges



Public Contracts Regulations 2015

Duty on Contracting Authorities to comply with Regulations

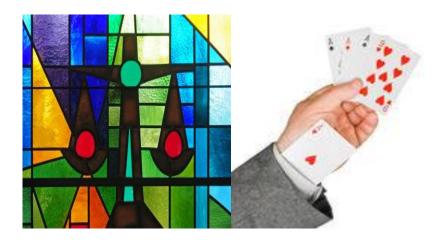
- Regulation 18 reflects the EU Treaty Principles:
 - Transparency
 - Equal treatment and non-discrimination
 - Proportionality
 - Mutual recognition
- Exemptions



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 s*ubjective 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 letterrequires a standstillperiod 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 promisesRumours 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



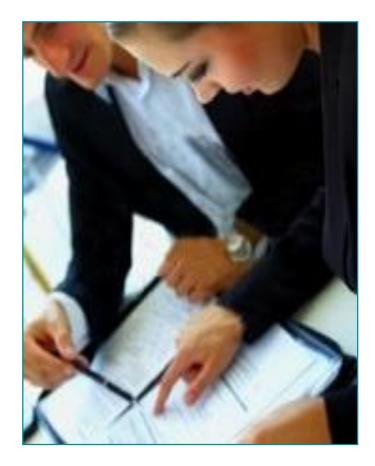
Most Common Disputes

- 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!

