



Requirement to distinguish between "selection" and "award" stages of a public procurement, and to give suppliers complete information about the criteria used in both stages

Action Note 04/09 29 April 2009

Issues

1. Recent case law and infractions have highlighted several important issues regarding the selection and award stages of public procurement exercises to award public contracts:
 - There is a distinction between the "selection" and "award" stages of a procurement process and the criteria which must be applied at each of these stages.
 - "Selection" criteria such as suppliers' capability and experience must not be used at the "award" stage.
 - Contracting authorities must state the award criteria, and where applicable the weightings and marking scheme, in the contract notice or contract documents. This must include any sub-criteria used. Merely providing suppliers with high-level or summary criteria and weightings is not sufficient if a more detailed distinction will be used in the evaluation.
 - Likewise full details about the scoring of a pre-qualification questionnaire (PQQ) used at selection stage must be made known to suppliers, as must any "pass mark" for the PQQ set by the contracting authority.

Dissemination

2. You are requested to circulate this Procurement Policy Note (PPN) within your organisation, agencies, non-departmental public bodies (NDPBs), and any other bodies for which you are responsible.

Contact

3. Enquiries about this paper should be addressed to the OGC Service Desk 0845 000 4999
servicedesk@ogc.gsi.gov.uk

Action

4. Contracting authorities should ensure that they maintain the distinction between selection criteria and award criteria for their procurements. Where call-off contracts are let under a framework agreement contracting authorities must ensure that appropriate award criteria are used.

5. Contracting authorities should also make sure that detailed award evaluation criteria, sub-criteria, scoring schemes and weightings are made available to bidders.
6. Details of criteria and sub-criteria, scoring, weightings and pass marks used in pre-qualification questionnaires at the selection stage should also be made available to suppliers.

Background

Distinction between selection and award

7. Under the public procurement rules, contracting authorities may require suppliers to satisfy minimum levels of economic and financial standing, and / or technical or professional ability. These matters are commonly described as “selection criteria”, (although this designation is not set out explicitly in the Public Procurement Directives or Regulations) and are often assessed by means of a pre-qualification questionnaire (PQQ).
8. Where a supplier is successful at the selection stage this will result in one of the following: (a) substantive evaluation of the supplier’s tender (Open Procedure), the eligibility to receive an invitation to tender (ITT) (Restricted procedure), (c) selection to negotiate (Negotiated procedure), or (d) the supplier’s eligibility to enter into a competitive dialogue (Competitive Dialogue procedure).
9. The selection process focuses on the supplier’s characteristics and suitability in principle to provide the contracting authority’s requirement. In the open procedure all suppliers which pass the selection stage will be eligible to have their bids assessed at the award stage. In the Restricted, Negotiated and Competitive Dialogue procedures, the authority will select the suppliers that will be successful ultimately at contract award stage from the pool of suppliers who pass the selection stage. The Directive and implementing Regulations require that the process to limit the number to participate should use objective and non-discriminatory criteria, and also specify the minimum number of suppliers who may be selected.
10. The award stage considers the merits of the eligible tenders in order to assess which tender is the most economically advantageous. When evaluating tenders at award stage, contracting authorities may only use criteria linked to the subject matter of the contract. These criteria are commonly known as the “award criteria”.
11. Recent case law, (see European Court of Justice case C-532/06, Emm G Lianakis AE and others v Dimos Alexandroupolis and others) emphasises that the “selection” and “award” stages have distinct processes and criteria, even if both are carried out at the same time (as may happen under the Open procedure). Contracting authorities must ensure that this distinction is maintained when assessing PQQs or equivalent documents or bids during a procurement procedure.
12. Contracting authorities must ensure that selection criteria are not used at award stage; to do so may invite infraction proceedings, as has already happened to UK contracting authorities which have not maintained this separation. This is because the use of selection criteria such as experience at award stage may perpetuate the advantage of an incumbent or previously used supplier, to the detriment of other qualified candidates.
13. “Lianakis” establishes that “experience” is a selection criterion, and contracting authorities must not use past experience as an award criterion. OGC notes that case law in this area is evolving, and that while experience is not a legitimate criterion at award stage tenders may contain some information about a supplier’s experience as part of the answer to a question in the ITT. Where appropriate reference is made to experience as evidence to support a supplier’s answer this may be legitimate. However, contracting authorities should not use this information as the sole or primary basis for their assessment of whether or not a particular tender is the most economically advantageous. OGC is currently engaging with the Commission to seek further clarity on this issue.

14. Contracting authorities should ensure that they are able to provide unsuccessful suppliers with a debrief that is meaningful and which relates to the criteria that are relevant to the stage at which the supplier was rejected. Failure to do so may attract infraction proceedings.

Distinction between selection and award in competitions under framework agreements

15. The distinction between selection and award criteria must be also maintained in cases where there is a re-opening of competition (otherwise known as a “mini competition”) amongst suppliers on the framework who could potentially undertake the contract.
16. Contracting authorities which put framework agreements in place, whether for their use only, or as central purchasing bodies, must ensure that the award criteria for further competition, set out in the specifications of the framework agreement, do not include “selection criteria”. OGC has recently issued updated guidance on the use of framework agreements to which the attention of contracting authorities is drawn.
http://www.ogc.gov.uk/documents/OGC_Guidance_on_Framework_AgreementsSept_08.pdf

Ensuring disclosure of award criteria and weighting rules to tenderers

17. The public procurement rules require that the contract notice or contract documents set out the award criteria and their respective weighting or weighting ranges (or ranking if weightings are not used). A contracting authority cannot apply sub-criteria or weighting rules which it has not previously brought to tenderers’ attention; it is not sufficient to provide tenderers with only a high-level summary of the award criteria.
18. Contracting authorities must adhere to the approaches to scoring advised to tenderers (see *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 (QB)). OGC advises contracting authorities to make the full details of the award criteria, sub-criteria weightings and scoring available to tenderers as early as practicable in the procurement process, and not later than at the invitation to tender stage.
19. Potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer and their relative importance when they prepare their tenders. Similarly, if a maximum score on any given question can only be obtained by a response which exceeded the specified requirement, bidders should be so advised.

Ensuring disclosure of selection stage (PQQ) scoring and weighting rules, and minimum requirements to suppliers

20. Scoring mechanisms for the “selection” process are not explicitly covered by the Lianakis or Letting International judgments. Moreover, the public procurement Directive and Regulations do not explicitly refer to the use of a PQQ, although in practice this is a means of collecting and assessing selection procedure information widely used by UK contracting authorities. However, in the context of a recent UK public procurement infraction case, the European Commission considered that the obligation of transparency extends to the disclosure of PQQ marking information, including any minimum standards or pass mark.
21. Therefore where a public body issues a PQQ which allocates specific marks and weightings to questions, those marks and weightings should be made known to suppliers. If there is a pass mark for the PQQ, suppliers should be informed. Likewise, if certain questions are sufficiently critical that an unsatisfactory answer may lead to exclusion, irrespective of the score on the rest of the PQQ, suppliers should be advised.

Relevant Regulations

The generic requirements affecting information as to economic and financial standing are set out in Regulation 24 of the Public Contracts Regulations 2006, SI 2006/5, those for technical and professional ability are contained in Regulation 25. Regulation 30 covers award criteria. The Regulations can be found at the following link. <http://www.opsi.gov.uk/si/si2006/20060005.htm>

OGC 1 Horse Guards Road,
London SW1A 2HQ

Service Desk: 0845 000 4999
ServiceDesk@ogc.gsi.gov.uk
www.ogc.gov.uk

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Press enquiries

T: 020 7271 1318
F: 020 7271 1345

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