

---

# White Paper Procurement Conferences

Awarding Public Contracts Skilfully and  
Lawfully within the Procurement Rules

Mike Mousdale

# How relevant is past performance to the award of a contract?

- Can we take into account references and performance on our own contracts?
- How do we promote SMEs and new starters, which might not have a long track record?

# Ask an expert



---

brownejacobson  
*law, less ordinary*

# Good or bad performance? Or does performance matter?

- How is poor performance treated?
- How do we evaluate good performance?
- What if there is no performance i.e. no track record?

# Application

- General principles, especially proportionality
- Specific selection rules
- PPN 8/16 including CCS Selection Questionnaire
- Award criteria?
- Frameworks and Dynamic Purchasing Systems
- Light Touch regime
- Below Threshold Procurements
- Lots

# Principles

- Treaty principles generally
- Regulation 18(1) - treat economic operators equally and without discrimination and act in a transparent and proportionate manner
- Regulation 18(2) - design of the procurement shall not be made with the intention of artificially narrowing competition
  - i.e. unduly favouring or disadvantaging certain economic operators
- Proportionality is the key in this case

# Exclusion

- Mandatory exclusions for certain criminal offences
- Discretionary exclusions for:
  - Bankruptcy
  - Grave professional misconduct
  - Competition breach
  - Significant or persistent deficiencies in performance of public contracts
- “Spent convictions”
- Self cleansing

# Selection

- Regulation 58(1) - selection criteria may relate to:
    - suitability to pursue a professional activity
    - economic and financial standing
    - technical and professional ability
  - Regulation 58(3) - limit requirements to those that are appropriate to performance of the contract
  - Regulation 58(4) - all requirements shall be related and proportionate to the subject matter of the contract
  - Contracting Authorities may impose requirements relating to:
    - possession of human and technical resources (58(15))
    - sufficient level of experience, demonstrated by suitable references from contracts performed in the past (58(16))
  - Professional ability may be evaluated with regard to skills, efficiency, experience and reliability (not for supplies)
-

# PPN 8/16: Standard SQ

- Scope
  - Services and supplies above threshold
  - Works -see PAS91 PQQ
- Inapplicable to Light Touch regime
- Parts 1 and 2 mandatory -no deviation
- Part 3 - possible to add questions if relevant and proportionate

# How does the SQ deal with Past Performance?

- Up to 3 references in past 3 years (5 for works)
- Client Referee only to confirm accuracy of information provided
- If cannot provide any examples, a 500 word account of suitability
- If sub-contracting, demonstration of maintaining a healthy supply chain
- Insurance
- Additional questions only for central government above £20M
- Evaluation in open procedures - what are your minimum levels?

# Other sources of information?

- Incumbent contractor
  - can we give ourselves a reference?
  - what about our knowledge of performance?
  - a level playing field?
- Press and media reports
- Third party sources
- Consequences of misrepresentation

# How do you apply the criteria?

- Open *versus* 2-stage
  - In Open Procedures selection relies only on passing minimum levels - no comparative exercise
  - Self-certification (including as to past performance)
  - In Open Procedures, verification of minimum levels to take place *before* award of contract
  - In 2-stage procedure, evaluation of SQ is made in order to shortlist
  - Any such evaluation must be in accordance with the criteria, weighting and scoring set out in the SQ documentation
-

# 2-Stage Procedures

- General principles apply
- Disclosure in OJEU and/or invitation to confirm interest.
- Transparency over criteria and methodology apply just as much as with tender evaluation criteria - the RWIND tenderer should be able to understand what is required
- Difficult to see how the less experienced tenderer can prevail in a fair and objective assessment which is weighted towards experience

# Dealing with Experience in the Tender

- Previously completely off-limits
- Organisation, qualification and experience of staff may be used as evaluation criteria
- Cannot use these criteria in selection stage if they are to be used as award criteria
- Enables contracting authority to ‘neutralise’ organisational experience in selection but still assess the applied experience of a candidate (but subject to equal treatment and proportionality principles)

# Frameworks

- Procurement of a framework subject to same Part 2 PCR procedural rules
- But call-off contracts are not
- Apply appropriate minimum levels to a multiple operator framework procured under open procedures
- Need for clarity as to how the framework will be operated
- Understand the rules applicable to award under frameworks
- Potentially enables case by case assessment of eligibility

# Dynamic Purchasing Systems

- Similar advantages apply as with frameworks
- Although the DPS must follow a restricted procedure, all applicants satisfying selection criteria must be admitted (no comparative exercise)
- Contracting Authorities may require a renewed ESPD at any time
- DPS remains open to new entrants

# Below Threshold Procurements

- Regulation 111 - a contracts authority shall not include a pre-qualification stage.
- May ask “suitability assessment questions” (provided relevant to the subject matter and proportionate)
- Questions may relate to: suitability, capability, legal status or financial standing
- Standard questions from SQ and exclusion questions may be used as a guide
- One stage procurement only allowed - no comparative analysis to be carried out
- Minimum levels should not be set too high

# Light Touch Regime

- Public contracts for social and other specific contracts
  - Principles of transparency and equal treatment are overriding
  - Part 2 PCRs does not apply, but contracting authority may choose to apply corresponding procedures
  - Relevant considerations to award decision:
    - quality, continuity, accessibility, affordability, availability and comprehensiveness of the services
    - specific needs of uses
    - involvement and empowerment of users
    - innovation
  - No requirement to feature experience in the decision to award (or even short-listing if that is included)
-

# Supporting the SME - Division into Lots

- Discretion for the contracting authority over the size of and subject matter of Lots
- Requirement to provide justification for not dividing into Lots
- Ability to limit the number of Lots any one tenderer may bid for
- Ability to limit the number of Lots any one tenderer may be awarded
- Sensible sizing of Lots and limitations upon bidding and award levels the playing field of SMEs
- See also Small Lots exemption (£65,630 - supplies and services; £820,370 - works; up to 20% total value) - in effect creates a reserve of work for SMEs

# Conclusions

- Open procedures - set minimum levels which are relevant and proportionate
- 2-stage procedures - consider focusing scoring on issues other than institutional experience but ensure equal treatment and proportionality
- Make use of lots and small lots exemption
- Where appropriate use Frameworks and DPS flexibly

# Thank you

 @MikeMousdale @brownejacobson

[michael.mousdale@brownejacobson.com](mailto:michael.mousdale@brownejacobson.com)

---

brownejacobson  
*law, less ordinary*