



Developing an Effective Procurement Strategy

Mary Mundy, Senior Associate,
DAC Beachcroft LLP

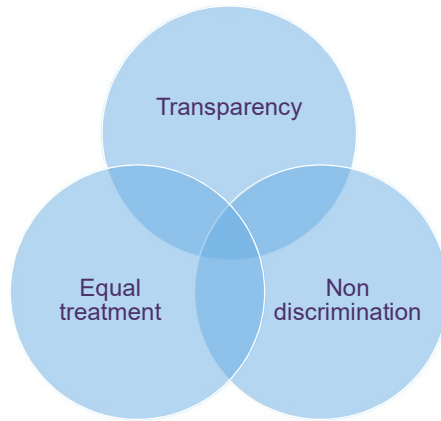


Legal Background

- EU directives
 - Public Directive 2014/24/EC
 - Concession Directive 2014/23/EC
- English Law (separate Scottish Regs)
 - Public Contracts Regulations 2015 (PCR)
 - Concession Contracts Regulations 2016 (CCR)
- Case law
- Guidance and PPNs



Procurement (Treaty) principles



The Procedures

- ▶ Open
- ▶ Restricted
- ▶ Competitive Procedure with Negotiation
- ▶ Competitive Dialogue
- ▶ Innovation Partnership
- ▶ Negotiated without prior publication
- ▶ How do these tie in with RIBA stages?



Pre Market Engagement

- ▶ Expressly permitted (and encouraged by Cabinet Office)
- ▶ Purpose: prepare the procurement and inform the market of procurement plans and requirements
- ▶ Contracting Authority must take appropriate measures to ensure that competition is not distorted
- ▶ Can only exclude where there are no other means to ensure non-distortion of competition
- ▶ Cannot assume distortion will occur, must consult and provide the tenderer with an opportunity to prove distortion of competition will not result



Tendering processes

	Open	Restricted	Comp with Negotiation	Comp dialogue	Innovation partnership
Pre market engagement	√	√	√	√	√
Contract notice	√	√ (or PIN)	√ (or PIN)	√	√
SQ	X	√	√	√	√
ITT	√	√	√	√	√
Negotiation	X	X	√	√	√
Tender	√	√	√	√	√
Post selection negotiation	X	X	X	√	X
Award	√	√	√	√	√
Further growth	X	X	X	X	√



UK rules

- ▶ Part 4 – Regs 105 – 114
- ▶ Remedies do not apply
 - ▶ Contracts Finder requirements
 - ▶ PQQ guidance requirements – now SQ
 - ▶ Below Threshold requirements
 - ▶ Payment of undisputed invoices within 30 days requirements



Payment

- ▶ Payment and interest requirements
 - ▶ above and below threshold
 - ▶ 30 day payment terms
 - ▶ consider and verify invoices – timely fashion
 - ▶ implied if not expressly drafted
 - ▶ contractors must pass down supply chain
 - ▶ publication requirements



CCS Standard PQQ

- ▶ Must be used for all procurements if over threshold
- ▶ Core questions and additional modules
- ▶ Must add evaluation methodology
- ▶ European Single Procurement Document – ESPD
- ▶ Also PAS 91:2013+A1:2017



Contract award criteria

- ▶ Must award to “most economically advantageous tender”
- ▶ On basis of price or cost – so can be price only
- ▶ Or can include the best price/quality ratio
- ▶ Price can include life cycle costing looking at acquisition, maintenance, end of life costs, usage eg energy consumption
- ▶ Quality criteria can take into account e.g.
 - ▶ Technical merit, social, environmental and innovative characteristics
 - ▶ Qualifications and experience where significant impact on contract performance
 - ▶ After sales service



Abnormally low tenders

- ▶ Must request explanation if abnormally low
- ▶ Must assess explanation provided
- ▶ Can only reject tender if explanation provided doesn't satisfactorily explain the low price/cost
- ▶ Must reject if reason is non-compliance with environmental, social or labour laws
- ▶ Can reject if State Aid but only after consulting with tenderer and report to Commission



Modification of contracts - allowed

- ▶ Modification can occur without a new procurement arising where:
 - ▶ Contract clearly and unequivocally provides for the change and it doesn't affect overall nature
 - ▶ Additional provision not envisaged but a change of contractor can't be made due to interchangeability or interoperability issues or significant inconvenience/ substantial cost duplication and not >50% of contract value
 - ▶ Couldn't be foreseen, doesn't affect overall nature and not >50% of contract value
 - ▶ Change of contractor due to merger, insolvency, acquisition etc
 - ▶ Change value doesn't exceed the relevant threshold AND is less than 10% of the original contract value (services) or 15% of the contract value (works) – net cumulative value of changes
 - ▶ Not "substantial"



Modification of contracts - substantial

- ▶ Changes are substantial, and therefore give rise to a new procurement, where it:
 - ▶ Renders the contract materially different in character to that originally concluded
 - ▶ Introduces conditions which if included originally would have brought other bidders/ different winner
 - ▶ Changes the economic balance of the contract in favour of the contractor in a manner not provided for initially
 - ▶ Extends the scope of the contract considerably or
 - ▶ A new contractor replaces the original contractor (except insolvency, acquisition, re-organisation)



Reporting

- ▶ Information on every contract/ framework agreement/ DPS
 - ▶ Authority details, the subject matter and value of the contract
 - ▶ Details of any shortlisting or de-selection and reasons;
 - ▶ Reasons for rejection of any abnormally low tenders
 - ▶ Winning bidder identity and reasons and if known any sub-contracting levels and main sub-contractor identities
 - ▶ Justification for the choice of procedure – negotiated/ dialogue
 - ▶ Reasons for any decision not to make an award
 - ▶ Reasons why any non-electronic communication has been used for tender submission
 - ▶ Any conflicts of interest detected and subsequent measures taken
- ▶ Sent to Commission or Cabinet Office on request



Collaborative contracts and Partnering



Joint bidding

- ▶ Who is the bidder?
- ▶ Consortium/ partner structure?
- ▶ Reliance on parent resources?
- ▶ Bidding agreement terms
 - ▶ Costs, roles, responsibilities, risks
- ▶ Disputes
- ▶ Dissolution
- ▶ Prevention on single bidding/ future projects?



SQ success

- ▶ Attend bidder/ supplier days
- ▶ Check pass/ fail requirements
- ▶ Follow submission instructions/ timing to the letter
- ▶ Financial – ratios/evaluation should be clear
- ▶ Tailor responses not generic materials
- ▶ Check evaluation method/ methodology
- ▶ Chase notification and push for information if de-selected
- ▶ If any issues – raise them asap



Tender evaluation

- ▶ Forward looking – how will you...
- ▶ What is the evaluation criteria?
- ▶ Criteria must be
 - ▶ Disclosed
 - ▶ Relevant
 - ▶ Objective and non discriminatory
 - ▶ Set for the tender, cannot change



Evaluation methods and detail

- ▶ Criteria, sub-criteria
- ▶ Weightings – if not given assumed equal proportions
- ▶ Model answers
- ▶ Be wary of and investigate interview scoring
- ▶ Clarifications to all and on same basis



ITT success

- ▶ It's an exam - answer the questions
- ▶ Check relevance of response to criteria
- ▶ Consistency in bid team
- ▶ Engage with authority
- ▶ Be wary of actions that could raise challenges by others



Standstill

- ▶ Most common challenge trigger
- ▶ Must include (PCR)
 - ▶ Award criteria
 - ▶ Name of winner
 - ▶ Your score and score of winner
 - ▶ Reasons for decision including “characteristics and relative advantages” of winner’s bid
 - ▶ Statement of when standstill ends OR date before which contract will not be awarded



Standstill

- ▶ Information to all tenderers and candidates (i.e. SQ bidders) who haven’t been given notification
- ▶ Minimum 10 clear days notice
- ▶ Must end on a working day
- ▶ If letter is correct then no further right to information BUT can try!
- ▶ Verbal debriefs/ further requests can elicit more data
- ▶ Should get final notification of contract award also and see contract award notice



If you aren't happy?



Remember

- ▶ PCR claims
 - ▶ Generally 30 days from when you knew/ought to have known of grounds to issue legal proceedings
- ▶ Other routes to complain but less teeth
 - ▶ Cabinet Office mystery shopper (unlimited)
 - ▶ "Appeal" ?!
 - ▶ Judicial review (30 days if procurement driven)
 - ▶ EU complaint (unlimited)



Claims/ remedies

	Pre contract award	Post contract award
Breach of duty (PCR)	Automatic suspension Damages	Damages
Ineffectiveness (PCR) - illegal direct award - breach duty & standstill - Incorrect over threshold framework call off	Automatic Suspension Voiding of contract Damages Civil financial penalties Contract cancellation	Voiding of contract Damages Civil financial penalties Contract cancellation



PCR remedies limitation period

- ▶ Breach of duty
 - ▶ 30 days from knowledge/ when ought reasonably to have had knowledge
- ▶ Ineffectiveness
 - ▶ 6 months from contract conclusion
 - ▶ Reduced to 30 days if
 - ▶ no OJEU but contract award notice
 - ▶ OJEU with summary of reasons for not winning
 - ▶ Reduced to 10 days if a VEAT notice/ reasons



Practical issues on claims

- ▶ Get fishing
- ▶ Time is of the essence- act quickly
- ▶ Use your contacts – “off the record” can be used
- ▶ Press the procuring body
- ▶ No stigma to challenging
- ▶ Reasons/ issues can leak out more as you push to keep going
- ▶ Get legal advice ASAP – don't prejudice claim



Carillion: lessons learned and its impact on the procurement process



When did Carillion Collapse?

- ▶ Officially collapsed on 15/01/18 when banks refused to provide any further financial support following talks
- ▶ Warning signs as early as 10/07/2017: profit warning and £845m writedown on contract values
- ▶ Two more profit warnings within five months of each other



Lesson Learned: Long-term focus

- ▶ In one survey, of 253 private companies asked, 50% said that cost was the driving factor in awarding government contracts
- ▶ “Buying work”
- ▶ Barriers too high to attract many bidders, resulting in a market ‘Oligopoly’.
- ▶ Estimated that since 2016 the Government has had to spend £120 renegotiating contracts



Lessons Learned: Long-term focus

- ▶ Recent Parliamentary inquiry concluded that the procurement process should focus on delivering quality and move away from short-term cost savings to focus on long-term economic impact
- ▶ The Government will extend the requirements of the Public Services (Social Value) Act 2012 to guarantee all major procurements explicitly evaluate social value
- ▶ The Government will now exercise the right to exclude companies from tender in the future; it 'did not believe it had grounds' to exclude Carillion from tenders



Lessons Learned: emphasis on competitiveness

- ▶ The Government's view: the more bidders the greater the quality in service
- ▶ It also spreads the risk more evenly to avoid similar instances to Carillion
- ▶ There will also be a move to understand the quality of leadership and governance in a company – "greed and appetite for risk" in Carillion were stated to be at odds with public service values
- ▶ Changes to SQ/ procurement policy going forwards?



Lessons Learned: Recommitment to government policy

- ▶ The Government aims to rebuild public trust
- ▶ The Government will adhere more closely to the Green Book guidance when appraising or evaluating a company
- ▶ The Government will openly publish reasoning when deciding whether to keep a job in-house or to outsource it
- ▶ They are also looking to give the Financial Reporting Council and The Pensions Regulator greater powers to exercise their respective roles properly to avoid future difficulties



Brexit and Procurement

- ▶ The UK leave the EU at 23:00 (GMT) on 29 March 2019.
- ▶ The UK and EU are currently negotiating a withdrawal agreement. This is expected to include a transition or implementation period, until the end of 2020, when EU law will continue to apply in the UK – including in relation to procurement.
- ▶ Confusion about future applicability of EU treaty principles for cases where the relevant procurement regulations do not apply.
- ▶ After this, the UK will, in theory, have more freedom for the UK to set and change its own procurement rules. However, such freedom to change the rules may be restricted by any international agreements that the UK chooses to make, with the EU and other countries.



Brexit and Procurement

- ▶ In respect of international agreements, the main options are:
 - ▶ Option 1 – EEA membership or equivalent (a.k.a. the 'business (largely) as usual' option) – for essentially political reasons, this option seems increasingly unlikely.
 - ▶ Option 2 – the Bespoke option (a.k.a. the Switzerland option) – seems more likely. If agreed, it is probable that the EU will insist on the UK maintaining, in broad terms, current EU rules on procurement.
 - ▶ Option 3 – the GPA option – on 1 June 2018, the UK Government submitted its application to re-join the WTO's GPA as an independent member after Brexit. This offers the UK the most flexibility in policy terms post Brexit, e.g. the Government could more readily create rules to stipulate requirements to 'buy British'. However, this may come with reduced access to foreign markets, e.g. the Single Market.
- ▶ At present, the UK government's preferred option is not clear.



Any questions?

