10 Common Pitfalls in Public Procurement

October 2012
Pitfall 1 – valuing the contract

- Current threshold values as of 1 January 2012
- Depends on:
  - Type of contract being procured
  - The identity of the contracting authority

<table>
<thead>
<tr>
<th></th>
<th>Supplies</th>
<th>Services</th>
<th>Works</th>
</tr>
</thead>
<tbody>
<tr>
<td>Central Government bodies</td>
<td>£113,057</td>
<td>£113,057</td>
<td>£4,348,350</td>
</tr>
<tr>
<td>Other public sector contracting authorities</td>
<td>£173,934</td>
<td>£173,934</td>
<td>£4,348,350</td>
</tr>
</tbody>
</table>
Pitfall1 – valuing the contract

- Contract value calculated on the reasonable estimated value of the contract
- If there is more than 1 contract to fulfil a single requirement the value of those contracts should be aggregated
- Where there are separate phases to a construction project, the contracts relating to all of the phases may need to be considered as one when applying the threshold
- There is an exception for low value contracts. Where a contract value falls below £805,137 (works) or £64,500 (goods/services) and the contract together with any other such contract(s) accounts for 20% or less of the value of the works as a whole, there is more flexibility in awarding
Pitfall 2- below threshold contracts

• Potentially relevant EU Treaty principles are:
  – Proportionality
  – Transparency
  – Non-discrimination
  – Equal treatment

• These principles apply to contracts with a “cross-border interest”
  Relevant considerations are:
  – Subject matter of the contract
  – Value of the contract
  – Place of performance
  – Size and structure of the market

• The principles may therefore need to be followed for below threshold
  contracts or Part B services contracts that are not subject to the full
  Regulations
Pitfall 2- below threshold contracts

• What does compliance with the principles mean in practice?
  – Advertising the contract opportunity appropriately
  – Ensuring all tenderers are treated equally
  – Ensuring transparency of all selection/award criteria
  – Adequate debrief

• Don’t needlessly follow the full Regulations
Pitfall 3 – misuse of frameworks

• When using a framework contracting authorities can appoint only suppliers originally appointed to the framework
• Frameworks can be used only within the scope originally tendered
  – cannot be used by contracting authorities unless identified in tender establishing the framework
  – cannot extend to services/works/supplies unless identified in tender establishing the framework
Pitfall 3 – misuse of frameworks

• Misuse of a framework is not the problem of the framework administrator it is the problem of the contracting authority using it
• You cannot renegotiate the contract terms for call-off contracts
• You cannot always appoint anyone you want from the framework, you may need to run a mini-tender of all those on the framework capable of performing the contract
Pitfall 4 - confusing selection and award criteria

- Selection criteria relate to the ability of the tenderer to perform the contract
- Award criteria relate to the assessment of the tender submitted
- Selection criteria can be considered only at the PQQ stage
- Award criteria can be considered only at the ITT stage
- Confusing the two stages can (and very often does) result in a non-compliant tender process
Pitfall 4 - confusing selection and award criteria

What does this mean in practice?

• Selection criteria assess whether a tenderer satisfies minimum levels of economic or financial standing, and its technical or professional ability
• Selection criteria focus on the tenderer not the tender
• Award criteria focus solely on tenders submitted to identify which tender is the most economically advantageous
• Award criteria must be linked to the subject matter of the contract
• Past experience is a selection criteria and should generally not be used as an award criterion
• The specific team proposed for the job can be relevant at the award stage

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Pitfall 5 - specification

- Specifications define required characteristics
- Technical Specifications must be in the contract documents
- Afford equal access to economic operators
- Do not create unjustified obstacles to opening up public procurement to competition
Pitfall 5 - specification

– Standards of technical specifications must be defined in accordance with the Procurement Regulations - in order of preference:
  – British standards transposing European standards;
  – European technical approvals;
  – Common technical specifications;
  – International standards; or
  – Other technical references systems established by the European standardisation bodies.
Pitfall 5 - specification

- In the absence of European or International standards:
  - British standards
  - British technical approvals
  - British technical specifications relating to the design, calculation and execution of the work or works and use of the product
- Must be accompanied by the words “or equivalent”
Pitfall 5 - specification

- Performance & functional requirements
  - must be sufficiently precise to allow an economic operator to determine the subject of the contract
  - may be defined by reference to standards as a means of presuming conformity
  - may be used for certain characteristics and standards used for other characteristics

- Tenders cannot be rejected on the grounds that:
  - it does not comply with a standard if the bidder can prove that the proposed solution satisfies the requirements of the standard in an equivalent manner; or
  - it does not comply with performance and functional requirements if it complies with a standard which meets those requirements
Pitfall 5 - specification

- Technical specifications must not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products unless:
  - the subject of the contract cannot be described by references to technical specifications which are sufficiently precise and intelligible to all economic operators; or
  - the subject of the contract makes the use of the reference indispensible
  - must be accompanied by the words “or equivalent”
Pitfall 5 - specification


- most specifiers specify by brand for projects under the Directive
- no-one attached 'or equivalent' to each brand specification
- 80% did not attach 'or equivalent' to citations of standards
- over half the respondents had difficulties arising from use of 'or equivalent', both for brands and standards
- half thought avoidance of brand specifications had a negative impact on the project
- none saw it as positive
Pitfall 6 - disproportionate selection/award criteria

- Selection criteria must be appropriate, relevant and proportionate to the subject matter of the contract
- Selection criteria must be non-discriminatory
- Award criteria must be linked to the subject matter of the contract
- Award criteria must be proportionate and non-discriminatory
- Is the financial threshold reasonable for the value of the works?
- Are the insurance requirements proportionate for the contract?
Pitfall 7 - transparency of award criteria

- The award criteria and any sub-criteria must be disclosed.
- Each criterion and sub-criterion (if any) should be clearly defined so that it is absolutely clear what is required.
- Award criteria must be sufficiently clear to allow "reasonably well-informed and normally diligent tenderers to interpret them in the same way."
- Weightings for criteria and sub-criteria must be disclosed.
- Scoring methodology should be disclosed.
Pitfall 8 – contract extension/variation

• A contract extension or variation that amounts to a material change may result in the creation of a new contract
• New contracts may require to be re-advertised and re-tendered
• Failure to comply with this can result in a challenge by an aggrieved bidder
Pitfall 8 – contract extension/variation

• Changes to key contract terms (e.g. price, duration, scope of services/works, risk allocation) can amount to an award of a new contract

• Factors to consider:
  – Was the change/extension envisaged in the original tender?
  – Does the extension/variation materially change the original contract?
  – Does it potentially mean that had the change/extension been included in the original tender another bidder would have bid or could have won the contract?
Pitfall 9 - qualified tenders

- Contracting authorities will often reject qualified bids
- Qualified bids can result in a material change to the terms of the contract tendered
- Contracting authorities could breach the Procurement Regulations unless the contract is re-tendered
- A qualified bid is treated the same as post-tender negotiation under restricted and open procedure
Pitfall 9 - qualified tenders

- If aspects of the tender document are unclear, bidders should seek clarification rather than qualify bids.
- The issue should be raised immediately otherwise potentially time-barred.
- Distinction drawn between clarification and qualification.
- Contracting authorities may clarify aspects of bids if a clear error has been made but they are generally not required to do so.
- Contracting authorities must, at all times, ensure all bidders are treated equally.
Pitfall 10 - getting the debrief and standstill wrong

- Purpose of debrief is to “put an unsuccessful tenderer in a position in which it can clearly identify the reasons for rejection in order that it can defend its rights”
- Purpose of standstill is to “give tenderers sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure”
- PQQ - contracting authority must notify candidates eliminated at PQQ stage “as soon as reasonably practicable” of the fact of their elimination
- No requirement to provide reasons at PQQ stage but best practice is to provide reasons
- If candidate makes a written request, debrief information must be provided within 15 days
- If you do not notify candidates eliminated at this stage of their elimination then you will be required to inform them of the contract award decision (i.e. provide them with a standstill notice)
Pitfall 10 - getting the debrief and standstill wrong

- Contracting Authority must issue a standstill notice to all tenderers and any candidates that have not been informed of their elimination at PQQ stage.
- Standstill notice must contain:
  - Contract award criteria
  - The score obtained by the unsuccessful tenderer and the successful tenderer
  - The name of the successful tenderer
  - A summary of reasons why the tenderer (or candidate) was unsuccessful
  - The characteristics and relative advantages of the successful tender
  - A precise statement as to the effect of the standstill period on the recipient’s rights (10 days standstill if debrief issued by electronic means)
Pitfall 10 - getting the debrief and standstill wrong

Summary of reasons and characteristics and relative advantages – what does this mean in practice?

- Scores against the evaluation criteria for each criteria and sub-criteria
- A scoring breakdown on its own is not enough. A narrative explanation of the scores must also be provided
- A narrative explanation of why the successful tenderer was awarded a higher score in particular areas
- Contracting Authority must take care not to compromise confidentiality or intellectual property of the successful tenderer
- The standstill notice must give true reasons for the rejection
- The reasons must accurately reflect the conduct of the evaluation procedure (e.g. it should be drawn from the evaluation panel’s comments and scores noted during the tender evaluation stage)
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