WEBINAR SERIES: PROCUREMENT BITES

M, N, O OF PROCUREMENT

Clare Dwyer

Well good morning everyone I'm Clare Dwyer and this is session five of Procurement Bites, our alphabetic run through of all things procurement related. I'm joined by my colleagues Charlotte Parkinson, Paul Rowley and Jack Doukov-Eustice.

Today we offer you M, N and O. M for Moderation which Charlotte's going to take you through. N for Non-discrimination from Paul and O for the Outsourcing Playbook from Jack. Do put some questions in the chat and we will pick them up as and when we have time.

So without further ado I bring to the floor my colleague Charlotte Parkinson who is going to talk to you about moderation. Charlotte …

Charlotte Parkinson

Thanks Clare.

So starting with some moderation I thought I would look at a recent case from Scotland to draw out some of the key points around moderation. Now the case is one of OLM Systems, a shame it wasn't ONM for this session, and Fife Council and that case confirmed that the extent to which scores should be moderated and the approach an authority should take to selecting a method for the moderation is open to the discretion of the authorities.

Now a very little bit of background just to set the context, OLM were Fife's incumbent IT provider and they came third in Fife's procurement for a new software system contract and OLM alleged among other things that the scoring system that Fife had used was unlawful because they hadn't published a procedure to reach a consensus score in a two stage moderation procedure save for a scoring key that had graded marks between 0 and 10 and OLM said that Fife had therefore failed to adequately supervise by not giving specific directions to its evaluators of how they should be arriving at a consensus score and it seemed that OLM were looking for Fife to have some kind of mathematical calculation or a decision tree for the moderators to using in that second meeting to agree the consensus score. Now there was no record of discussion that happened in that second moderation meeting and the only thing that has been noted was the final score that the moderators had reached, however, the court find that there wasn't a breach by the authority as regards this moderation process. Now it might seem from that conclusion as first blush that this case could be helpful to authorities, however, if we dig a little deeper I think what we find is actually there's nothing particularly novel that's come from the case. We do have a nice reassurance that two stage moderations are fine. We also have confirmation that group discussion to reach a consensus score is fine and finally confirmation that providing guidance to your evaluators about how to reach a consensus score is in the authority's discretion in a qualitative assessment providing obviously that it's carried out fairly transparently and treating all of the bidders equally.

So it wasn't necessarily legal requirement for Fife to further elaborate how the moderation phase was to be conducted but what about records? Now it wasn't really addressed in any amount of detail because of the way that OLM had put forward their complaint and the particular complaint wasn't in fact about misapplication of criteria and so the lack of records doesn't seem to have affected the judge's decision

here but I think that may be because she was less concerned because she had clear evidence before her that there had been extensive discussion and a proper job had in fact been done in that second meeting to reach the final consensus score, however, she could only determine that because she had extensive written affidavits from the individuals who were involved in that moderation process and no doubt a significant amount of time and costs was incurred in preparing those affidavits as well as the time preparing the case to go before the judge not to mention the uncertainty and the risk for both parties while they were waiting for the judge to make her decision and so I do wonder whether all of that might have been avoided if there were some written records showing the extent of the discussions that were had and exploring how the scores developed from that initial score that the individual assessors gave to a bid to the final score that was reached from consensus discussion at stage two or perhaps I am being a little optimistic and it might have just been a different claim but we do know that a court will always closely scrutinise the valuation exercises and it's always going to be difficult for authorities to show that they've complied with obligations if there's no documentation about how decisions were reached and the best evidence really is contemporaneous so not after the event, not a summary of how the meeting went and really not a witness recollection months down the line and a final point in light of the Green Paper which is currently open for feedback. It seems that the future of procurement is some more transparency to enable all bidders to clearly see how their bid was evaluated and also how the other bids were evaluated so a proper understanding of what happened in those moderation meetings which arguably should come from good record keeping at the time should be helping with a more cards on the table approach and hopefully allow bidders to understand a lot earlier any challenge that they might need to make and the prospects of succeeding in that challenge and this could actually bring about a quicker resolution of disputes.

So my three top tips for authorities when it comes to moderation in the spirit of M, N and O is to make a detailed note of the meetings including how the tender criteria has been applied to all of the bids. Know who said what and why that ultimately influenced any movement in scores particularly from those initial individual scores if it's a two stage process to the final score that is then recorded and offer this record up for disclosure as your best evidence to support that the moderation procedure has been carried out properly and in accordance with the obligations and conversely if you're a concerned bidder start asking questions about the moderation as early as possible including reviewing those records if they are offered up and consider what it is you're claiming went wrong at that moderation. A clearly explained concern based on what you can see in those documents might actually help you achieve an early resolution and that could possibly include a rewind or a rescore rather than lengthy and costly court proceedings.

With that I will hand back to Clare to see if there are any questions.

Clare Dwyer

Thank you Charlotte.

Well we do have one question. Is it better just to keep basic notes rather than risk detail which then gets disclosed in mitigation and could possibly be misinterpreted? What's your view Charlotte?

Charlotte Parkinson

Yeah so I see the point the risk that if you don't do it right there could just be a different challenge but I think ultimately a lack of a note or detail in a note would be quite concerning to any agreed bidder and it may strengthen the feeling that the authority is trying to hide something so for authorities I think if you're acting as best you can in accordance with the regulations then document it and disclose it because if you've got a bad or an incomplete audit trail you risk being able to disprove the existence of an issue and we know that the moderation stage is critical so good records should be kept in the interest of both parties because it allows the authority to almost show their working out as it were and the bidder should then be able to see from that trail that they did act fairly transparently, treat everybody equally and actually applied the moderation criteria in the way that the ITT said that they would but perhaps it's one for the next webinar so we could R for Record-keeping and Best Practice.

Clare Dwyer

Thank you Charlotte. That's a nice idea for the next seminar.

Great. Well the next person we welcome to the podium is my colleague Paul Rowley who's going to talk to us about Non-discrimination. I'll just get the next slide up. Paul …

Paul Rowley

Thank you Clare and good morning everybody.

Non-discrimination is one of the fundamental EU treaty principles which underpin EU public procurement law, the others being free movement of goods, the freedom to provide services and freedom of establishment.

In a public procurement context the non-discrimination principle has been broken down by European Court of Justice over the years as comprising the general legal principles that are set out there on the slide, equal treatment, mutual recognition, transparency and proportionality. Even post Brexit these principles will remain relevant in the UK because the various bits of UK procurement regulation and legislation all implements EU directives which are based on these fundamental principles. In the Regulation 18(1) for example of the Public Contracts Regulations embodies the legal principles in statutory form. It states in 18(1) contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. There's similar wording in other bits of the relevant procurement legislation in the UK.

The UK Procurement Regulations post the Brexit transition period for now at least will continue to reflect/retain EU law and there's nothing in the recent Green Paper which suggests any foreseeable departure from that in England.

It's important to recognise that in the EU where a tender process falls outside the relevant statutory regulations for example it's a below contract value threshold procurement then the contracting authority must still comply with these four key principles there on the slide but it is important to note that in Great Britain, now there is no freestanding requirement to apply the principles to some threshold procurements any more other than if the freestanding requirement does continue in place in Northern Ireland.

So what do these principles mean in practice? Well they do overlap as you might expect because it's difficult to separate them out. I think proportionality is best thought of as an overriding one which is context to the other three. Well just running through them. Equal treatment and mutual recognition are some of the key points that emerge from the European Court case law over the years. I'll give you some examples. Firstly, comparable situations must not be treated differently unless such treatment can be objectively justified there is a margin of discretion to contracting authorities on this but they must ensure that any discretion is not excessive and is not arbitrary. In the Commission and Denmark case from 1993 the ECJ said that once a contracting authority has set out its terms to bidders it must ensure compliance with the essential terms and tenderers must submit in accordance with the requirements so as to ensure that an objective comparison between bidders can be made.

So a contracting authority should not therefore permit tenderers to depart from the tender terms by adding their own qualifications or reservations except where that has been expressly permitted in the terms of tender. European Court ruled in the *Suvidha Furuta* case that a contracting authority may not during the procurement process change any of its essential terms if doing so may have allowed tenderers to submit substantially different tenders. Where tenderers are required to submit certification in support of their bids contracting authorities should recognise equivalent status documents where a bidder comes from another state and time limits should be long enough to allow all prospective tenderers

including those outside the UK to properly consider the requirements and respond and that will continue in place post Brexit.

Finally, where you have a negotiated procedure all tenderers must have access to relevant information, the same relevant information and be given the same opportunities in that dialogue so that's equal treatment and equal recognition.

In terms of transparency, some of the key points. In a number of cases in the ECJ the contracting authority has been told that it must formulate the award criteria in a way that all reasonably well informed and normally diligent tenderers will be able to interpret them in the same way. You should describe the subject matter in a non-discriminatory way so you shouldn't refer to specific brands or processers, intellectual property rights, origins etc so the more general the better. In the *Suvidha Furuta* case the European Court ruled that the contracting authority is to interpret criteria in the same way throughout the process and for all tenderers and apply that uniformly and objectively to everyone so basically once it's set the rules the contracting authority must stick to them and in the same way to all bidders.

Changing decision making processes during the evaluation risks an outcome of all the pre-decision making or suggestions or favouritism.

The contracting authority must disclose any factor that it intends to consider when its evaluating bids and it should ideally set out their relative importance to each other. If a contracting authority intends to limit the number of applicants who are invited to tender it must do so in a transparent and non-discriminatory manner and any limiting factors but be objectively assessed so as to ensure that they're reasonable. Aware criteria or permissions should not in themselves impose conditions which cause direct or indirect discrimination between tenderers and other states and that's still a requirement in UK law post the Brexit transition period.

So a couple of practical thoughts to finish with. Contracting authorities should clearly exercise caution around clarification bids. I think it's common for authorities to do that including after the final tender stage but they must ensure that doesn't result in amendments to tenders in effect and it must ensure that all bidders are treated equally when it's gauged in that way. It should also be aware of the risk of a finding against it or there being undisclosed evaluation criteria or weightings where a contracting authority has decided not to disclose details or doesn't think about whether it should be doing so properly because that in itself can result in a finding of a breach of equal treatment or transparency.

A final point I have focused there on considerations to the contracting authorities and what they should do as best practice. Obviously if you are a bidder then what you want to be doing is looking for instances of where the authority may not have done any of the things that I've just outlined so that's a quick run through of some key points on non-discrimination and the components of it.

I'll pass back to Clare in case there are any questions.

Clare Dwyer

Well thank you for that Paul. I've just got a question for you in relation to sub-threshold procurements. Given that we no longer have the EU general treaty principles how do you think the courts in Great Britain are going to approach that?

Paul Rowley

Yeah I think that's clear from the legislation and recent guidance and sort of cabinet office guidance, recent PPN that makes it absolutely clear there's now no enforceable requirement on authorities to follow the general for each principles in sub-threshold contracts and also I think in the explanatory notes to the EU Withdrawal Act that it does state in there explicitly that there's no right of action in domestic law based on a failure to comply with the EU more general treaty principles so I think it's highly unlikely now that you can find a legal challenge based solely on those principles being breached and indeed I think if a UK court was to continue applying those principles now to any post 31 December contract awards then that's going to be right for appeal. I think what will happen is that inevitably authorities still

have duties to act reasonably and rationally, to act fairly under the long established public law principles and English law, same applies in Scotland too I guess so any conduct which would on the face of it have breached the freestanding treaty principles may still give rise to challenge and relief but it would be through I think applying public law principles so judicial review rather than just directly through a procurement challenge looking at those freestanding principles.

Clare Dwyer

Thank you very much Paul and moving on now to our final speaker Jack Doukov-Eustice who'll talk to us about the Outsourcing Playbook.

Jack Doukov-Eustice

Thanks Clare. Trying to sign me for something I've not prepared.

Jack and Clare laughing

Clare Dwyer

Sorry about that.

Jack Doukov-Eustice

No problem thanks for that. Hi to everyone on-line and I hope everyone's keeping well but thank you for taking the time to let me speak to you for a few minutes about the Outsourcing Playbook.

I'm going to go out on a bit of a limb and say that the Outsourcing Playbook is the most useful and importance piece of current government guidance available on procurement at the moment. Why do I think that? Well I advise on complex outsourcings and IT projects. I also advise on major infrastructure investments and I think all of these procurements are usually complex, they're time pressured and they're multi-fasted so I'm sure many if not all of you will agree the procurements tend to face similar pinch points each and every time that they're wrong so we all spend quite a lot of time trying to learn from mistakes you know and putting back into use and best practice lessons learned so the Playbook represents a collection of these lessons and quite a useful critical thinking on these sorts of pinch points. Government guidance on procurement is to be fair of variable quality I think a lot of the time and a lot of the material which is released can often raise more questions than it seems to resolve but this isn't the case of the Outsourcing Playbook, I think it's actually incredibly useful so why am I such an unashamed fan of the Playbook? I think there are two simple reasons for this first as I said it sets out quite thoughtful observations and practical advice on how to approach these sorts of procurements but it's also set out and presented quite clearly in a digestible way with references out to further guidance which is quite useful as well.

In addition to the quality of the document I also expect it's going to be referred to and lent on quite a lot over the near year or so, so on that and Charlotte has also already mentioned this but in terms of the formal procurement law we have the Green Paper and in that the Outsourcing Playbook and the Construction Playbook which is more recently released are referred to quite a few times and those of you who have read through the guidance will recall that guidance actually refers to this being quite a fundamental and important part of the new legislative regime that they're looking to introduce so there a lot of common themes between the Green Paper or any Outsourcing Playbook so the focus on transparency that Charlotte's already mentioned, how to procure central value, S&E] engagement and so on so I think what we will see is guidance that produced as a thought list form will draw from the Playbook quite heavily so I think for that reason alone it is worth getting familiar with the Playbook. What it says, what the aims are, what the advice is as well as the supporting guidance around it because if it isn't itself used and developed on I think it will certainly provide the foundation for that guidance as its developed.

So with that sort of incentive to pitch bit over, hopefully I've convinced you that the Playbook is a good document what does it actually do? So first and foremost it only formally applies to central government and their related bodies but I would stress that all authorities are going to find it useful to some degree

and to refer to this and to use the lessons and advice in there. The second, it applies to any outsourcing of a service so a works contract have said there's the Construction Playbook I think it you're doing a goods or supply procurement you can pick and choose from either of the documents in terms of how to operate a procurement looking for tips.

It's worth noting that if you've got a complex outsourcing which has got a definition in the Playbook there are additional pieces of advice or requirements of the central government and its replacement bodies have to follow so Playbook addresses the key stages of a procurement so from planning all the way through to contract management and it's clearly got a lot to squeeze in between those two bookends so to sort of make it navigable and digestible it breaks that down into eleven key stages which you can see on the slide and against each of these during the approach that it tends to take is to first explain what the government's policy is on this area and why that's the policy and then it collects the best practice tips and refers us to further guidance for example the Green Book and the Orange Book are referred to a few times for further reading so I just to highlight a few of these, there's not enough time to go through all of them but there are three which from a sort of legal adviser's point of view we deal with quite a lot I think they're quite useful and hopefully it will show you the kind of stuff that can be useful that is included in there so there's a market engagement … the negotiation double up phase risk share.

So on market engagement I think the section includes a lot of statements that buyers' authorities would really quite like to hear on innovation which has you known been a key priority of many our clients for years and years and years. The Playbook says that achieving this relies on creating forums where ideas can be considered and assessed when new technologies can be understood so the Playbook stresses that, you know market engagement allows authorities to understand the deliverability of their requirements and the feasibility of alternative solutions to help deliver better public services. This information can then be embedded in designing the requirements for a procurement before you go out and the Playbook says that this should be used to inform the development of the delivery model, the settlement approach, the testing and pilot if you wanted to do that, the procurement procedure itself you know choice of procedure, bid evaluation criteria and the overall timetable so I'm really underpinning everything there.

My experience is that there's often quite a lot of hesitancy about market engagement because of the fear of doing something wrong which is completely understandable but ultimately I would echo the comments in the Playbook and stress that advanced planning and engagement of the market is incredibly useful and really does underpin discussing the procurement so the section in the Playbook on that is very useful.

In terms of negotiation and dialogue the Playbook raises some quite pertinent points in my view and it reflects a lot of the advice that we tend to give our clients when running procurements. In terms of a successful negotiation or dialogue it lists out six key points to aim for. The first is being commercially business driven fundamentally. The second is identifying areas of complexity or risk that would actually benefit from dialogue or negotiation so where there's utility in negotiating topics. Third, restricting that dialogue and negotiation to those areas to the benefit from the process, identifying a strong chair to lead the dialogue, whipping people into shape and keeping people on point and having a support team around that person with defining roles and the right appropriate skills and experience to be able to negotiate and take decisions on points. Five, would be based on pre-agreed negotiation positions so thinking about what the red lines are, having a negotiation playbook in the back of your minds when you have those discussions and lastly adopt an appropriate and clear timetable coupled with a strong programme and what they call a product management dissidence to mitigate the risk of cost and time overlaps.

So those are all points that we tend to build into the ITTs when we have a discussion protocol and I would say that early consideration of these points is quite important to join a refined and efficient negotiation or dialogue that really delivers on your commercial aims. Ultimately I would say negotiation

or dialogue should be as simple as you could possibly make it and if you achieve that I think you're on the right tracks.

And just lastly in terms of risk share and the drafting of Ts & Cs or the terms of a contract the Playbook recognises I think quite pointedly that the area of national audit office constantly or almost frequently raises as the cause of failures of contracts and failures of service inappropriate allocation of risk in the Ts & Cs and having the wrong contract terms in there. Now risk allocation is a topic which the Playbook recommends is subject itself to quite extensive scrutiny before going to market so it's really going back to that market engagement and testing your terms and conditions first. The second is that it should be something which is discussed with the bidders in negotiation and dialogue especially complex outsourcings so again it's highlighting the importance of the utility of an appropriate negotiation on those topics and in terms of what you want to achieve with risk allocation and setting Ts & Cs there are three aims that the Playbook highlights so identification of those risks, so knowing what they are. Second quantifying them and then third allocating them to the party who is best placed to manage them which I think is a very important point. I think it's probably where the Playbook would push authorities to go which is not lowering the contract risk, it's trying to figure out who is best placed to manage that and then engaging with them with the bidders in negotiation and dialogue around that topic. So from getting that right ultimately you get a better more viable contract and service as a result well will be better so the Green and Orange Books are referred to in the section in particular so if you want to see sort of further approaches of how to go about Ts & Cs and risk share those are the sources which should help out.

So overall on the Playbook I wouldn't hesitate to say this really is compulsory reading for anyone involved in complex procurements or really any procurement. I think the lessons that they've collected and the tips that are in the Playbook are useful for every procurement and I think you can pick and choose you know if it doesn't apply to you formally or you're dealing with a simpler procurement.

In summary, well worth the read.

With that I will hand back to Clare to see if there are any questions which this has prompted.

Clare Dwyer

Thank you very much Jack. I think we'll probably close now as we're just past midday but thank you for that. It will be extremely interesting to see if the government follows its own playbook in dealing with future procurements given the way its hit the press recently.

Now so thank you everyone for your attention this morning. The 6th session will follow next, P, Q and R. Any ideas gratefully received for that and also looking ahead we have a feeling that X, Y, Z may be particularly challenges but I'm sure we're all up to it so thank you for joining us today. Stay safe and see you all again soon.

Thank you.