

WEBINAR SERIES: PROCUREMENT BITES**P, Q, R OF PROCUREMENT****Jonathan Davey**

Okay well I think we're quorate now.

To do the introduction again I'm Jonathan Davey one of the commercial and procurement partners at AG. I'd like to welcome you to this session 6 of our A, B, C of procurement. We've got three great speakers for you today to cover P, Q and R.

We'll talk to you later on about the next of these sessions. We are currently scratching our heads about quite what we're going to do with X, Y and Z but more of that in due course.

Can I mention to you we are recording this session. Please do ask any questions using the chat function and we'll do our best to get through those and if you have colleagues who you think might find this session useful the full video including the slides will be available on our website in due course and that will get sent to everybody who's registered so I hope you find that useful and indeed all of the alphabet to date is available on the website along with our recording of our seminar from January with Sue Arrowsmith on the Green Paper so do feel free to access those and we hope you'll find them useful.

I'm going to pass you across now to the first of our speakers Louise Dobson one of our litigation partners who specialises in procurement work and she's going to take P for Past Performance. Louise.

Louise Dobson

Thanks Jonathan.

So looking at Past Performance it's one of those issues that is a real focus at the moment for both bidders but also contracting authorities and it's something that has an impact both on valuation of bidders during a process but also potential disqualification and contracting authorities are permitted to exclude a bidder where that bidder has shown significant or persistence deficiencies in a performance of any substantive requirement under a prior public contract and if that contract had led to early termination, damages or other comparable sanctions.

It's a quite high bar in terms of poor performance under a contract but it's something that is becoming increasingly looked at. We know at the moment that the current position is based on certificates of performance but also that the Green Paper regarding procurement reform suggests a number of changes into how contracting authorities will be looking a lot more closely at prior performance of bidders in any new tenders so at the moment we have certificates of performance which are where a contracting authority certifies to the best of their knowledge and belief that the supplier has satisfactorily supplied the goods or the services described in accordance with the contract and the standard wording in the PPN about election and evaluation based on past performance so a contracting authority can look at things like delay and supplying goods or services, failure to supply everything in accordance with the scope of the contract, failure to meet any service levels or supply the goods in accordance with any quality standards but also any other failure by a supplier to comply with the obligations in the contract and we know that a CCS currently maintains a data base of information on supplier performance. It's limited to a three-year period looking backwards but it also includes performance of sub-contractors so that can lead to some difficulties where a prime bidder has a quite complicated supply chain for example.

The contracting authority needs to be really careful if they are seeking to exclude a bidder based on past poor performance. It's quite hard to do that proportionately, appropriately and in line with a subject matter of a contract. It really does depend on the circumstances.

As I mentioned before the Green Paper makes this a real central issue of reform because of this concern generally about bidders not necessarily performing contracts but moving around different contracting authorities, bidding and winning those contracts and continuing to perform poorly so there is a proposal of a central debarment list for mandatory and some discretionary exclusions where there will be a central registry of bidders who have performed poorly or who've had issues in the past but there is also a proposal to widen the circumstances where past performance will be taken into account so instead of just being termination of a contract, damages or comparable sanctions which are quite heavy duty it will include things like where there is minor delay or minor breaches rather than the current more serious test. There is a little bit of a concern about the potential that that might lead to, either misuse in negotiations or some more forced adversarial contract management because of a real fear by bidders of having a default on their record and that impacting on future bidding. It's also a bit unclear how that'll apply where things like service credits or KPI management is built into the contract and expected and planned for by the contracting authority as a revenue stream so it'll be interesting to see what the picture looks like when those Green Paper reforms have gone through.

I'll hand back now to Jonathan for any questions.

Jonathan Davey

Thanks Louise. Well we have a question for you. It picks up on one of the things you mentioned regarding reforms. The reforms look quite similar to the existing position and as you mentioned CCS already tracks certificates of performance centrally. What do you think will change?

Louise Dobson

I think that they'll be an increased focus on this by bidders because of the fact that it includes a lot more instances that you might see as standard contract management and that relationship and particularly it might be that there are elements of concern about how this is going to be monitored and registered.

Jonathan Davey

Sorry Louise, we're struggling with your sound a little, do you want to try again.

Louise Dobson

Sorry. Hopefully that's better.

I think that what might change is that there will be ...

Jonathan Davey

Okay, we're struggling a bit with that Louise.

Louise Dobson

Okay.

Jonathan Davey

Let me stop you there and maybe we can come back to it later if we can get the sound improved, apologies.

We're going to move on now to Q. Andrew Finfer one of the procurement lawyers in our Scottish offices is going to talk about questions and clarification so over to you Andrew.

Andrew Finfer

Thank you very much Jonathan.

Well excuse me but I can't pass up this opportunity to do a presentation by answering certain questions and the questions that I'm going to look at are what, why, when and how. Obviously questions may be asked about any aspect of your procurement. They're mainly going to be asked by candidates so most of what I'm going to say is of particular interest to contracting authorities and utilities so what questions may be asked? They may range from what is the scope of your procurement right down to the meaning of a particular word in a particular document. They're totally wide-ranging.

On the basis that prevention is better than cure it's always a great idea if you can to obtain certainty right from the word go by designing your procurement to ensure that a lot of the questions that may arise have already been thought of and dealt with. Now obviously certainty comes at a cost of flexibility and in some circumstances flexibility is the most desirable objective. We wouldn't have the competitive dialogue or the competitive procedure with notification if contracting authorities and utilities weren't in a position where they didn't know what they want so you are always going to get questions but if you can be certain about the boundaries of your procurement and those boundaries will be set out in the contract notice then that aids you by setting the boundaries within which clarification may be sought.

So we will go on and consider where those boundaries are first and foremost. They are patrolled by the reasonably well informed and normally diligent tenderer so if you can create your documents in a way that such a person would only have one interpretation of anything in the document you're going to cut down the scope of what you do and the reason why you want to do that is to enable you to focus on the answer to the next question, why are you doing all this? Why, because you're under a duty to treat everybody equally and you're also under an obligation to act transparently. The obligation of transparency requires consistent interpretation of documents and information that has been put out to the market and obviously the duty to treat economic operators equally and in a transparent manner requires you to give them the same information so the questions that you may receive and your answers to them will enable you to discharge that obligation and it's important to remind ourselves that tenderers must be in a position of equality not just when their tenders are evaluated but when they are putting together their tenders, when they're creating them so you can expect questions right from the word go and you must have consistency throughout because transparency requires as I've said consistent interpretation of any statement that is made throughout the process and consistency is not just consistency over time, it also has to be consistency at any time so you do need to ensure that if you're talking about a particular subject that you are consistent and if you are consistent that enables you obviously to answer questions easily.

Looking at when questions may arise there are obvious stages in a procurement, some of them are mentioned on the slide there. I've talked already about advertisement. What I want to just mention, a market engagement and the qualification process. I recently spent two hours looking at a webinar to check what had been said in the market engagement exercise before looking at the terms that would be set out in a contract notice and what was said in the market engagement entirely prescribed what was said in the contract notice. Market engagement is a different exercise. It has influence on what you do in your tender process but please don't ignore what you've said when you're looking to answer questions later on and obviously qualification process again is a different process but again you need consistency between the statements you make in your qualification and the answers to your questions you might have later.

So looking at how you go about ensuring that your answers to questions are the proper ones. Planning I've talked about, if you plan out what you're doing, get as much certainty and interrogate what you do before you put it out into the market. Get somebody who's a project manager in another project for example to look at your documents and come up with the questions hopefully that may be asked later so you can think about them beforehand. Always record any answers to the questions you get and review those. It's necessary for you to review throughout the process in order to be able to get that consistency over time in response to questions that I've talked about.

You have rules in the ITT, do enforce them and quite often questions are designed to chip around the edges of the rules that you set out, it's important that you consistently enforce those rules when you're

answering questions so if people want you to step outside the requirements of the ITT when they ask a question you have to be diligent and go back and say no, in answer to your question we can't do that because the ITT says this and in extremis obviously pause whatever you're doing, ask for advice and assistance both from your colleagues or external advisers in order to ensure when you answer a question you're not going to give a hostage to fortune. The most important thing is consistency. The most important thing is that everyone is treated equally and if you bear that simple rule in mind then you shouldn't have too many problems.

So on that note I will hand back to Jonathan and no doubt he's got some horrible question somebody wants to ask me so I'll do my best to try to answer.

Jonathan Davey

You are so right Andrew. Thank you for that.

A question we've had in is about a situation in which a contractor seeks clarification of the nature of the works that the contracting authority requires and the tenderer says ask for confirmation whether what they've proposed is suitable or acceptable to the contracting authority so how would you recommend that a contracting authority responds to a question like that?

Andrew Finfer

Well then if I can paraphrase every football commentator that's a question of two halves Jonathan.

The first half is obviously the clarification about the statement and please yes do address that using the rules I've referred to.

The second part of the question seems to be an invitation to approve what they're proposing before they've proposed it and at that point you must smile sweetly, be quiet and say, sorry what you propose is up to you, I cannot comment on it at this stage because that's obviously something for assessment and what you don't want to do is to give a hostage to fortune to the contractor who may then come back later and say when they lost well you said it was suitable and it was okay so why I have lost so focus just on answering the question and nothing else. Okay.

Jonathan Davey

Great. I'm having a bit of problem with your sound but I think we've worked out it might be at my end so hopefully everybody got that and we'll pick it up on the recording so thanks very much for that and maybe we'll come back for some more questions on your section at the end but in the meantime I'd like to pass the baton to Ryan. Ryan's going to talk about one of those subjects that in my experience is more honoured in the breach than the observance which is record keeping. Ryan.

Ryan Geldart

Thanks Jonathan.

Good morning everyone.

One of the most frequently challenged aspects of any procurement process is the reasons given by evaluators in awarding a particular score for a particular question and an agreed bidder often believes that it should have scored more and a competitor should have scored less and in a challenge situation the question of the reasons given and whether they were sufficient to support scores awarded is often inherently linked to the quality of the written records of those reasons and these were all key aspects of the HS2 litigation in which we acted for HS2 in successfully defending a claim brought by Bechtel in relation to all that conversation which you can see a little picture of there and I'm hoping to pull out a few key points from what is a 152 page Judgment.

So starting with reasoning. What is the court approach to individual assessor scores versus moderated scores? Well in this case HS2 used a fairly common approach to evaluation by which each question was scored by two evaluators. First each evaluator would review and score their response independently and then they would meet to discuss those scores in moderation and the independent

assessments were expressly stated in the ITT to be only draft scores. The moderation meetings where they discussed and agreed the scores were also attended by a moderator and by a minute taker. In the dispute Bechtel argued in relation to a number of questions, that the individual assessment score of one evaluator was in fact correct and should have prevailed over that of the other evaluator in the moderation process and that was often coupled with an argument that the merits of the moderation meeting didn't sufficiently explain why an evaluator had changed his or her score from their draft score to the moderated final score in the process of moderation. In his Judgment Mr Justice Fraser made clear a number of points that are really helpful in practice regarding the approach to a moderation process such as this one.

First, on the facts of this case the evaluator's initial draft scores were never intended to be anything more than drafts even if their draft scores were the same as each other the evaluators at moderation still properly considered the factors of the question and the responses provided and were still prepared to move from their initial draft scores if they thought that necessary in moderation and the court found that that was the correct approach to take given the approach to evaluation was explained in the ITT documents.

Second, Bechtel were wrong to elevate the draft scores to something akin to a final score awarded and it wasn't necessary for there to be a cogent explanation from HS2 as to why the initial draft scores had moved to the final evaluator scores and in fact the change in scores in this case was found to often be a good example of the process in moderation working well and as it was intended to and finally Bechtel's contention that the draft score most favourable to it rather than the other less favourable score should take primacy was wrong. There was no reason to consider that one draft score ought to be given primacy over the other.

So moving on to look at records of the evaluation how were the moderated scores recorded and how much detail is needed at that process. In terms of the scoring and moderation process HS2 had records of all of the evaluators' individual independent scores and their rationales for their scores and at moderation HS2 kept minutes of the moderation meeting which were taken by the separate minute taker and they produced a separate set of rationale documents which detailed and recorded the evaluator's combined consensus score and the rationale for those scores.

As I explained the court found the key record needed was the record of the reasons for the final moderate scores. Bechtel had complained that the moderation minutes did not record what had actually been said by the moderators but the Judgment makes very clear that the record of the moderator meeting does not need to be a record of everything that has been said in the moderation meeting. The judge explained that short of tape recording every hour of moderation which would be entirely disproportionate, minutes of moderation will inevitably not amount to verbatim note of the meeting but no contracting authority is required to take a verbatim note of such a moderation in an evaluation section and there has to be a sensible limit on what is required of contracting authorities and utilities in terms of recording its evaluations.

So finally I just wanted to touch on the impact of a lack of records at first evaluation documents. It's clear that contracting authorities and utilities are under an obligation of transparency throughout the procurement process and that doesn't just apply to evaluation awarding scores and a lot of focus was placed in this trial in relation to post evaluation clarification meeting which Bechtel alleged that impermissible reassurances had been provided as to the winning bidder's ability to form a contract. HS2 argued that the meeting was designed simply to clarify the leading bidder's bid, that the evaluation process had already been closed and so the meeting had no impact on the scores and final results of the procurement. On the facts relating to this particular meeting the judge did find that HS2 had failed to keep sufficiently comprehensive record of that clarification meeting as no formal minutes were drawn up after the meeting took place. However, having reviewed the handwritten notes that were taken and disclosed in the proceedings and having heard the witness evidence of those who attended the meeting the judge concluded that the purposes of the discussion and the meeting itself were entirely proper and were within the clarification process set out in the ITT. Bechtel had argued that a failure on the part of

HS2 to comply with any of its obligations to keep proper records even of just this one meeting ought to result in Bechtel being successful on its liability claim but again the judge dismissed that argument finding that if Bechtel were right on that point then the absence of records of even a single meeting in a period of a procurement process of nearly a year which didn't affect the scores awarded in the evaluation would result in the court overturning the outcome of the procurement competition and the judge commented that that would impose a council of perfection upon the contracting authority or a utility at a time when the regulations don't require and so this Judgment has some really helpful guidance for both authorities and utilities but also for bidders when looking at a process after the event if they had concerns about the process that's taken place and keeping an eye on how far the duty of transparency goes. I've obviously summarised given how the Judgment is so I hope that's been a helpful run through of some of the key points on reasons and the record keeping and why specific scores were awarded against criteria.

So I'll hand back to Jonathan for any questions for me or for the other parts.

Jonathan Davey

Thanks Ryan that was really clear and I expect a lot of people on the call who work for or at contracting authorities will take a lot of comfort from that and in particular Mr Justice Fraser's comments about counsellor perfection. That's certainly one I'm going to salt away.

We've had quite a few questions through so I'm going to fire these rapidly at the team and ask them to give really punchy answers so we can get through as many as possible.

Louise, the first one's for you. You mentioned certificates of performance. Are these supposed to be proactively issued by contracting authorities and what form do they take?

Louise Dobson

They are in a specified form which can be found in PPN which we can circulate a link to. It's a bit of a mixed picture sometimes they're proactively sought by contracting authorities, sometimes bidders will collect them as they go along and deploy them when they need to.

Jonathan Davey

Great.

Louise Dobson

I hope that's a punchy answer.

Jonathan Davey

That really did what it said on the tin, thanks for that.

Ryan, one for you. How did the court approach the situation where evaluators had very different views and their independent evaluation compared to the final moderated score? I know that's one that worries contracting authorities a lot of the time.

Ryan Geldart

Yeah and the worst situations in this case where evaluators and their independent assessment has scored very differently to one other, what I think helped in this case was firstly the ITT was very clear that the initial scores were only tracked but secondly it just too was able to explain that individual evaluators had been chosen for their own particular specialism and insight into a particular area and that consequently when those evaluators came together and brought their different perspectives to a question, it was quite often sensibly explained as to why one of the team response would be better than another or perhaps not picked up on a weakness that the other evaluator had so provided that was all clearly documented in the moderation process the court was very happy to leave that to the discretion of evaluators.

Jonathan Davey

Great. Thank you. That's great.

Andrew, is the public authority required to share the exact question that has been asked by the bidder or can they paraphrase?

Andrew Finfer

They can if they are going to share the question and the answer, they can paraphrase it but only to the extent that they contain within that paraphrase all the essential questions that have been asked and that are being answered. Obviously there may be confidential information in a question that has to be taken out so paraphrasing can achieve that objective but they can cut it down to a sensible level provided they don't change the meaning of the question.

Jonathan Davey

Great. That's really helpful.

Probably the final question we'll have time for. For you Louise. If a supplier has fulfilled technical contractual requirements but there's evidence of the supplier have acted in breach of say the Equality Act 2010 or similar for example has engaged in racial, sexual or other forms of discrimination how does that play out in terms of excluding them from future procurements on that basis?

Louise Dobson

So I think there's a distinction here isn't there between the mandatory and the discretionary in terms of what is happening with, in terms of you know the seriousness of the breach and whether it relates to something about their performance as a company as against their performance on that specific contract so we have to look at it in the round, I think the intention with the new debarment list is that those things will be logged centrally and they will be taken into account.

Jonathan Davey

Great. That's really useful.

Thank you all. I hope like me you found that very clear, very informative, really up-to-date in the case of the case that Ryan was telling us about.

Apologies if we haven't got to your question. I'm sure I'm going to wait for them to nod at this point but I'm sure the speakers will be really happy if you had a question that you didn't have time to ask or that we didn't get to, to get an email from you and to answer that separately so please do do that and as I said the recording of this session will be available.

All that remains apart from to thank you for attending is to remind you that the next chunk of the alphabet is, of course, S, T and U. We will send you an invitation out to that session and we'll tell you what S, T and U stand for when you get the invite but I'm going to leave you on tenterhooks.

Thank you for your attention and have a good day.