

**WEBINAR SERIES: PROCUREMENT BITES****V, W, X, Y, Z OF PROCUREMENT****Clare Dwyer**

Well, hello everyone and welcome to the 8th and final instalment of procurement bites where we serve our small portions of procurement law in hopefully digestible parts for authorities, bidders and utilities on procurement issues.

We were hoping that this would signal the complete end of lockdown but we're not quite there yet.

However, this being the final session in this particular series we have 5 letters, 5 speakers, some creative thinking as to how to deal with the various letters we've been challenged with and a few minutes per speaker.

You can ask questions in the question box and if we have time at the end we will pick them up.

So, first up to the virtual podium we have Michael Rainey with letter V and VTNs.

**Michael Rainey**

Thanks Clare.

Morning everyone. So I'm going to start off by talking about Voluntary Transparency Notices or VTNs also known as VEAT Notices or Voluntary Ex-Ante Transparency Notices.

Whatever you want to call them these are a useful tool for managing the risk of procurement challenge if you're an authority or a utility particularly when you're making a direct award or changing an existing contract.

They can protect you against challenges seeking damages and they can also protect you against challenges seeking ineffectiveness but it will only give you that protection if they're done right.

So today I'm going to talk you through my top 3 tips for doing VTNs correctly.

The first of those is that vagueness is fatal. You should avoid at all costs publishing a VTN that is vague. It needs to have sufficient and precise detail in it in order to confer the protection that you're looking for. For ineffectiveness protection you need to disclose your justification for taking the action that you're proposing to take. That means setting out sufficient justification for why you're not running a competition, the underlying illegal analysis for that and the factual background. You need to explain why you're doing what you're doing and you need to explain a kind of sufficient level of detail that any reader of the notice to decide whether your justification actually holds water.

If you're looking for protection from damages claims which you would also be looking to achieve through a VTN it's also important that you provide as much detail as possible because the key there is to ensure that any perspective challenger is told the information that they might want to complain about as early as possible. Again the devil is very much in the detail and that detail needs to be in the notice.

The second point is to focus on the timing. It's important that the Voluntary Transparency Notice is published before you enter into the contract or make a change to the contract by entering into a variation. In order to get ineffectiveness protection you need to publish the notice 10 days before signing and for damages that's 30 days before signing to ensure that the challenge period expires completely, however, you need to make sure that you don't publish the notice too early. It's essential that you wait until the

commercial deal is finalised so that the salient points of that deal can be concluded in the notice and you therefore discharge your obligations to give detail as we've already discussed.

The last and most important point is that publishing a Voluntary Transparency Notice is absolutely not an admission of guilt. There used to be some stigma around publication of these notices but authorities and utilities would only publish these notices where they were avoiding a competition, where they knew they'd done something wrong and they were trying to get away with it. It is now accepted that this is a sensible and prudent part of commercial life for authorities and utilities looking to navigate through the maze of procurement law.

Procurement law has a number of grey areas particularly around the exemptions for making direct awards and changing existing contracts and therefore it is entirely permissible to publish Voluntary Transparency Notices to mitigate that risk, help you through the grey areas and publish what you're doing in a clear and transparent way to the market.

Certain other reasons why you might want to do a direct award for example because there is only supplier in the market, acting transparently and publishing your intention as early as you can and before you actually commit to the action is a sensible transparent and prudent step and that's VTNs in a nutshell at which point I'm going to hand back to Clare. Clare.

### **Clare Dwyer**

Thank you very much Michael.

So moving on. Next up to the virtual podium is Jack Doukov-Eustice who's going to tackle letter W and Weightings. Over to you Jack.

### **Jack Doukov-Eustice**

Thanks Clare.

So 3 minutes and 3 key points about weightings. Some of this is going to be sort of based up on territory but hopefully you can take away some practical and interesting tips from this today.

So first what is the purpose of weightings? In the most basic sense it indicates how important price is versus quality to you but I think the real function of weightings is a bit more than that so thinking about normal life a purchasing decision is often complex and quite subtle so you might have in mind for example that you want a new car. You may also have in mind a list of features which are important to you as well as an idea of how much you want to pay. When you actually make your decision on which car you buy you'll be making a holistic decision which looks at the relative importance of a lot of different things layered on top of each other which is reviewed in the context overall of your budget. You know, what are you willing to pay for certain features and how much is too much for a particular feature? So this level of subtlety I think can get missed with regulated procurements but let's face it you know setting all this out, this thought process in advance isn't an easy task but it is important to secure value for money so my top practical tip for how to go about this is to run through some dummy models of your evaluation process and see what the result is and you can adjust and refine from there.

Once you're happy with your model being transparent about it is the next thing on the list and it has been a hot topic in previous years so what level of detail do you need to share with bidders? Case law says that information must be shared if it could affect the formulation tenders. Now thinking about for just a second other than in cases of very minor elements or very specific situations it's quite hard to think of many circumstances where weightings aren't going to affect how a tender's put together. Unfortunately the case law doesn't provide much help in terms of deciding where to draw the line and cases have tended to turn on the facts but from a practical and commercial point of view it makes sense to provide this information, be transparent with bidders because it should mean that the bids you get back are more relevant and based on your needs.

Finally is there a requirement to have certain percentages allocated to certain criteria? The gut reaction to this would be no, it's be silly, it's for me to decide what meets my needs so you may be surprised to

learn that there is case law which suggests for example that 25% is too low for price. It was argued that this led to price being neutralised in this case and that's part of the tendering procedure that was nonetheless supposed to identify the most economically advantageous tender so in the end it just wasn't as important in the grand schemes of the procurement. So what's the upshot of this? Does it mean that contracting authorities and utilities are required to have a minimum percentage for certain criteria? Well no, not exactly. The court agreed that 25% was too low in this case but that was because the authority's own internal discussions showed that the process didn't produce the result that they wanted and they were ending up paying more for quality that they didn't need. So we come full circle, back to the importance of doing dummy runs and ensuring that the result that you get is the one that you want.

So a quick run through, I hope that's helpful. Clare back to you.

### **Clare Dwyer**

Thank you very much Jack.

So next up and with a creative use of the alphabet here we have Bill Gilliam who's going to tackle the letter X with X-Referencing.

### **Bill Gilliam**

Thanks Clare. I'll deal with it extremely quickly given we've got the 3 minutes.

So X-referencing is a really important area that often gets missed and it's vital that in ITTs that it's made very clear to a rewind, RWIND so a reasonably well informed and normally diligent tenderer how questions need to be answered and how they're going to be assessed. We've seen a number of cases that we'll come in to and example in a minute, where some of those things can cause confusion.

The 3 tips that we've got there for avoiding that confusion whether you're an authority, utility or a bidder is number 1 eXplanation so it's vital that the ITT explains whether each question will be considered in isolation or whether you can have cross-referencing and if so how that will be dealt with.

eXpectation again with apologies doing offence to the letter, the authority utility must consider matters carefully and with all procurements thinking about what the outcome should look like ideally, what a good result would be in terms of the offering of the goods or services and so be clear in what you are asking and how you want those questions to be answered and how you're going to evaluate those so there can be situations in which it makes sense not to have any ability to X-reference so each question is considered and the answers are considered in isolation though that could lead to a fair amount of repetition within the various answers so just thinking through how that might work if you are considering them in isolation or if you are going to have some sort of X-reference or read a X reference and then finally of those three points vital, as ever, that the bidders very carefully consider the content and the meaning of the questions and consider the guidance that's contained within the ITT and follow those instructions and that guidance so that they are answering the exam question and if in any doubt to ask clarification questions so the quick eXample in relation to that is the recent case of Bechtel versus HS2 which was a major challenge that AG successfully acted for HS2 on and in that HS2 had said that answers should be answered in a way that demonstrated a holistic approach to bidders' delivery proposals and also that answers would give confidence if they aligned with other answers but that answers should be capable of standing alone and not X-referenced.

Now Bechtel were unsuccessful in their bid and subsequently tried to challenge arguing that that approach wasn't something that would be understood by a RWIND tenderer and also that it demonstrated manifest error and the court's view in relation to that was the explanation that was given by HS2 and the approach that they took was eminently appropriate, was well within the margin of discretion that subject matter experts have and that the principles of fairness, equal treatment and transparency had been complied with and so again key there because HS2 had followed those three principles in terms of making sure that the understanding was there that their approach was followed and upheld by the court.

Back to your Clare.

### **Clare Dwyer**

Thank you very much Bill. Thank you, nothing X-rated there.

Okay now next up it's our penultimate speaker in this series and it is my colleague Louise Dobson who is going to deal with the letter Y and yes/no answers. Over to you Louise.

### **Louise Dobson**

Great, thanks Clare.

So yes/no answers which are often past fail in tenders are something that contracting authorities and utilities can often quite like to use because it reduces the amount of time they have to take in terms of evaluating a narrative response and I'm just going to run through very quickly some pros and cons on using lesser answers depending on whether you are a contracting authority or utility or you are a bidder looking to make the most of the opportunity to showcase your offering in the tender process.

So looking first at the pros for yes/no answers. As I said it can be seen that yes/no answers sometimes make it easier for a contracting authority or utility to compare between bidders and also look at the criteria and evaluate because often it's easier to analyse that if you have a position where you could someone said yes and someone said no. It can also be seen that yes/no answers can make tender requirements really clear because effectively the contracting authority or utility drafts out what they're looking for and then a bidder just has to say yes on their own response and also thinking of it in terms of does it make it easier for SMEs to bid and to get involved in tenders because there is less need for bidder ITT support. I'm not sure if that is the case that is one of the pros that is often used as to why yes/no answers are good.

Looking at the cons now and how sometimes yes/no answers can be quite difficult. Often from a bidder perspective it can be quite difficult to respond to these because sometimes the answer might be yes if or no oops that there isn't space within the tender response to be able to add that detail and so then that means you can often get to a point where there's lot of clarification questions where a bidder is trying to discern where they sit with that yes/no question and also bidders will take advice quite a lot in terms of how they respond to those types of questions because there is a lot of room within a yes/no which you wouldn't quite think dependent upon exactly the wording used in the question so authorities and utilities also have to be careful how they frame those questions depending on what response they're expecting to receive.

Contracting authorities also sometimes have issues where they're trying to verify responses to minimise the risk of challenge so how do you check if when someone says yes they really mean yes and if they say no do they really mean no because often contracting authorities can find themselves in a situation where a lot of bidders are potentially out of the process because of past fail thresholds when actually that's not ideal for testing the market and trying to get the best and most economically advantageous tender and if often works well though for very price heavy bids so where it's very much weighted towards the pricing and the criteria can be still into those yes/no questions. Often authorities will prefer to do it that way so as a bidder you have to work within the framework of the tender that's set but it can use that clarification process to ask questions and work out what exactly is meant by those yes/no questions from an authority and I'll hand back to Clare now to take us through the final couple of points.

### **Clare Dwyer**

Great. Thank you very much Louise.

Okay and our final speaker in this series from our Scottish office is Andrew Finfer who's going to tackle the letter Z and Zoning. Over to you Andrew.

### **Andrew Finfer**

Thank you Clare.

11:48 on a Thursday and we're nearly there.

I'll try and keep this short and sweet.

Zones and zoning why use them? If you have a wide geographical area that you need to procure services or supplies for. Quite often there are benefits to split the geographical area up into zones. You obviously get the benefit of specialisation. You are able to do for example cast the net wider when it comes to contractors. You may be able to break your geographical areas up into sufficiently small zones to enable new entrants perhaps SMEs to come in and you can also ensure that you don't have one contractor that's working across zones who may be tempted to steal from Peter to pay Paul when particular issues arise. You get the benefit of specialisation. Also if you do have for example a requirement across the whole of the UK it might be difficult to manage if you try to procure a service that was going to operate across the whole of the UK so quite often zones are used to split up the areas of operation so the contracting authority or the utility can manage them efficiently because they are small and discreet and particularly if each zone gives rise to its own problems it's nice to have a particular management team focusing on those so there are those benefits but obviously problems do arise from zoning and they usually arise when circumstances change and nothing stays the same, no plan of contact, no plan of actions ♦ [00:18:19] contact with the enemy as I've just demonstrated. The disadvantage of zones. the rigidity and delivery that you have to have if you're going to get specialisation can cause you problems. You may find if you're a utility or contracting authority that you have a contractor that's over- burdened in one area and another contractor on the adjacent area who has got tons of capacity and you'd obviously like to flex the zones in order to be able to enable the contractors to deploy their resources more efficiently so a well-structured procurement will build in both specialisation and flexibility for example by procuring the zones in lots and also having provisions that enable the contractor who wins an award in one lotted area in certain circumstances to operate in an adjacent or even a remoter area if they're able to in order to meet the needs of the contracting authority or the utility.

So when thinking about how to build this flexibility in you need to look at what will justify movement in one zone to another and commercial drivers really dictate this. It should be performance. So your well-structured procurement as for example key performance indicators or some other indication of the quality of delivery, if the quality falls off in one area it may give you the opportunity to move a contractor from another area in to supplement or into supplant the existing contractor and its important in these circumstances that your contractual arrangements clearly have provisions in them that you can rely on to ensure that this happens. Otherwise your faced with the problem of having to re-tender if you want to restructure delivery in your zones. So the practical reality is that where you have several zones and a need is being met by different contractors in different areas replacing them has to be done through the contractual provisions. They should obviously be able to decide this upfront and the performance provisions that you're going to rely on to move a contractor out of a zone or to introduce another contractor will have to be agreed.

So if you can do all of that you will spending less time with lawyers which is always a good idea. Thank you. Clare?

**Clare Dwyer**

Thank you very much Andrew. Well we do have a little bit of time now for a few questions and I've got a couple here if the speakers would like to join us all again. First up I have a question for Jack about weightings. Can we change weightings of sub-criteria during the course of a procurement?

**Jack Doukov-Eustice**

Yeah good question. I mean it doesn't happen so much as changing the requirements themselves but we have seen it happen. I think the answer to that is it depends really. I think your starting point is transparency and equal treatment so they will require you to be clear as to what they are and to keep them consistent throughout the procurement process but on a practical level I think if you are in the middle of the procurement process and it's before the tenders have been submitted then a change to

the weightings, so long as the tenderers have got time to take that into account and adjust their bids accordingly then I think that deals with the main source of risk there. The one caveat to that is probably think about the effect that it might have had on the market as to who wanted to participate in this process so for example if you were to change the price from a 30% weighting to 80% you know that's going to attract a completely different market so there is always that question of "ok am I changing something so drastically that actually you know different people would have wanted to take part?". So yes broadly I think changes can be made but be transparent and just make sure you're not changing anything too drastically. It's definitely a question that the legal team should be involved in, it can get quite tricky and there's no clear answer.

**Clare Dwyer**

No carte blanche there. Thank you Jack. Right I have a question for Bill. Is it better to permit X referencing in bids or not?

**Bill Gilliam**

The short answer is it will depend. So with the approach generally often the authorities won't want X referencing. The difficulty of it is obviously each answer would then if it X referenced to a number of different other areas you've got an awful lot to take into account and particularly in most procurement exercises where you're wanting to limit the word count. The danger is that get abused by multiple X referencing, so as with the HS2 case with Bechtel, the key is to be very clear in terms of fairness and transparency and equal treatment about how you are going to approach any X referencing and how any read across or alignment or holistic approach is going to be done because if the wording is unclear the risk of a tenderer not understanding and so not bidding well, or as well as they could do, and equally one or more unsuccessful tenderers challenging on the basis that a reasonably well informed and normally diligent tenderer couldn't understand what was going on or that that approach was somehow irrational. So our advice is always tell them what you're going to do, do it, tell them what you've done and that alignment is key on X referencing so getting that consistency.

**Clare Dwyer**

Great, thank you Bill. Finally, I have a question on VTNs for Michael. When you're changing a contract can you combine a VTN with a modification notice, can you do it all in one?

**Michael Rainey**

When you're changing a contract there are certain circumstances where you have to publish a modification notice under certain grounds for changing a contract so that also has to be published in the FTS system. Those are typically published after the change has been made whereas a VTN is a pre-contract device. Whether you can combine them all in a single notice is difficult because they both have different standard forms but I think you should certainly try and combine the timing of the two together because the VTN gives you protection that you know if someone comes out of the woodwork before you've actually entered into the change you can do something about it so if you're going to do that you should probably publish a modification notice at the same time so you're not overcommitting and then publishing a notice later when someone has come forward when you've actually done the thing that somebody might complain about so I think I would streamline the timings but not necessarily combine the content of the two notices.

**Clare Dwyer**

Great, thank you Michael. I think with that, with 3 minutes to go I think we will draw our session to a close. Thank you so much all of you for joining us on our journey from A to Z. We wish you all the best for the Summer and when we launch our next session or series we hope you will join us again so thank you to all our speakers throughout the series and thank you. Have a good day.