



Presentation — April 2020

Top tips for managing ongoing procurements

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What to consider when commencing/continuing a procurement

- What does the guidance say?
- Where are you in the process?
 - Pre-procurement
 - Mid-procurement
- Knowing and understanding your market
- No knee jerk reactions – pause and consider
- Do you need to make any changes?
 - Timetable
 - Procurement documents
- Adapting the process to suit the situation

Engaging with your market in a procurement compliant fashion

- Soft market testing
 - Refining your procurement
 - Generating interest
- Prior Information Notice (PIN)
- Bidder events/presentations
- Data Rooms
- Ensuring a level playing field
- During the procurement process:
 - Communications
 - Meetings

What to do with site visits, interviews and meetings

- Query why you require physical presence
 - “Must have” vs “good to have”
- Site visits:
 - Contracting Authority Site(s)
 - Bidder reference sites
 - Alternative solutions
- Interviews/meetings
 - Virtual platforms e.g. zoom/MS Meetings
 - Equal treatment of bidders
 - Meeting protocols

How far can you amend your procurement documents?

- Treaty principles are key
- What can be amended?
 - Submission requirements (e.g. COVID-19 policy?)
- Evaluation criteria / selection criteria – usually a material change
- Risk assessment process – changes may be permitted prior to evaluation of proposals where:
 - Tenderers are notified of amendments
 - Timetables are extended and opportunity given to amend proposals
 - The change is not material

Introduction to evaluating economic and financial standing

- Audited accounts for the past two years of trading and information on the structure and ownership of tenderer and its group
- What if accounts aren't available?
- JV and consortia
- Key sub-contractors
- Credit ratings and credit scores
- Remember – snapshot of financial standing on day of assessment

Issues when evaluating economic and financial standing

- Commencing a new procurement?
 - Financial threshold requirements pre-COVID might not be as realistic now
 - Supply chain diversity
- Recently commenced a procurement?
 - Are financial thresholds/requirements still reasonable and appropriate in light of COVID-19?
- Coming to the end of a procurement?
 - Final finance compliance check
 - Anticipating rules for the potential scenario

Abandoning a procurement (1)

- Key principles
 - Contracting authorities have a wide discretion to decide to award a contract or to abandon – *Embassy Limousines v European Parliament* T-203/96 [1999] 1 CMLR 667
 - Not limited to exceptional cases or serious grounds
 - No implied obligation to award a contract
 - No specific provision regulating abandonment but must comply with fundamental EU Treaty principles and Reg 18 PCR
 - Should not commit manifest error when deciding to abandon

Abandoning a procurement (2)

- When can the discretion to abandon be exercised? See *Croce Amica v Arev* [2015] PTSR 600
 - Insufficient competition
 - Changes in economic context / factual circumstances
 - No longer in public interest to award contract
 - Errors in the evaluation process
- Can factors include individual circumstances connected to a particular bidder? Yes, subject to compliance with fundamental EU Treaty Principles and Reg 18 PCR

Abandoning a procurement (3)

- Recent case law
 - *Amey Highways Limited v West Sussex County Council* [2019] EWHC 1291 (TCC)
 - *Ryhurst Limited v Whittingdon Health NHS Trust* [2020] EWHC 448 (TCC)
- Considerations and risk areas
- Audit trail

Any questions?

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