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Procurement Act 2023 guidance: assessing competitive tenders

Technical guidance on assessing competitive tenders.

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What are the rules on assessing tenders in a competitive tendering procedure?

1. The process by which tenders in a competitive tendering procedure are assessed in order to determine the most advantageous tender (i.e. to identify the supplier(s) that will be awarded the contract) is key to achieving value for money and the successful delivery of public services. The Procurement Act 2023 (the Act) regulates this process by making provision for rules on award criteria and assessment methodologies, addressing abnormally low tenders and refining award criteria.

What is the legal framework that governs the assessment of tenders submitted in a competitive tendering procedure?

2. The legal framework is set out in the following sections of the Act:
- a. section 19: Award of public contracts following a competitive tendering procedure
 - b. section 23: Award criteria
 - c. section 24: Refining award criteria.

What has changed?

3. The basis on which contracts are awarded is largely unchanged from the previous legislation, in terms of what can be assessed when evaluating tenders. The removal of the requirement that award criteria must be considered from the

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'point of view of the contracting authority' that was included in the previous legislation (see regulation 67(1) of the Public Contracts Regulations 2015, regulation 82(1) of the Utilities Contracts Regulation 2016 and regulation 31(1)(a) of the Defence and Security Public Contracts Regulations 2011) serves only to highlight and clarify that contracting authorities may take wider factors than price and technical quality into account when determining value for money.

4. The overall basis of award is now referred to as the most advantageous tender (MAT), rather than, as in the previous legislation, the 'most economically advantageous tender' (MEAT). However, this is not a change in policy and the change is to clarify and reinforce for contracting authorities that tenders do not have to be awarded on the basis of lowest price/cost, or that price/cost must always take precedence over non price/cost factors.

5. Under the Act, a contracting authority may refine the award criteria in a competitive flexible procedure in certain circumstances. This is a new provision in the Act and was not dealt with directly under previous legislation.

6. Unlike (where relevant - the Concessions Contracts Regulations 2016 do not include provisions on abnormally low tenders) under the previous legislation, where in some instances (see regulation 69 of the Public Contracts Regulations 2015 and regulation 84 of the Utilities Contracts Regulation 2016), but not all, it was mandatory, contracting authorities are not required under the Act to ask suppliers to explain their price where it appears to be abnormally low. They are required under the Act, however, as in the previous legislation (see regulation 69 of the Public Contracts Regulations 2015, regulation 84 of the Utilities Contracts Regulation 2016 and regulation 31(6)(7) of the Defence and Security Public Contracts Regulations 2011), to investigate an abnormally low price and provide the supplier with an opportunity to demonstrate that it will be able to perform the contract for the price proposed before disregarding a tender on that basis. Unlike in the previous legislation, the Act does not include an illustrative list of the types of explanations that suppliers may provide to explain their price (for example, the economics of the manufacturing process) but these may still be relevant and

under the Act contracting authorities can seek explanations about anything related to a supplier's ability to perform the contract for the price offered.

Key points and policy intent

7. Throughout the procurement, contracting authorities must have regard to the objectives set out in section 12 of the Act. Of particular relevance to the design and application of award criteria are the objectives relating to maximising public benefit, delivering value for money and the duty to have regard to the fact that small and medium-sized enterprises (SMEs) may face particular barriers to participation, and consider whether such barriers can be removed or reduced. Contracting authorities must also have regard to the Wales Procurement Policy Statement (WPPS) in accordance with section 14 of the Act.

8. In the context of awarding a public contract following a competitive tendering procedure, there are a number of key points arising from the requirements of sections 12 and 14 of the Act:

- a. the objective of sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions means sharing all relevant information at the earliest opportunity and ensuring that everyone has parity of information and at the same time
- b. in complying with the duty to have regard to SMEs, contracting authorities should not create award criteria that are prohibitive, or set timescales in the procedure that do not give suppliers sufficient time to prepare quality tenders
- c. in order to achieve value for money, contracting authorities should have a comprehensive understanding of their requirements and link them to their policy priorities (which may include wider economic, social, environmental and cultural considerations where they are relevant, proportionate and non-discriminatory) and any priorities set out in the WPPS
- d. in complying with the duty to have regard to the Wales Procurement Policy

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Statement (WPPS), value for money should be considered on a whole life basis in terms of generating benefits not only to the organisation, but also to society and the economy, whilst minimising and eliminating negative environmental impacts and maximising the cultural well-being of people and communities in Wales. To achieve this, contracting authorities should take these factors into account when designing specifications, award criteria and other requirements

- e. value for money can be directly affected by the choice of assessment methodology and contracting authorities should undertake appropriate scenario-testing to understand the impact of different methodologies and criteria weightings.

Award Criteria (section 23 of the Act)

9. The award criteria are the criteria against which tenders are assessed during a competitive tendering procedure. Award criteria, including any social, economic, environmental and cultural criteria, must relate to the subject-matter of the contract. This will mean contracting authorities focus on the particular procurement in question and properly assess each tender in respect of what is being procured. The Act gives contracting authorities a wide discretion when selecting award criteria: the fact that there is no list of criteria that can be taken into account means that any criteria can be considered, provided they meet the requirements of section 23. There is also no reference in the Act to award criteria needing to be considered solely from the 'point of view' of the contracting authority, so that it is clear that benefits of a contract to service users or other stakeholders, which may not directly flow to the contracting authority itself, may be explicitly factored in if they are relevant and meet the other requirements of award criteria.

10. The key requirements for award criteria are:

- a. they must relate to the subject-matter of the contract

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- b. they must be sufficiently clear, measurable and specific
- c. they must comply with the rules on technical specifications (see guidance on technical specifications for more information)
- d. they must be a proportionate means of assessing tenders having regard to the nature, complexity and cost of the contract. For example, it is unlikely to be proportionate to include a wide range of award criteria for a low value contract for stationery.

11. Section 23(3)(a) refers to the 'assessment methodology', which must set out how tenders will be assessed against the award criteria. For example, this will include any scoring matrices to be used by evaluators when assessing tenders against the award criteria.

12. The process of awarding contracts must be transparent; contracting authorities must publish the award criteria and the assessment methodology, or a summary of the criteria, in the tender notice. Section 21(5) of the Act requires the contracting authority to provide information sufficient to allow suppliers to prepare tenders in the tender notice or associated tender documents before inviting suppliers to submit a tender. Therefore, if not published in full in the tender notice, further details of the award criteria and assessment methodology must be included in any associated tender documents.

13. If there is more than one criterion, the contracting authority must set out the relative importance of all the criteria. This can be through the use of weightings or ranking in order of importance or described in another way. For example, percentage figures could be applied to each criterion to explain how they are weighted. The rules provide for flexibility in terms of how the relative importance of criteria are described. Pass/fail criteria are also permitted but it must be set out in the assessment methodology if failure to meet one or more criteria would disqualify a tender.

14. Where a procurement has been divided into lots, the contracting authority can limit the number of lots an individual supplier may be awarded, as long as it

applies an objective mechanism for doing so.

15. For light touch contracts, because of the special nature of these contracts, section 23(6) of the Act provides an additional list of what may be considered 'the subject-matter of the contract' to take account of service recipients. (Further information can be found in the guidance on light touch contacts.)

16. Award criteria are distinct from conditions of participation. Conditions of participation are used to determine whether a supplier is capable/suitable to perform the contract. This is distinct from award criteria, which determine the merits of the supplier's tender. Conditions of participation must only relate to the supplier's legal and financial capacity or technical ability to perform the contract.

17. In any procedure, the responses to the conditions of participation must be assessed separately from the tender, the tender (only) being assessed against the award criteria. In practice, their assessment may occur in parallel (for example, in an open procedure), but once a supplier has met the conditions of participation, their tender must, in relation to the award criteria, be assessed without consideration given to how they were assessed under the conditions of participation. (Further information can be found in the guidance on conditions of participation.)

18. Awarding on the basis of MAT includes the possibility of awarding based on lowest price/cost only, where price/cost is the sole criterion, although this is unlikely to be suitable for most contracts. Contracting authorities may assess tenders against a wide range of factors to determine the best solution. These factors may include price, quality and technical criteria in addition to wider social, economic, environmental and cultural issues and benefits (for instance, creating new jobs and skills, reducing waste and addressing net zero or carbon reduction outcomes) as long as such factors relate to the subject-matter of the contract, are sufficiently clear, comply with the rules on technical specifications in section 56 of the Act and are a proportionate means of assessing tenders.

19. When assessing tenders against the award criteria, contracting authorities must base their assessment on the published assessment methodology and the relative importance of the award criteria:

- a. if only a single award criterion is used, the assessment will be based on that criterion
- b. if more than one criterion is used, the MAT will be assessed across the range of criteria.

20. The Act allows for flexibility in how contracting authorities describe the relative importance of the criteria and refers to weighting criteria using percentages or ranking them in order of importance or describing relative importance in another way. There is no hierarchy in these options - contracting authorities are able to choose the most appropriate method for their particular circumstances.

21. A contracting authority must always consider its other obligations under the Act before deciding to have price as the sole award criterion, for example having regard to the section 12 duties including the requirement to maximise public benefit and to achieve value for money which is likely to be broader than cost alone in most procurements.

Refining award criteria (section 24 of the Act)

22. Section 24 allows contracting authorities, in a competitive flexible procedure, to refine award criteria (which might involve consequential refinements to the assessment methodology). This may be useful when there is a multi-stage procedure where all of the detail is not known at the first stage. Should contracting authorities wish to refine award criteria during the procedure, they must provide for this possibility in the tender notice or associated tender documents and may only refine award criteria before inviting final tenders (i.e. prior to inviting tenders to be assessed under section 19).

23. Contracting authorities may know the overall or general award criteria at the outset of a competitive flexible procedure, but may wish to retain the opportunity to refine those criteria as the procurement progresses (e.g. after carrying out dialogue with suppliers or reviewing prototypes from suppliers who are invited to participate in response to the tender notice). The outcome of such activities undertaken in the earlier part of a competitive flexible procedure may be a better understanding of what is possible, meaning that further detail or new sub-criteria related to the initial award criteria set out in the tender notice and any associated tender documents can be added. Contracting authorities can only refine what has already been provided; they cannot add new criteria. This is a mechanism by which a contracting authority can plan to add further detail to the award criteria as the procedure progresses and only applies in a competitive flexible procedure.

24. Contracting authorities may not make a refinement that would, had the refinement been made earlier, have allowed one or more suppliers that did not progress beyond an earlier round or selection process to have done so. This is similar to the rules on wider modifications to a procurement prior to the deadline for submitting tenders or requests to participate (as relevant) under section 31 of the Act which are appropriate when unforeseen modifications are required and which apply in any competitive tendering procedure (see guidance on modifications to a procurement).

25. Contracting authorities must modify and republish or provide again the tender notice and any associated tender documents affected by the refinements.

26. Set out below are some examples where contracting authorities are likely to be able, or likely to be unable, to refine award criteria. However, whether or not refinement will be possible in a particular scenario will always depend upon the specific facts. Refinement must comply with all the requirements of section 24 and other relevant obligations under the Act, for example the section 12 objectives.

27. Likely to be permitted:

- a. adding sub-criteria to those set out in the tender notice/associated tender documents as long as they directly relate to the relevant existing main criteria
- b. adding more detail to existing main criteria set out in tender notice/ associated tender documents
- c. adding more detail to existing sub-criteria set out in the tender notice/ associated tender documents
- d. changing weightings within a pre-existing range that was set out in the tender notice/associated tender documents, e.g. if an award criterion relating to transition arrangements was set out at 10%-30%, a contracting authority could start with a 30% weighting and end with a 10% weighting for the final assessment if the other requirements in section 24 are met.

28. Likely to not be permitted:

- a. adding new main criteria
- b. adding new sub-criteria not associated with the main criteria in the tender notice/associated tender documents
- c. adding or removing pass/fail tests
- d. reversing the answer to pass/fail tests expressed in the tender notice/ associated tender documents (i.e. changing what initially constituted a 'fail' to a 'pass' instead).

Awarding contracts following a competitive tendering procedure (section 19 of the Act)

29. Section 19 makes provision about awarding contracts following a competitive tendering procedure, including on how abnormally low tenders should be treated. The key points are:

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- a. following a competitive tendering procedure, a public contract can only be awarded to the supplier that submits the MAT, and
- b. the MAT is the tender that both satisfies the contracting authority's requirements and is the best tender when assessed against the award criteria and the assessment methodology.

30. It is possible for a contracting authority to award separate contracts following a competitive tendering procedure to multiple suppliers (for example, when establishing a framework) if the award criteria and assessment methodology set out in the tender notice and any associated tender documents provide that more than one tender can satisfy the contracting authority's requirements and best satisfy the award criteria and on what basis. In these circumstances, all tenders considered successful pursuant to the criteria and assessment methodology should be considered the most advantageous tender.

31. In an open procedure, which is a single stage tendering procedure without restriction on who can submit tenders, all tenders submitted that are not disregarded (for example, because the tender was submitted by an excluded supplier or because the tender failed to meet a condition of participation) are assessed under section 19 for the purpose of determining the MAT. In a competitive flexible procedure that may have multiple tendering rounds, only final tenders are assessed under section 19 for the purpose of determining the MAT. The process for limiting tenders that progress in a competitive flexible procedure before the final assessment stage is set out in section 20 of the Act.

32. Section 19 of the Act sets out that a tender must be disregarded where the supplier does not satisfy the conditions of participation (see guidance on conditions of participation).

33. It also provides that a tender may be disregarded where:

- a. the supplier is not a UK or treaty state supplier (a supplier entitled to the benefits of an international agreement specified in Schedule 9 of the Act). In

making a decision to exclude a non-UK or non-treaty state supplier, the contracting authority must consider its other general duties under the Act including the objectives in section 12

- b. the supplier intends to sub-contract the delivery of the contract or part of it to a supplier that is not a UK or treaty state supplier. Contracting authorities should be transparent about any restrictions on sub-contracting at the start of the procurement, for example by setting these out in the tender notice or any associated tender documents, and should apply these in a manner that is consistent with the equal treatment obligation in section 12(2) of the Act (further information can be found in the guidance on treaty state suppliers)
- c. a contracting authority considers the price of the tender is abnormally low. Before disregarding a tender on this basis, a contracting authority must first notify the supplier and provide it with a reasonable opportunity to demonstrate that it will be able to perform the contract at the price offered. If the supplier demonstrates to the contracting authority's satisfaction that it will be able to perform the contract for the price offered, the tender may not be disregarded as abnormally low. If the supplier does not satisfy the contracting authority, the tender may be disregarded. Reasons for a low price might be production efficiencies or leveraging economies of scale. Alternatively, a low price might be due to inaccuracies in cost modelling or as a result of unlawful practices or funding sources, casting doubt on the ability of the supplier to perform the contract
- d. the supplier has breached a procedural requirement set out in the tender notice or associated tender documents (for example the tender is submitted late or the tender is over the prescribed word count).

34. In addition to the grounds on which a tender must or may be disregarded as set out expressly in section 19, the Act makes provision elsewhere for tenders to be disregarded on other grounds. There are cross references to these in sections 19(8) (referring to excluded or excludable suppliers), 19(9) (referring to reserving public contracts to supported employment providers and qualifying public service mutuals) and 19(10) (referring to disregarding tenders from

suppliers that are not members of a dynamic market).

35. After the contracting authority has completed the assessment of tenders under section 19 and before publishing a contract award notice, it is required to provide an assessment summary to all suppliers who submitted an 'assessed tender'. Contracting authorities should consider the requirements of the assessment summary when developing their award criteria and assessment methodology and when carrying out the assessment of tenders. Please refer to the guidance on assessment summaries for more information.

What other guidance is of particular relevance to this topic area?

- Guidance on covered procurement objectives
- Guidance on the Wales procurement policy statement
- Guidance on preliminary market engagement
- Guidance on conditions of participation
- Guidance on competitive tendering procedures
- Guidance on light touch contracts
- Guidance on lots
- Guidance on the contract award notice and standstill
- Guidance on assessment summaries

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