

PROCUREMENT INSIGHT

The Latest News in Procurement Law

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Disclosure of Award Criteria – Model Answers

It is a well established principle that award criteria in public sector procurements must be disclosed. One of the best examples of an authority falling foul of this can be found in the case [McLaughlin and Harvey Limited v the Department of Finance and Personnel \(No. 2\) \[2008\]](#).

The quality and cost criteria were broken down into twelve separate criteria with weightings attached. These were disclosed by the DFP. However, the assessment panels evaluation guidance broke these twelve headings down into a further 39 sub-criteria consisting of 186 sub-sub-criteria.

The judge concluded that the DFP had breached their obligations by failing to disclose the 39 sub-criteria. He did not consider whether failing to disclose the sub-sub-criteria was unlawful since a breach had been established at the higher level.

The question of disclosing award criteria reared its head again recently in [Mears Limited v Leeds City Council \(No. 2\) \[2011\]](#); though in this case the issue was the use of model answers as marking aids.

In short, Leeds CC had formed a number of model answers to assist in the marking of submissions. These answers were not disclosed to participants (a point that formed the basis of a case concerning the same parties earlier this year).

In the recent case, the judge held that two of the model answers contained undisclosed award criteria, and as a result, Leeds CC had acted unlawfully.

This judgement further enforces the point that anything that might contain award criteria must be disclosed to participants to minimise the risk of a legal challenge.

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Objective Award Criteria

Judgement was given in the Northern Ireland case *Traffic Signs and Equipment v DRD and DFP* in April 2011. Weatherup J held that allocating 40% of the award criteria to quality *“does not accord with the obligations of objectivity and transparency”*.

The decision is a curious one since the 40/60 quality/cost split appears to have been clearly set out in the OJEU contract notice and the competition documents, thus providing transparency.

The judge did not take issue with the sub-criteria or scoring for the quality assessment, so it is not clear why it was decided that the 40% quality allocation lacked objectivity.

It is, however, clear that if the courts start to find breaches of obligations on grounds such as these, it will become difficult for contracting authorities to shore up against legal challenges.

For further information on
anything in this newsletter or for
any other EU procurement law
queries, please contact your
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Top Marks for Avoiding Challenges

Why is setting up a good scoring methodology for price submissions so disproportionately awkward?

The problem stems from the fact that the lowest price should get the highest mark and *visa versa*. Fine say the mathematicians—there are a number of ways to achieve that. Which would you like to use?

Now comes the important question - does it matter which method is used so long as the usual boxes are ticked (equality, transparency, etc)?

Yes, it does matter - the scoring methodology can mean the difference between happily going about your business or fending off a legal challenge.

How do price scoring methods differ?

One of the methods we most commonly see gives the average price a score of 50 out of 100,

then calculates scores for the prices submitted based on their comparison the average price.

Whilst this is a perfectly legitimate methodology, it can result in narrow margins between final scores i.e. A £50,000 difference in prices could equate to a 1 mark difference in price score.

That is where the problems start. Our experience has shown that the most likely challenge comes from a tenderer who was close to winning.

What can be done?

One alternative scoring method that uses a broader spread of marking range is giving the highest price a mark of zero and the lowest price a mark of 100. Other prices are then scored *pro-rata*.

A word of warning

If a different price scoring methodology appeals to you, be careful not to make changes midway through a process where a system has been published; it is likely to be unlawful.

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NEC Training

Quigg Golden offers a cost effective introduction to NEC Contracting for Employers. The package has options for:

- General Concepts
- Large scale projects
- Short Contracting
- Term Service Contracting

Courses are delivered at your venue and are designed for between 6 and 10 staff members with experience in construction. The aim is to introduce the NEC form of contracting with the objective of allowing understanding of the concepts and issues.

Prices start at just £85 per person

Additional modules on compensation events, programming and risk management can also be provided.

Contact 020 7022 2192 or NEC@QuiggGolden.com for more details.

CONTRACTS

NEC – Not new, not for engineering and not just a contract

The NEC might be a bit of a misnomer. It stands for New Engineer Contract as this was the original handle put on the contract form when it was conceived. The brand has now moved on to calling it just the NEC. And a good thing too since it is:

- Not new: it has been around for over 20 years now and is an embedded and very widely used method of contracting
- Not for engineering: it is just as suited to building projects or even maintenance works as it is for engineering. The engineering reference comes from its birth in the Institution of Civil Engineers. Although the contract is still often (erroneously) associated with engineering projects
- Not a contract: At least it is not a single contract, rather it is a suite of contracts from which clients can choose the specific form that best suits their needs.

Although the NEC is strongly recommended by the OGC and those that advocate best practice

contracting, and it is now very widely used, it is still seen by many as problematic. The analogy is that the contract has now survived a turbulent infancy and now finds itself in late adolescence. Those that loved the child continue to love the teenager. Those that did not are as wary of the NEC as they would be of a bunch of hoodies outside the supermarket.

Adopting the NEC as a client holds a lot of promise. It does promote much better practice. It does drive value for money when it is used properly. It does contain sensible and well balanced protections for the Employer and the Contractor. It is encouraged from on high.

However, it is not without its problems. The contract is different. It uses a different language and the concepts, although familiar, are different in important ways. It can unsettle those well drilled and inculcated in another way of thinking; especially those wedded to the use of bills of quantities in all circumstances for all things. Adopting it means change. Change is something that many approach with trepidation. This trepidation is not limited to Employers; many contractors do not understand the concepts and are not set up for them. Even many lawyers struggle with the new way of describing obligations and setting up the contract. Adopting the NEC is not to be taken lightly.

At Quigg Golden, we have been at the forefront of the development of the NEC and its adoptions. Our NEC cell includes those with a length of experience of the NEC as long as it is possible to have. We have seen NEC contracts implemented well and implemented very badly. *When it is good, it is very very good; but when it is bad it is awful* could have been coined for the NEC. If you are looking at adopting it, do:

- Think about it carefully;
- Get proper and appropriate advice (perhaps consider our introductory training package on it)
- Expect to have to learn lessons

Do not:

- Dismiss it out of hand; or
- Expect implementation to be painless.

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