

## **Transparency in Procurement: Where are the Limits?**

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## **Introduction**

- Transparency in the Process
- Transparency in Litigation
- Transparency in the Future

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## **Transparency in the Process**

- Rationale
- Implementation
  - Formulation of Award Criteria
  - Application of Award Criteria
  - Reasons

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## Original Rationale

- C-324/98 *Telaustria*:
  - Equal treatment “implies, in particular, an obligation of transparency in order **to enable the contracting authority to satisfy itself that the principle has been complied with**”
- C-19/00 *SIAC Construction*:
  - “the principle of equal treatment implies an obligation of transparency in order to enable compliance with it to be verified”

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## Current Rationale

- *R (Law Society) v Legal Services Commission* [2008]
  - Enables the contracting authority to satisfy itself that the principles of equal treatment and of non-discrimination on the grounds of nationality have been complied with
  - Facilitates competition
  - Enables impartiality of procedures to be reviewed
  - It precludes any risk of favouritism or arbitrariness on the part of the contracting authority
  - It promotes a level playing field by enabling all tenderers to know in advance on what criteria their tenders will be judged and those criteria are assessed objectively

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## Formulation of Award Criteria: Test

- Award criteria have to be “clearly defined” (C-340/02 *Commission v French Republic*)
- “clear, precise and unequivocal” formulation (C-368/10 *Commission v Netherlands; Gaswise v Dublin City Council* [2014])

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## Formulation of Award Criteria: Principles

### ■ Question for the Court

- *Healthcare* [2014] UKSC – “legal standard”
- *Gaswise* [2014] – account taken of what tenderers’ had done

### ■ Industry Perspective

- *Clinton* [2011] “the court’s attention must focus very much on the ‘industry’ concerned, in which the professionals and practitioners are not lawyers”
- *Release Speech Therapy* [2011] “a reasonable and intelligent speech therapist provider”

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### ■ Not necessary to envisage every eventuality

- *Clinton* (NICA) [2012]: “not required to make advance provision for all the situations, however rare, which could in practice arise”
- *Healthcare* [2012] CSOH: not required to frame documents “in such detail that **two reasonable people** could not reach different views on its interpretation without acting unreasonably”

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### ■ Mandatory Conditions Stricter

- *Clinton* [2011]: particular demand for clarity and transparency where non-compliance with a criterion is fatal to the tender

### ■ Reasonable Care

- *Healthcare* [2012]: The obligation on the contracting authority “does not mean that a tenderer is not expected to use reasonable foresight in its analysis of what the stated criteria or sub-criteria entail”

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## Application of Award Criteria

- **Interpret Consistently Throughout**
  - C-19/00 *SIAC Construction*
  - C-226/09 *Commission v Ireland*
  - T-299/11 *European Dynamics v OHIM*
    - IT Project, 1 of 5 criteria had 7 elements (not sub-divided)
    - Reasons letter: successful tenderer had "identified change management and communication as **the two most essential tasks** for the success of the project"

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## ■ Prohibition on Undisclosed Criteria

- *Resource (NI)* [2011] "elementary requirement"

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- C-331/04 *ATI*: sub-weightings for award criteria are not required to be disclosed unless:
  - Altered the criteria
  - Could have affected preparation
  - Likely to give rise to discrimination
- C-352/06 *Lianakis*:
  - "all of the elements to be taken into account have to be disclosed"
  - Weighting of award criteria/sub-criteria

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- T-70/05 *EMSA*
- C-6/15 *Dimarso* (AG Mengozzi) (10 March 2016)
  - *ATI*: weighting of sub-criteria
  - *Lianakis*: criteria, sub-criteria, weighting of award criteria

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■ **Evaluation Methodologies**

- C-70/05 *EMSA*: committee must be able to have "some leeway" may without amending the award criteria "structure its own work"

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■ **Case C-6/15 *Dimarso***

- Quality(50%)/Price (50%)
- High, satisfactory, low for quality
- 3 of 4 tenders were "high" on quality
- Price therefore became "decisive" and "benefited from a higher relative weighting" than 50% might have suggested

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- *RPS v Kildare County Council* [2016]
  - Notice: comparative marking from 100%
  - 100%, 80%, 60% “much more crude”
  - “radical departure from the published scheme”
    - C-6/15 *Dimarso* and T-70/05 *EMSA*?

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## Reasons

- *RPS v Kildare County Council* [2016]
  - “Your response to this criterion was of a good standard however compared to the successful tenderer it lacked sufficient specific detail on new studies and reports that would be required going forward.”
  - “Your response to this criterion was of a very good standard however the successful tenderer provided more relevant and specific experiences/lessons learnt in recent public works contracts.”
  - “Your response to this criterion was of a good standard however the successful tenderer offered a more comprehensive approach to ABP oral hearings and measures to maximize the chance of a successful outcome.”

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- “The reasons were a combination of a repetition of the criteria, a repetition of the scores but phrased in terms of ‘good’, ‘very good’, and so on, and a handful of additional words, **16 in total, which contained a vague and general reference** to the manner in which the preferred tenderer was superior in qualitative terms to the applicant.”

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■ **Purpose of Reasons**

- Encourages and supports better administrative decision-making
- Acts as a promoter of transparency; unsound or even improper decisions can readily be cloaked with reassuring bureaucratic language

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■ **Directives (2004/18)**

- Article 41(2) – 2 steps
  - Summary
  - Reasons on request: characteristics and relative advantages

■ **Remedies Regulations (SI 130/2010)**

- Regulations 6(2)(c) and 6(3) – 1 step
  - "summary of the reasons" shall include "the characteristics and relative advantages"

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■ **Content of Reason-Giving**

- Regulation 6(5): scores "may" suffice but only where price
- Duty to provide reasons higher for subjective criteria
- Legal requirement for a "bespoke statement of reasons"
- Succinct statements not therefore sufficient
- Sufficiently precise
- Must mention matters that should have been included in tenders
- **Separately from the general duty, an unsuccessful tenderer may request additional information and must be responded to positively**

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- **Remedy**

- Letter with sufficient reasons had to be furnished
- The Court reserved the power to review the reasons

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## Transparency in Litigation

- **National Procedural Rules**

- Equivalence and effectiveness

- **Recent Developments**

- Cross-examination
- New evidence on appeal
- Discovery

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## Cross-examination

- *Somague v TII* [2015]

- Luas, criteria Red-line tie in (RLTI)
- Mr Corsi, an evaluator
  - Notes suggested the RTLI sub-criterion subdivided and re-bundled
  - Meeting with 3 evaluators and score raised from 20 to 40

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- Transparency, fairness, objectively ascertained criteria are the particular ways the Directive mandates fair competition
- National procedural rules – conflicts of fact
- Review in light of transparency
- Rejected the submission that transparency is only transparency in the process
- Utmost transparency and fairness of process mandates higher degree of scrutiny of the available evidence

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## New Evidence on Appeal

- *Student Transport Scheme* [2015]
  - *Murphy* criteria sufficiently flexible
  - No modification of national procedural rules required

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## Discovery

- *BAM v NTMA* [2015]
  - "There are not special rules for discovery in different kinds of legal action such as judicial review and procurement cases."
  - The "*pleadings are the matters to be taken into account by the Court*"
- Note slightly different approach in *Roche Diagnostics* [2013]
  - "uniquely difficult position" of the unsuccessful tenderer

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## Transparency in the Future

- **Transparency in the Process**

- Article 67 of Directive 2014/24/EU

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- **Transparency in Litigation**

- **Article 84(1)**
  - Draw up a written report which shall include name of successful tenderer and the reasons why its tender was selected
- **Article 84(2)**
  - Document the progress of all procedures
  - Ensure they keep sufficient documentation to justify decisions in all states of the procurement procedure

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## Conclusion

- Limits unclear
- Potential is significant

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