

White Paper

Avoiding Challenges to the AWARD[®] Decision

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Introduction

The implementation of the EU Remedies Directive in the United Kingdom has had a huge impact on purchasing authorities.

There is increased opportunity for an aggrieved tenderer to challenge the decision and a greater impact upon the purchasing authority of a challenge.

This paper describes an approach which reduces the likelihood of being challenged; increases the probability of successfully defending any challenges; and eases the burden of producing debrief information. It has been successfully used by Commerce Decisions (CD) when advising its customers over the last 10 years.

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What can be challenged?

In essence: anything!

The courts are most likely to uphold challenges relating to the process undertaken by the purchasing authority. This can be because the decision process failed to follow the Public Contract Regulations (PCRs), wasn't sufficiently well described or the purchaser didn't follow the process they published.

Challenges to the conclusions reached by the purchaser based upon the information provided by the supplier are less likely to succeed, provided that the criteria used are indeed related to the product or service being procured.

When can challenges occur?

The period during which tenderers can challenge a procurement decision is no longer limited to the 10 day standstill ("Alcatel") period, though there is still the requirement for this cooling off period between announcements of the preferred tender and commencement of the contract.

The exact period during which challenges can be made is still evolving, but the important fact is that it can now happen after the contract has started.

What are the implications of being challenged?

If the contract hasn't yet been entered into then it cannot proceed until the challenge is resolved. This could lead to expensive delays, not to mention legal costs. If the contract is already underway then the purchasing authority could be subject to penalties imposed by the courts as well as damages being awarded to the unsuccessful tenderer. It could even be forced to terminate the contract and re-run the competition.

How to avoid challenges being successful?

It is simply not possible to guarantee that a purchasing authority will not be challenged. However, it can both reduce the likelihood of challenge and increase the chance of successfully defending against a challenge. Put simply, the authority just needs to state what it is going to do, and then do what it said it would.

What it is going to do is to make a series of decisions that will culminate in deciding the winning tender (or tenders) against which it will issue a contract or agreement.

Our experience at Commerce Decisions is that the more open a purchasing authority is in describing exactly how it will choose the winner(s), not only is it less likely to be challenged, but it is also easier to debrief the suppliers and defend against challenge.

Reasons for not explaining the decision process fully are often that the procurer just hasn't decided how it will choose the winners before the invitation is issued, or because it wants to retain "wriggle room" until they know the content of the tenders. Whilst the former is bad planning (which is inexcusable) the latter is simply illegal. The result of both is a significant increase in the likelihood of challenge.

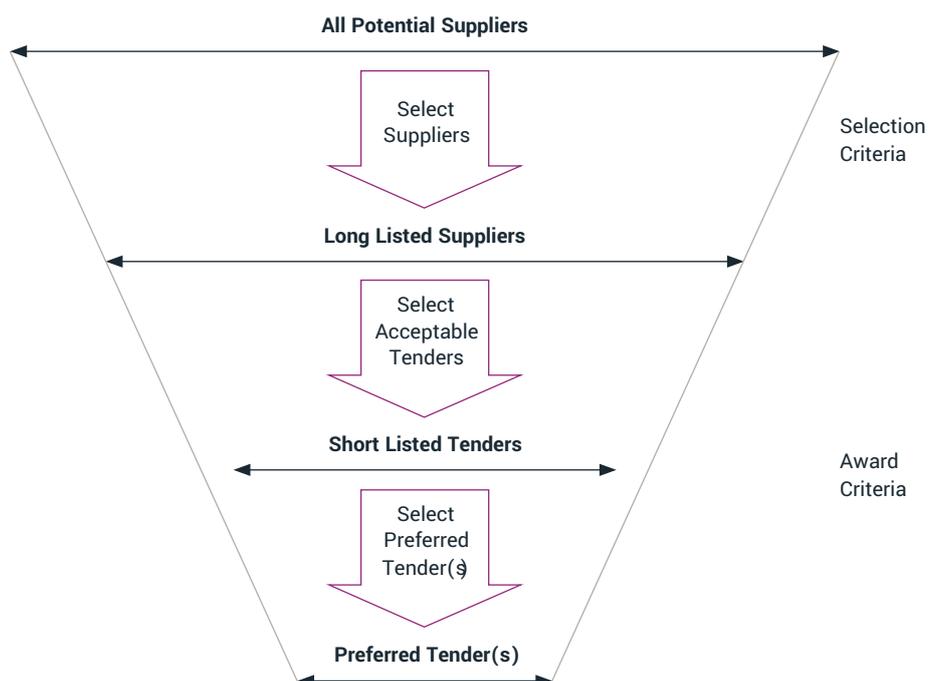
Figure 1.

How to explain the decisions to be made?

No matter which of the procedures within the Public Contract Regulations (PCRs) are being applied (Open, Restricted, Competitive Dialogue or Negotiated), the decisions that are made during the procurement process are the same.

1. Select a "long" list of potential suppliers who have the capability, capacity and longevity to provide what is required.
2. Determine a "short" list of acceptable tenders from the selected suppliers.
3. Choose the tender(s) which demonstrate the best value for money against which the contract(s) will be awarded.

The PCRs describe the criteria you can apply to these decisions as "selection criteria" for the first and "award criteria" for the second and third. Furthermore they state that all the criteria you use must be published to the suppliers.



The long listing decision is made on the basis of the following judgements:

- Completeness: has the supplier provided all the information requested?
- Acceptability: is the supplier "good enough"?
- Score: belief in stated ability to provide an acceptable tender based upon their capability and capacity.

Whilst the short listing decision is made on the basis of the following judgements:

- **Completeness:** has the supplier provided all the information requested?
- **Affordability:** is the tendered solution affordable?
- **Acceptability:** is the solution being tendered "good enough"?
- **Score:** belief in ability of the solution described to the requirement.

Finally, the decision between the short listed tenders comes down to:

- **Preference:** Which of the short listed tender(s) is preferred?

It is vitally important to explain exactly how each of these decisions will be made, and the consequences of each decision. Completeness, Acceptability and Affordability are comparatively easy to explain to the suppliers.

Even so, this all still needs to be said!

For example:

Completeness: "If a bidder fails to provide all of the information requested then they will be excluded from the competition".

Acceptability: "Bidders must confirm that they have not been found guilty of relevant criminal offences, and are not currently subject to criminal prosecution, or they will be removed from the competition"; "Bidders must agree to all of the conditions in the standard contract before their tender can be assessed further"; and "Bidders must indicate that their solution will be fully compliant with all of the mandatory requirements

or their bid will be removed from further evaluation".

Affordability: "If it is determined that a bidder's solution is unaffordable, then their tender will be excluded from the competition".

Score and **Preference** are harder to explain. The latter is defined by the PCRs as either "the cheapest compliant" or the "most economically advantageous" tender. This will not be addressed at all in this paper as it is covered in detail in CD's White Paper entitled "Measuring value for money in a tender evaluation".

Just what are we scoring?

It is worthwhile spending some time thinking about this seemingly simple question. In essence the tender contains a promise from the supplier: "if you pick me then I will deliver this solution and it will meet your needs". Presumably the purchasing authority will want to know how "good" the solution being tendered really will be.

If the supplier claims that their solution is fully compliant with all the stated needs, then this could be taken at face value. If there are areas of partial or non-compliance in areas that are acceptable to us then we need to determine how much less favourable this solution is compared to one which is fully compliant. This approach works well for procurements in which there is little or no risk in the solution being offered – typically commercial off the shelf (COTS) items with little or no service element, such as consumables.

However, taking the supplier's claims at face value does not work where there are areas of risk. This is typically because the supplier is being asked to solve a tricky technical problem for which no COTS solutions are available, or because successful delivery is dependent upon a significant service element. In these cases the supplier's promise simply isn't good enough. Assurance needs to be sought that the supplier's solution really will meet the stated needs, and that the supplier really can deliver their solution! In other words, the measure of confidence that the solution actually delivered by the supplier will meet out needs must be determined (i.e. scored).

In this case simply measuring “compliance” is not enough; levels of “confidence” in the tendered solution must be measured.

Commerce Decisions recommend the following scale when scoring tenders:

Mark	Generic Meaning	Score
High Confidence	<p>The tenderer has convinced the Authority that the solution is fully deliverable and</p> <p>The tenderer has identified and mitigated all risks associated with their solution and</p> <p>Any residual risks to the Authority are acceptable</p>	100%
Good Confidence	<p>The tenderer has convinced the Authority that the solution is fully deliverable and</p> <p>The tenderer has identified and mitigated the major risks associated with their solution and</p> <p>Any residual risks to the Authority are tolerable</p>	66%
Low Confidence	<p>The tenderer has not wholly convinced the Authority that the solution is deliverable or</p> <p>The tenderer has not mitigated all major risks associated with their solution or</p> <p>The solution presents some undesirable residual risks on the Authority</p>	33%
Concerns	<p>The tenderer has not convinced the Authority that the solution is deliverable or</p> <p>The solution presents some unacceptable residual risks to the Authority</p>	0%

What should the suppliers be told about the criteria?

Clearly the suppliers must be told what information is required from them in order to assess the criteria, otherwise there won't be anything to assess! However, what sometimes happens is that the instructions telling the supplier what information to provide isn't clear or all in one place. Often it is scattered throughout the invitation documentation and not clearly associated with any particular criterion.

The law and evolving case history indicates that the full scoring scale must be defined, together with the weights that are to be applied to all criteria. We at CD recommend that the safest approach is to tell the tenderers anything that could affect the way in which they prepare their tenders.

How do we consistently apply the chosen scoring scheme against the criteria?

What about the problem where, from reading exactly the same information in the tender, one evaluator gives a score of "Low Confidence" whereas another picks "High Confidence". Whilst this can never be stopped from happening, it can be rendered much less likely by describing what each of the points on the scale means.

A traditional way of doing this is to provide a "model answer". In other words, if the supplier's solution "looks like this" then give them this mark. A real example of this that has been encountered by CD related to an element of a contract to control vermin on the client's site. The model answer talked about the number of rat traps that would be used. One supplier said afterwards that they had a better solution however they couldn't propose it as they knew they would be marked down as it wasn't the same as the model answer. Their innovative solution was to encourage owls to nest around the site! Hence model answers are bad news as they overly constrain both the suppliers' solutions and

Criterion: Project Delivery Time

the ability of the assessors to give credit to an innovative solution.

A better way of describing the scoring scale is to describe what the successful outcomes will be, as opposed to what the solution itself looks like. In other words, what characteristics would the solution have to exhibit in order to give confidence to the purchaser that it will meet their needs? CD call these the "Confidence Characteristics".

Using the vermin example, the purchasing authority would define the reduction in the population of rats that is required in order to award each mark. Be careful how you do this, if this is measured on the number of dead rats then an unscrupulous supplier may ship in dead rats! If it is judged on lack of rats, then the result should be lack of rats, be it via rat traps, owls or some other mechanism.

How else can the purchasing authority help the supplier understand the criteria?

The answer to this is simply to explain why the criteria are being applied in the first place. This can be achieved by describing both the aims of and supporting background to the criteria. These together should explain why the criteria are important and explain why the information is being requested from the suppliers.

The aims should describe the successful outcome to be achieved, the goals or benefits of the programme and why the competition in being undertaken in the first place. The background is anything that helps explain this further, including any assumptions being made and constraints or standards that apply to the solution.

In other words, anything that helps the supplier understand why the questions have been asked in relation to the criteria, and that allows them to decide if there is anything else they can usefully provide that hasn't been asked for.

Below is an example of a fully defined criterion.

Aim

To contract with a supplier who demonstrates that they will deliver the project on time.

Background

To contract with a supplier who demonstrates that they will deliver the project on time.

Confidence Characteristics

Key tasks, events and milestones have been identified and their sequencing is well considered.

All dependencies are identified and sufficient lead times included where needed.

The Critical Path or Critical Chain is fully defined and viable.

All tasks are feasible with the quantity and quality of resources identified.

Strong evidence is provided that all aspects of the plan are feasible, robust and cost effective.

Supplier Instructions

Provide a detailed project plan which shows the key milestones, tasks and dependencies between tasks. Identify the resources (human, tools and materials) that will be needed to support each task.

Highlight where the risks associated with your plan can be found in your risk management plan.

Explain why you believe the Authority should be confident that your plan is feasible, and that you can implement it cost effectively and with low risk.

Evaluation

This criterion will be scored using the four point confidence scale and carries a weight of 6.7%.

Assessor Guidance

High Confidence	Project will be delivered at least 1 month early
Good Confidence	Project will be delivered on time
Low Confidence	Project will be delivered up to 1 month late
Concerns	Project will be delivered over 1 month late

How to ease the debrief burden

A particularly thorny aspect of the PCRs is where they instruct the purchaser to include “the characteristics and relative advantages of the successful tender” when debriefing a losing tenderer. One tenderer cannot be told how another proposed to solve the problem as it may be commercially sensitive information.

The answer is, once again, to focus upon the outcome that it is believed will be achieved by the winning tender, rather than the method the tenderer will use to achieve it. If the scoring scheme has been defined in terms of the output, and this has been published to the tenderers, then all that needs to be done is to publish the score achieved by the winning tenderer. Note that the PCRs indicate that this should be done anyway. Job done!

In conclusion

This paper describes an approach which reduces the likelihood of being challenged; increases the probability of successfully defending any challenges; and eases the burden of producing debrief information.

They key elements of this approach are:

- Measure and debrief upon the purchasing authority’s **confidence** that the tender, if implemented by the tenderer, would deliver a solution that would meet their needs.
- Define the scoring scale in terms of the **outcomes** being sought, not the perception of what a successful solution should look like.
- **Publish** the full definition of the criteria (i.e. that which will be used by the assessors) to the tenderers.

About Andy White

An experienced Principal Consultant with 30 years IT and Consultancy experience. Andy joined Commerce Decisions in 2004 having worked previously in the development of large, IT intensive systems and bidding into government agencies.

With Commerce Decisions, Andy has had extensive experience in the creation and implementation of a wide variety of decision- making schemes and the deployment of these using the AWARD system.

About Commerce Decisions

Commerce Decisions has been supporting strategic, high-risk procurements globally since 2001, and is at the forefront of best practice procurement. With a unique focus on complex evaluation, we have unrivalled experience in supplier evaluation and are a trusted provider of procurement services to the public and private sectors.

We deliver a robust and defensible procurement process to our clients, proven time and time again across many sectors including construction, transport, education, health, defence and facilities management procurements – to date, we have supported over 13,000 strategic projects, collectively worth over \$400billion. This enviable experience and in-depth knowledge has enabled us to develop proven methodologies, supporting clients to deliver the best possible outcome on strategic and complex procurement projects.

Headquartered in Oxfordshire, UK, and with offices in Canberra, Australia, and Ottawa, Canada, Commerce Decisions provides software and services to support the procurement and post contract review processes for both buyers and suppliers. For buyers we improve the efficiency and effectiveness of the evaluation process to

make the best buying decision based on all the relevant criteria, underpinned by our AWARD® software. For bidders we improve the quality and timeliness of proposals to best meet the needs of the potential buyer and thereby give them the best chance of securing the contract, underpinned by our ADVANCE™ software.

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