

Would Public Procurement Stretch Dante's Imagination?

If Dante lived amongst us today, he might, according to some, be forced to add a tenth ring to his *Inferno*: public procurement. Here's how contracting authorities can make the tendering process more hospitable to humans.

Dante's Inferno created a world of pain and suffering beyond human imagination and defined our modern picture of hell – a subterranean funnel of suffering in nine distinct levels. Never had the concept of hell been so captivating and so entertaining.

If he were still alive, Dante might reserve a tenth ring of his demonic underworld just for the torments of public procurement. Botticelli, too, would equally have to update his *Mappa dell'inferno* to include the pitfalls that must be successfully navigated to eventually make the ascent into public procurement paradise.

The message is simple for all contracting authorities that do not want to 'abandon all hope' when dealing with a disgruntled tenderer – start the procurement process with the end in mind when the tender documents are configured. Think of the requirement to reply later to unsuccessful tenderers: good, up-front organisation why they were rejected. Previously, contracting authorities had to provide unsuccessful tenderers with the relative advantages of the winning tender. This is not enough anymore. Mr. Justice Humphreys imposed an obligation to also positively respond to a request for further information when requested, as set out in his [*RPS Consulting Engineers Limited v Kildare County Council judgment*](#) [2016] IEHC 113.

In his Hamlyn lecture (*Protection of the Public – a New Challenge*, 1990), Lord Woolf regarded "the giving of satisfactory reasons as being the hallmark of good administration" and noted that "Mr. Justice Humphrey has now brought this standard to a much higher level."

Problems in explaining a tender decision have their roots in poorly understood criteria

Standard/ boilerplate regret letters with largely "content free platitudes" or "a flimsy and threadbare attempt to explain the decision" with a "bland, anodyne, bureaucratic, uninformative formula" won't suffice anymore as contracting authorities are required to give a bespoke statement of reasons. To be able to do so, the contracting authority must understand precisely the subject, scope, minimum requirements and scoring matrix of the competition.

When it comes to the evaluation of the various bids, the evaluators should jointly, as a team, be clear what the award criteria mean and what is scored under each criterion. Subsequently, the evaluators should express clearly the reasons why the winning tender won under the published criteria. No new criteria can be introduced, bids must be evaluated under the published criteria, and the criteria should be understood by all and should be interpreted by any reasonably well-informed tenderer to mean the same thing.

When the reasons for choosing the winning tender are set out, they should be detailed and guided by the award criteria. But this goes back to the beginning: the tender documents themselves must have clear criteria, because it is only then that evaluators can clearly set out the reasons for their decision. If these reasons are a quick afterthought, then the evaluation team will trip up at the debriefing meeting and be exposed to a legal challenge.

Likewise, in determining whether there is a manifest evaluation error, the Court will have regard to the alignment of the published criteria, the provided reasons and allocated scores. Should these align, the Court will not disturb the evaluation team's decision as the Court is mindful of the risk of becoming embroiled in the merits of the evaluation and assessment of a tender, which it is poorly placed to do. Absent a manifest error, the court will not interfere. The risk is therefore that the process is unfair and the above alignment defective.

Clarity is everything

In the words of Jonathan Swift "*when your thoughts are clear, the best words will offer themselves first and your judgment will direct you in what order to place them so as they may best be understood*". Whilst this might sound like a self-evident truth, it is not uncommon for the specifications and the pass/fail requirements in tender documents to contradict each other, and for the members of the evaluation team to disagree at the evaluation stage as to what precisely is covered by a specific criterion.

The contracting authority must take appropriate measures to effectively prevent, identify and remedy a disconnect between the published words and the evaluation process, and avoid any segmentation of the procurement process. This is best practice, and it is that simple -- probably too simple, as it is often ignored.

HERBOTS
Solicitors