RANDOM EFFECTS OF SCORING PRICE IN A TENDER EVALUATION

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One of the key features of public procurement law and practice is that the system is designed to produce predictable and transparent outcomes. The expectation is that the stated tender evaluation system should generate an answer in a manner that is protected from inappropriate interference and should be seen as predictable by bidders. It should also be possible for those wanting to contract to understand in advance how the choice of one evaluation model or another would affect the sort of offer that is likely to be accepted. It is strange, therefore, that systems commonly applied should so often operate unpredictably. It is also rather strange that this is the subject of so little comment given that the problems are quite well known.

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In this post, Michael Bowsher QC considers two problems arising from the use of a common formula for evaluating price.

Two recent publications have highlighted issues with one of the most commonly used formulae for identifying the most economically advantageous tender (see *Moreau, "La question de la régularité de la méthode proportionelle d'évaluation du critère du prix" (2014) Contracts et Marchés Publics 11, and Kiiver & Kodym, "The Practice of Public Procurement" (2014)*). These issues are encountered fairly frequently in practice but because they are the consequences of an evaluation process that bidders sign up to at the outset, it is usually too late to raise them in a challenge at the end of the process.

When evaluating tenders by reference to price and quality criteria, it is necessary to apply some means of tying together the two analyses so as to take account of trade-offs between them. This is often done by some arithmetic means which allows quality and price scores to be drawn together in a total score representing the entire evaluation for each bid. To do this, the price expressed in currency units must be translated into a point score and this is often done by use of the following formula.

$$\text{Price score} = \frac{\text{Lowest price bid}}{\text{Price of tender being evaluated}} \times \text{Price weighting}$$

This can then be added to the total quality score (also multiplied by the appropriate weighting) to give the total.

Take an example in which the scores are weighted 60% for price and 40% for quality. The following prices and scores are submitted and awarded.

	Price	Price Score ex 60	Quality Score ex 40	Total ex 100
A	400	45	38	83
B	350	51.4	32	83.4
C	300	60	20	80

Bidder B wins with 83.4 points.

If the same three bids are submitted in the same tender, but now a bidder D submits a bid with a price of 250 currency units and is awarded a quality score of 15, the price scores and overall totals change as follows.

		Price score ex 60	Quality score ex 40	Total ex 100
A	(25/40×60)	37.5	38	75.5
B	(25/35×60)	42.86	32	74.86
C	(25/30×60)	50	25	70
D		60	15	75

Bidder A now wins. Bidder B has put in the identical bid but its bid is marked as being less economically advantageous than that of Bidder A even though neither of these bids has changed. The relative advantage of Bidder A over Bidder B (and vice versa) is determined by an essentially irrelevant factor, namely the existence and score of the bid put in by Bidder D.

Of course, depending on the rules of the bid Bidder B might in the second scenario claim that Bidder D's bid was abnormally low or failed to meet a relevant quality threshold so that it should not be treated as a valid bid. Whatever the rights and wrongs of this debate, the fact remains that the outcome of the contest between the two highest quality bids turns on the price of the lowest price bid.

There are simpler oddities with this formula. Take three priced bids:

		Scores		
A	100	50/100	=	50%
B	75	50/75	=	67%
C	50	50/50	=	100%

One might expect that the middle bid would receive a score of 75%, but because the formula is not a linear function its price score is lower than would probably be thought "fair". This of course substantially prejudices bids in the middle of any range of bids scored this way. A bidder cannot know whether it is likely to be so prejudiced until the end of the process as it cannot know where in the range its price falls, but in principle it does know that it is exposed to the risk of such prejudice. From the purchaser's perspective, the likelihood of the formula selecting a "Goldilocks" bid that is "just right" lying mid-range in price and quality is probably reduced by this effect.

This is, of course, not the only formula of this type but I am yet to find one which does not raise some odd outcome in some situation or another.

These issues raise real and pressing issues for contracting authorities planning their procurements and ceiling to predict the outcomes they are looking for. They raise difficulties for bidders trying to establish a winning bid strategy.

From a legal perspective they also challenge the assumption underlying the Altmark 4th criterion that the outcome of a public procurement will reflect the best economic solution and any contract entered into will therefore be free from state aid. How can that be when the outcome of that procurement is not determined by the relative economic merits of the bids but rather by the positioning of another quite separate bid?

In future blogs, Michael and Practical Law will look at problems arising from other common formulae used to evaluate price and consider what this means for tenders more generally.