



VALUE-BASED
PROCUREMENT

Partnering for patient-centric,
sustainable health care

Good practices for value based procurement in the healthcare sector

Guidance on the application of public procurement law
when using the MEAT VBP framework & tool in procurement
procedures of medical technology

NOVEMBER 2020

In collaboration with

C/M/S/

Law . Tax

Table of contents

| | |
|--|----------|
| 1. The importance of innovation and value in medical devices and technology procurement | 2 |
| 2. Public procurement law principles | 3 |
| 2.1. The conduct of a public procurement procedure | 3 |
| 2.2. Relevance of the MEAT VBP Framework & Tool for specific phases of a procurement procedure | 4 |
| 2.2.1. The use of the MEAT VBP Framework & Tool during preliminary market consultations | 4 |
| 2.2.2. The use of the MEAT VBP Framework & Tool during tender design | 5 |
| 2.2.3. The use of the MEAT VBP Framework & Tool in the definition of award criteria for the evaluation stage | 8 |
| 1. Link with the subject-matter of the contract | 10 |
| 2. Prohibition on an unrestricted freedom of choice | 11 |
| 3. Effective competition | 11 |
| 4. Verifiable character of the answers to the award criteria | 12 |
| 5. Transparency | 13 |

1. The importance of innovation and value in medical devices and technology procurement

The procurement of effective healthcare solutions is one of the most pressing public policy issues. Health and finance ministries have to balance the need for sustainable health systems in the context of an ageing population and increasing demand for healthcare services against the challenges of limited budgets and dwindling public resources.

Procurement entities active into healthcare consider it to be a challenge to apply public procurement procedures to healthcare purchases (medical devices, drugs, support services and innovative solutions and technology). These purchases are indeed often highly sensitive, with even lifesaving aspects, they are crucial for the physician's and hospital employees' activities and are in general very innovative and evolving goods.

Value based procurement is a way forward in an evolving landscape of procurement of products and services and contributes to the management of episode of care, even for the full care a patient with a specific chronic disease needs. Health and social care stakeholders emphasize the necessity to put the focus on "value" for these products and to make long term assessments of their integration into the care provider's organization. "Value based procurement processes", including innovation and long term collaboration between the industry and the health care sector as well as global and integrated solutions are preconized.

The MEAT ("Most Economically Advantageous Tender") VBP ("Value-Based Procurement") Framework & Tool is an evaluation approach with the objective of helping public buyers to procure those products, services and/or solutions offering the best value for money resulting in improving the outcome and lowering the total cost of the healthcare delivery process.

The MEAT VBP Framework & Tool's primary aim is to provide a practical tool, compliant with the EU Directive 2014/24 to procuring entities to evaluate medical technologies and solutions, using award criteria taking a holistic approach and considering wider economic and public health benefits. The MEAT VBP Framework & Tool is based on the over-arching goals and needs of a contracting authority. Each award criterion can be selected thinking about the value it carries to the stakeholders involved in the process and those who will benefit from it: patients, doctors, nurses, hospitals and the health system in general.

This document provides high-level guidance on the application of the public procurement rules (Directive 2014/24 and relevant national implementing legislation) when using the MEAT VBP Framework & Tool. It does not seek to provide comprehensive guidance on how to conduct a procurement procedure. The guidance is not a legal advice and all users of the MEAT VBP Framework & Tool should seek their own independent legal advice where necessary and appropriate.

2. Public procurement law principles

This chapter provides an overview of the conduct of a public procurement procedure, explains the stages at which the **MEAT VBP Framework & Tool** will be relevant and provides guidance on how it can be used in compliance with the requirements of procurement law.

2.1. The conduct of a public procurement procedure

There are a number of stages in any procurement process. The MEAT VBP Framework & Tool is of relevance to three stages of a procurement process highlighted in **green** below:

- at the outset during preliminary market consultations;
- when the tender process is being designed;
- during the evaluation process.

However, it is not relevant to the selection of suppliers stage in a procurement (tender) process
The relevant stages are set out below:



- **Preliminary market consultations:** Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to engaging with the market to assess what products and services are available, to inform economic operators of their procurement plans and requirements and to prepare the procurement process. This step is encouraged in the EU Procurement Directives but is not mandatory.¹
- **Tender design:** Following any market consultations, the authority will plan the tender process. This will involve formulating the specifications, deciding on the appropriate procurement procedure, choosing the selection and award criteria and preparing the procurement documents.
- **Publication:** Contracting authorities will make known their intentions of planned procurement(s) through the publication of a contract notice on the EU's TED-website. Depending on the procedure such a publication can be mandatory.
- **Selection:** The contracting authority assesses the suitability of tenderers to perform the contract based on exclusion and selection criteria.
- **Compliance:** The submitted tenders must be compliant with the demands of the contracting authority (technical specifications) as stated in the procurement documents. Deviations from essential clauses and requirements can give rise to exclusion.
- **Evaluation:** During the evaluation process, the contracting authority assesses the tenders, using award criteria (and the relative weight) to determine the actual price/cost and the relative merits of tenders, in order to determine the most economically advantageous tender.
- **Award:** on the basis of the evaluation, the contracting authority will award the contract to the most economically advantageous tenderer. From the moment of the notification of the award decision, other – non chosen – tenderers are offered a remedy period to challenge the award decision.
- **Execution:** The chosen tenderer will execute and implement the contract according to the procurement and tender documents.

1) Under article 40 of directive 2014/24 it appears that contracting authorities “may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.” Contracting authorities are consequently not obliged to do so, but such preliminary market consultation gives contracting authorities important possibilities for successful tendering.

2.2. Relevance of the MEAT VBP Framework & Tool for specific phases of a procurement procedure

2.2.1. The use of the MEAT VBP Framework & Tool during preliminary market consultations

To structure a healthcare public procurement process, thorough preparation on the part of a hospital's procurement team, physicians and hospital staff and, as the case may be, legal team, will be crucial. During this preparation phase, the project team will have to answer to different questions related to the different stages of the award and implementation of the contract (see below).

The public buyer has the possibility to have contact with the economic operators. The EU public procurement directive allows contracting authorities indeed to conduct market consultations with a view to **preparing** the tender and **informing** economic operators of their procurement plans and requirements.²

Whilst concerns can be raised about corruption, market consultations can be safely undertaken provided adequate safeguards are implemented to prevent distortion of competition and favouring certain suppliers.

How can the market consultations be organised in practice?

Preliminary market consultations can be conducted in a variety of ways and may involve:

- Meeting with suppliers – for example, an authority may hold individual or combined meetings with a range of suppliers to identify the products on the market and/or to discuss a preliminary set of (product) awarding criteria;
- Detailed research – for example, reviewing industry reports or obtaining the views of other authorities, or seeking the input of consultants;
- Supplier days where all potential suppliers are invited to a briefing about the future needs of the authority, or about an upcoming tender opportunity – however, whilst these can be useful, competition authorities recommend these are not generally used as they can create the conditions for bidder collusion;
- Market sounding approaches – for example, asking for expressions of interest or approaching trade bodies;
- Using more formal means of communication such as EU Prior Information Notices (PIN).

The MEAT VBP Framework & Tool and the preliminary market consultation

The MEAT VBP Framework & Tool can be described and discussed with suppliers during all such interactions and authorities can use these discussions to seek feedback on suitable award criteria, how the relevant products and services could be evaluated and the non-availability of products meeting the contracting authority's demand.

In conducting these discussions, a contracting authority should take care to ensure that the fundamental principles of non-discrimination and transparency are adhered to³. Thus a contracting authority should conduct market consultations to ensure all potential suppliers are treated and involved equally, no supplier is placed at an advantage/disadvantage as a result of the information shared or discussions held, and any specifications and evaluation criteria should not be 'agreed' with any specific supplier(s) or designed in favour of any one potential supplier.

Should a contracting authority conduct pre-tender consultations with potential suppliers in which the MEAT VBP Framework & Tool is discussed, **best practices** include:

- The authority ensuring that a **proportionate number of suppliers are consulted** which are commensurate with the market size and landscape – in other words there should be an open invite for all potential suppliers to participate. This can be achieved using a PIN notice.
- The authority should share the **same information** about the potential tender opportunity and needs and requirements of the authority with all potential tenderers – this prevents certain bidders gaining a competitive advantage later in the procurement process.

² Under article 40 of directive 2014/24 it appears that contracting authorities "may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements." Contracting authorities are consequently not obliged to do so, but such preliminary market consultation gives contracting authorities important possibilities for successful tendering.

³ Article 40, Directive 2014/24/EU

- The authority can indicate that it is seeking to use the Tool and **would welcome suggestions of suitable criteria** which could be used for the particular product. However, the authority **should not ‘agree’ the evaluation criteria with any supplier or enter into any detailed dialogue** with bidders as to the merits of criteria over others.
- The authority should keep **minutes of all meetings** and other contacts with suppliers;
- If there is an “information/briefing meeting” with all suppliers, the **dialogue should be one way (information provided by the contracting authority to the potential tenderers)**. Any feedback to be provided by suppliers should be done bilaterally on a one-to-one basis and without being disclosed to other suppliers – this is to prevent suppliers disclosing commercially sensitive information about how they may bid or their wider strategy.
- The authority should not **share confidential information or business secrets** provided by one potential tenderer with other potential tenderers.
- Any bilateral meetings should **not lead to pre-negotiations** between the authority and a supplier.

IMPORTANT

Once the procurement procedure is launched, all interested suppliers/bidders should have access to the same detailed information as those who participated in any previous pre-tender consultation (except for confidential information or business secrets).

Such transparency obligation can be achieved for example by sharing (i) the information provided via the specifications and/or (ii) the minutes of pre-tender dialogue with all interested bidders/suppliers.

2.2.2. The use of the MEAT VBP Framework & Tool during tender design

To structure a healthcare public procurement process, thorough preparation on the part of the care provider’s procurement team, physicians and hospital staff and, as the case may be, a legal team, will be crucial. During this preparation phase, the project team will have to answer to different questions related to the different stages of the award and implementation of the contract.

This preparatory work should include identifying the most relevant and appropriate award procedure for the specific healthcare purchase to be made.

When envisaging a purchase based on the long term value of an innovative solution (whether it is a technology, a device, services of an innovative process) the contracting authority should take into consideration different crucial elements, relevant at different stages of the award procedure or contract implementation.

Some of the preparatory questions a public buyer needs to consider are summarized below.

Structuring the value based healthcare procurement project – key questions

KEY QUESTIONS

- What do we want to “buy”?
- How do we want to buy and how do we want to structure the procurement procedure?
- What are the goals/objectives we can achieve with the purchase?
- How do we want to award?
- How do we want to work with the suppliers?

i. What do we want to “buy”?

- Does it exist on the market?
- Does the public buyer want to buy a product (machine)? Just the product or also consumables, maintenance, educational services? Or does it want to buy a concept/solution?
- Does the public buyer need an R&D phase that would lead to a tool/device or tool?
 - *Need for the legal team to understand the technical background of **what we are going to buy***
 - *This will determine the procedure to be chosen, the criteria that can be chosen, the structure of the procurement process*

ii. How do we want to buy and how do we want to structure the procurement procedure?

- Who is going to buy)? What is the appropriate team of stakeholders who will be use or benefit from the procurement and who will be involved in the procurement process (purchaser, physicians, nurses, etc.) –
 - These persons will need to be consulted about suitable award criteria to be used in the **MEAT VBP Framework & Tool** evaluation framework;
- Will the public buyer contract with several economic operators or just one?
- Which procedure will we use?
 - Open or restricted procedure?
 - Competitive procedure with negotiation?
 - Competitive dialogue?
 - Innovative partnership?
 - Negotiated procedure without call for competition?
- Is it appropriate to divide the contract in lots and/or to award a framework agreement (with or without mini competitions)?

iii. What are the goals/objectives we can achieve with the purchase ?

- What is the expected outcome for the hospital/public buyer? Identifying the needs and the related desired outcomes as well as the areas where improvements can be made
 - Focus on performances/results and openness for any solution?
 - Focus on direct price/cost?
 - Focus on reduction of costs on a broader and more long-term scale (ex. length of stay; time spent by care providers)?
 - Focus on direct quality of the device/the services (ex. user friendliness of the device, less risks of infection etc.)?
- Identify the technical specifications; if specific specifications (that could, for example, restrict the number of potential tenderers who could participate) draft an internal record to explain the necessity to use such a specification)
- Understanding the needs of the contracting authority/patients and the objectives of the procurement procedure – how will the procurement impact the pathology, the procedure and it outcomes. This will be central to identifying the appropriate **MEAT VBP** evaluation approach.

iv. How does the contracting authority want to award?

- Which **selection** criteria does the contracting authority wants to use?
- Which **award** criteria does the contracting authority wants to use?
 - Best price-cost/quality ratio → using Value Based procurement framework
 - Cost is broader than price and could integrate costs of the hospital
 - → need to choose the appropriate criteria
- For which award method the contracting authority will opt for?
 - Classic method of awarding points and weight per criterion?
 - Willingness to pay (“W2P”) method?
- Is the public buyer capable to assess verify what they are asking for?

v. How do we want to work with suppliers?

- During the contract implementation phase, there are a number of issues to consider in relation to the nature of the relationship[/partnership with the relevant suppliers⁴:
 - Establishing a “Value-Based Agreement”: Value-based contracting is a contractual model to align the economic interests of the procurer and supplier to the impact a medical device or solution delivers in practice, based on criteria selected within the Value-based Procurement framework. Value-based contracting enables risk sharing when the expected outcomes or benefits, or the cost impact, are less clear or lack detailed evidence at the time of contract negotiations. Value-Based Contracting is broader than outcomes-based contracting as it focuses on value, which includes (i) outcomes, (ii) other benefits for stakeholders and (iii) total cost of care impact⁵.
 - When drafting the contractual requirements, it is important for the contracting authority to project itself in the real implementation of the contract and draft clauses that “work” (about delivery modalities, sanctions, monitoring of results, etc.);
 - often, contracting authorities draft abstract clauses or are copying clauses from other contracts which leads to contractual provisions that do not fit with the reality of the future implementation of the contract
 - Anticipate potential problems (out of stock, delays etc.); organise “plan B” for them (if appropriate).
 - If appropriate, set realistic (outcome-based) KPIs and SLA’s (use KPI’s and SLA’s that you can actually verify/ assess).
 - Anticipate the termination of the contract (possible termination if a new product/generics enters on the market? Compensation? etc.).
 - Request stakeholders, nurses, clinicians to provide feedback on what went well/ what went wrong and take this into account for the next procurement.
 - How do we plan, prepare and conduct the contract Monitoring phase?

4) For some Value Based Contracting examples and types [like 1. Evidence-based care discounts, 2. Product or service guarantee, 3. Risk share by product, 4. Risk share by alternative payment model and 5. Fully integrated care provision including risk and contracting vs. payer], see “Overview Value-Based Contracting” presentation BCG, Euriphi Project, WP2, September 2019.

5) See “Overview Value-Based Contracting” presentation BCG, Euriphi Project, WP2, September 2019.

vi. Summary: success factors for a value-based procurement

In summary, the following elements are important when it comes to procuring “value” in the healthcare sector:

- Thinking broader;
- Thinking future;
- Preparing the procurement process with the relevant stakeholders (clinicians, nurses, management, economic operators);
- When writing tender documents, clearly contemplating the operation of the contract in order to draft contractual provisions that will “work”.
- Asking for answers one can compare/assess/verify/enforce during the procurement process AND the implementation of the contract.

2.2.3. The use of the MEAT VBP Framework & Tool in the definition of award criteria for the evaluation stage

As the **MEAT VBP Framework & Tool** strongly relates to the evaluation phase (and thus the awarding criteria), we will first clarify the notion of award criteria in the present section.

Directive 2014/24 contains various obligations on contracting authorities when selecting award criteria. This section sets out the key rules which flow from Directive 2014/24 (as well as the case-law of the ECJ) and provides guidance on the use of the **MEAT VBP Framework & Tool** within this context.

The selection of award criteria should always be done on a case-by-case basis, in accordance with principles identified below. Depending on the subject matter of the contract, criteria as proposed in the **MEAT VBP Framework & Tool** may or may not be suitable for the specific procurement.

Different type of criteria used during an award procedure

It is important to note that the MEAT VBP Framework & Tool is relevant only to determine awarding criteria. It is not relevant to determine exclusion grounds or selection criteria.

| | | | |
|-----------|--------------------|--|---|
| SELECTION | EXCLUSION GROUNDS | are circumstances in which an economic operator must or can be excluded from the procurement procedure – the MEAT VBP Framework & Tool does not relate to this phase |  |
| | SELECTION CRITERIA | determine the suitability, the economic and financial standing and the technical and professional ability of the tenderers to carry out the contract – the MEAT VBP Framework & Tool does not relate to this phase |  |
| AWARDING | AWARD CRITERIA | determine which tenderer has developed the most economically advantageous proposal that delivers the expected results and should therefore be awarded the contract – the MEAT VBP Framework & Tool relates to this phase and aims to provide guidance in determining the award criteria. |  |

What is an awarding criterion?

Transparency

An awarding criterion is a parameter on the basis of which the various tenders will be compared. They are crucial in the public procurement procedure, as they determine which supplier will win the contract.

Non-discrimination

Award criteria are in other words used to determine the most economically advantageous tender from the point of view of the contracting entity. They relate to the product or services to be purchased by the contracting entity.

Equal treatment

When awarding a public contract to a supplier, public buyers have to use “objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous tender.”⁶

The requirement that the criteria should be compliant with a number of principles, aims to ensure a fair competition between suppliers (so public money is well spend).

EXAMPLE

A contracting authority is free to choose the awarding criteria on the basis of which the public contract will be awarded. Examples of awarding criteria are mentioned in art. 67 of Directive 2014/24:

- (a) *quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;*
- (b) *organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract; or*
- (c) *after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.*

A contracting authority can for example use an awarding criterion **delivery term**.

- When such criterion is announced (principle of transparency), suppliers know that by offering a short delivery term, they could obtain more points than their competitors.
- A criterion as the delivery term is in principle also compliant with the principles of non-discrimination and equal principles, as it is possible for all suppliers to commit to a short delivery term.

The importance of each criterion depends on the weight of each criterion or the monetary value assigned to it if the willingness to pay method (W2P) is used.

Use of the MEAT VBP FRAMEWORK & TOOL

The **MEAT VBP Framework & Tool** is an evaluation methodology and it is at the discretion of contracting authorities whether and how to use it.

The MEAT VBP Framework & Tool contains a suggested evaluation framework: it provides guidance on the determination of value based award criteria to be used by an authority and provides a framework for the evaluation of those criteria.

However a contracting authority should take the following constraints in mind when determining the award criteria from the MEAT VBP Framework & Tool (any legal issues or concerns do not derive directly from the MEAT VBP Framework & Tool, but from the choice the contracting authority makes).

6) Recital 90 of Directive 2014/24/EC

What are the constraints applicable when determining the award criteria?

1. Link with the subject-matter of the contract⁷

GENERAL

Award criteria should always be linked to the subject matter of the contract (i.e. the works, products or services a contracting authority is purchasing).

The Court of Justice of the European Union explains this condition as follows:

“Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract.”

Although this rule seems logical, in practice it is not always simple to apply.

EXAMPLE

- An award criterion like “Studies supporting efficacy” for example shall not be sufficiently linked to the subject-matter of a contract for the purchase of medical devices, if the studies do not concern directly the medical device itself but, for example, the broader pathology.
- The comparative assessment of the level of performance offered by each tender should be done **“in the light of the subject-matter of the contract, as defined in the technical specifications”⁸**.

The question whether an award criterion is linked to the subject-matter of the contract should therefore be answered in light of the technical specifications. There should indeed be a logical link between on one hand the technical specification and the aim of the procurement process and on the other hand, the criterion used to assess the tenders on this aspect.

EXAMPLE

- It is possible to refer to an award criterion concerning “environmental impact”. Such a criterion could for example be used in order to evaluate packaging of medical devices or its production processes. However, this will not be a valid award criterion if it aims to assess, in general, the environmental (or CSR) attitude of the tenderer.
- In practice, an award criterion of this type will need to clearly identify the factors which are to be assessed and the linkage to the products and services which are to be procured.
- Criteria such as „positive impact for the society or social security“ are sensitive and present high risks of remedy as they are often not directly linked to the needs of the contracting authority. In such case, the description of the subject matter of the contract (including broader interests) will be crucial to assess the validity of such a criterion.

RISK

Using criteria that are not linked to the subject-matter of the contract can give rise to remedies against the whole procurement procedure.

GUIDANCE TO MITIGATE THE RISK

Bear in mind that the definition of the subject matter of the contract, in liaison with the needs of the contracting authority as well as a clear description of the factors which are to be assessed, will be key in determining whether the award criteria are or not appropriate considering the described subject matter.

- If the subject matter is defined narrowly, only criteria that are closely linked to the described product or service itself and the use of it will be admissible.
- If the subject matter is defined in a broader way the choice of the criteria will be more open.

In both cases, it is important that guidance is provided as to the factors which will be evaluated within the scope of each criterion.

⁷) Article 67(2) of Directive 2014/24

⁸) Recital 92 of Directive 2014/24

2. Prohibition on an unrestricted freedom of choice⁹

GENERAL

Award criteria cannot have the effect of conferring an unrestricted freedom of choice to the contracting entity.

This is often the case when vague criteria or very broadly worded criteria are used by the contracting authority. Such criteria offer to the purchasing body too much discretion during the evaluation process and could give rise to the possibility of providing an unfair advantage to some tenderers over others.

This obligation was articulated in a judgment of 4 December 2003 (C-448/01) of the Court of Justice:

“It is clear from the Court’s case-law that the procedure for awarding a public contract must comply, at every stage, with both the principle of the equal treatment of potential tenderers and the principle of transparency so as to afford all parties equality of opportunity in formulating the terms of their tenders (see, to that effect, Universale-Bau, paragraph 93).”

More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed tenderers of normal diligence to interpret them in the same way (SIAC Construction, paragraph 41).”

RISK

Tenderers could state that an award criterion was not sufficiently clear, and that they were therefore not able to draft their tender in a way that would meet the contracting authority’s needs.

GUIDANCE TO MITIGATE THE RISK

The criteria must be sufficiently specific that a bidder clearly understands which features and parameters are being evaluated.

Contracting entities should in other words:

- Use clear criteria and divide high-level or vague criteria (such as “quality” for example) into defined sub-criteria.
- Identify clearly the factors and characteristics which will be assessed within the scope of each criterion.
- **When using the MEAT VBP Framework & Tool:**
 - provide detailed description for the VBP criteria;
 - explain in the procurement documents each criterion/sub-criterion and how value will be assessed in respect of each of these ;
 - for life costing or TCO (“Total Cost of Ownership”) criteria: provide the calculation method in advance and the formulas with the relevant parameters.
- Explain in sufficient details in the procurement documents the evaluation methodology, including sub-criteria and scoring methods.

3. Effective competition

GENERAL

Award criteria (and technical specifications) shall not be used to restrict competition in a disproportionate manner. The procurement process must allow effective competition.

Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria.

⁹⁾ Article 66 (4) of Directive 2014/24

| | |
|--------------------------------------|--|
| RISK | Using tailor made criteria or specifications for one supplier, excluding or discriminating competition. |
| GUIDANCE TO MITIGATE THE RISK | <ul style="list-style-type: none"> • Conduct broad pre-tender discussions to assess different solutions of different suppliers. • Have an objective and proportionate explanation for criteria or specifications that could be perceived as excluding certain suppliers or a solution. |

4. Verifiable character of the answers to the award criteria

| | |
|----------------|---|
| GENERAL | The information provided by the tenderers in the context of the award criteria shall be effectively verifiable. |
|----------------|---|

In that regard, the Court of Justice ruled has held:

“It is thus apparent that where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure.

Therefore, an award criterion which is not accompanied by requirements which permit the information provided by the tenderers to be effectively verified is contrary to the principles of Community law in the field of public procurement.¹⁰

According to the Court of Justice, objective and transparent evaluation of the various tenders depends on the contracting authority, relying on the information and evidence provided by the tenderers and being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria.

However, an award criterion in the context of which the tenderer’s engagement can only be verified when the latter executes the contract is admissible. The Court of Justice ruled for example that the awarding criterion “reliability of supplies” is admissible, even if the absence of supply problems will only become clear during the execution of the contract:

“Having regard to those considerations, ...Directive 77/62¹¹ is to be interpreted as authorizing the bodies covered by that directive which wish to obtain diamorphine to award the contract on the basis of the tendering undertakings’ ability to provide reliable and continuous supplies to the Member State concerned.”¹².

| | |
|--------------------------------------|---|
| RISK | When using a criterion such as, for example, “Time spent using the medical device” the contracting entity should make sure that it will be able to assess and control this criterion preferably during the award process and in any case during the implementation of the contract. |
| GUIDANCE TO MITIGATE THE RISK | If it is not possible for the contracting entity to verify how much time the medical staff would need to use a certain medical device, it is advisable not to use such a criterion. |

The rationale behind this is that tenderers could speculate and “buy points” by providing unrealistic data to win the contract.

10) C.J.E.U., C-448/01, EVN AG Wienstrom GmbH, paragraphs 51 and 52.

11) This previously regulated the award of public supply contracts.

12) C.J.E.U., C-324/93, R v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd, paragraph 44.

5. Transparency

As in all public procurement procedures, it is critical to ensure that the procedure shall be transparent for all potential tenderers. As the MEAT VBP Framework & Tool is an innovative approach to procurement, it should be explained by the contracting authority in a transparent manner in the contract and tender documents.

Several key attention points shall be kept in mind during the procedure:

- All criteria (and sub criteria) shall be mentioned in the contract and procurement documents; there is no possibility to neutralize or add a criterion in the course of the procedure;
- The weight or the assignment of value shall be mentioned explicitly for each criterion and sub criterion;
- When using complex cost calculation criteria, the formula and parameters to fill in will be clearly indicated by the contracting authority;
- A contracting authority should not use general objectives of the procurement procedure as award criteria; the criteria shall comply with the principles identified above and shall be transparent, precisely identified, measurable, controllable and non-discriminatory. For example, 'achieving environmentally sustainable recycling of devices' or 'delivering a long term solution for patients' needs' are objectives and not suitable criteria.