

11KBW

Procurement and State aid update

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Procurement & State aid smorgasbord

1. Abnormally low tenders: FP McCann
2. Disclosure of marking method: TNS Dimarso
3. Marking challenges: Energysolutions v NDA
4. The automatic suspension: Kent NHS
5. State aid: Sky Blue Sports

Abnormally low tenders

- FP McCann Ltd v Department for Regional Development [2016] NICH 12
- Cheapest tender significantly cheaper than both average of other tenders and DRD's benchmark
- DRD asked McCann for ALT clarification on various aspects of its bid (held to be lawful)
- ... but rejected bid for mixture of those aspects & other aspects, not put to McCann for clarification (unlawful)
- Court recognised that DRD could have lawfully rejected bid on ALT grounds; but said it *may* not have done, had it verified / “engaged” with McCann; so damages to be awarded on “loss of a chance” basis

No obligation to disclose marking method

- C-6/15 TNS Dimarso NV v Vlaams Gewest
- Re-assertion of duty to publish “criteria”, “sub-criteria” and “weightings” ...
- ... but no duty to publish “method of evaluation” (as long as method does not alter criteria or weightings)
- Where is the line to be drawn between:
 - “sub-criteria” / “weightings” and
 - method?
- “*evaluation committee must have some leeway*”

Marking challenges

- Energysolutions EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 1988 (TCC)
- Correct interpretation of competition rules, award criteria and tender responses are all a matter for the Court (§§356-9). What about evaluator judgement?
- Court primarily concerned with evaluators' pre-claim (not *post facto*) reasons. Is it fair to restrict evaluators' opportunity to explain shorthand contemporaneous notes?
- If manifest error established, correct score is matter for Court. Does this attenuate deference to authority's views?

The automatic suspension

- Kent Community Health NHS Foundation Trust v NHS Swale and NHS Dartford, Gravesham & Swanley Clinical Commissioning Groups [2016] EWHC 1393 (TCC)
- Even though claimant's damages claim highly restricted (it was a public body not motivated by profit, and had not priced tender to deliver commercial rate of return), damages would (according to Stuart-Smith J) be adequate remedy
- Contrast Bristol Missing Link [2015] EWHC 876 (TCC) (Coulson J)
- Variance of approach between different judges is bad for legal certainty

State aid and the market economy investor (“MEI”) principle

- R (Sky Blue Sports & Leisure Ltd) v Coventry City Council [2016] EWCA 453
- SBS alleged loan by Council to its subsidiary was State aid because terms not commercial (risky, low interest rate, lack of security, repayment term)
- CoA and HC rejected challenge
- Light touch standard of review: “*would manifestly have been unable to obtain comparable facilities from a private creditor [MEI] in the same situation*” (i.e. one with shareholding to protect), taking account of investors’ “entrepreneurial skills” and margin of judgement