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Local Government Conference 2016: EU procurement and State aid law
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1. This paper addresses the most important EU procurement and State aid decisions over the last 12 months.

(1) Land related development agreements

R. (Faraday Development Ltd) v West Berkshire Council [2016] EWHC 2166 (Admin)

2. On 4 September 2015, West Berkshire District Council ("WBDC") entered into a Development Agreement ("the DA") with the Interested Party, St Modwen Developments Limited ("SMDL") "to facilitate the comprehensive regeneration" of an area of land which WBDC owned at the London Road Industrial Estate, Newbury, Berkshire ("LRIE").

3. So far as relevant for present purposes, the Claimant alleged that the DA is a "public works contract" and/or a "public service contract" within the meaning of the Public Contracts Regulations 2006/2015 ("the PCR 2015") and therefore WBDC's decision not to comply with the public procurement regime was unlawful (There was also a separate challenge based on s. 123 of the Local Government Act 1972, but that is not the subject matter of this paper.). The Claimant also specifically alleged that WBDC deliberately sought to avoid imposing any directly or indirectly enforceable obligation on SMDL to carry out or procure works on the LRIE, so as to avoid the application of the PCR 2015.

4. The claimant ("F") was a special purpose vehicle incorporated to assemble land for redevelopment within the LRIE. F held long leaseholds from WBDC in respect of plots 1, 9 and 22 on the site and an option to acquire the long leasehold of an adjoining area, plot 6.

5. F wished to pursue a development scheme on its plots and entered negotiations with WBDC for the grant of a new consolidated ground lease for a term of 250 years in respect of plots 1, 6, 9 and 22. By April 2011 F and WBDC had agreed heads of terms and drafted the lease. In the meantime, F reached heads of terms or pre-let agreements with a number of occupiers for its scheme. However, from July 2011 onwards WBDC ceased to negotiate with F for the grant of a new consolidated lease.

6. Subsequently (in 2013), WBD and David Wilson Homes ("DWH") made a bid in the Council's tender process for the regeneration of the LRIE. The bid included F's land at a substantially reduced value in return for a share of the profits. It was also envisaged that Faraday would develop the flats proposed on its land and 25% of all other residential development proposed by the bid. However, on 27 March 2014 WBDC's Executive chose SMDL's bid in preference to WBD's.

7. The Court summarized the DA entered into between WBDC and SMDL in the following way (§§127-128):

"127 The DA imposes upon SMDL an initial obligation to prepare Project Plans for the SG's approval, that is a Business Plan and Master Plan covering the whole of LRIE setting out development plots, sites to be retained (so that a lease previously granted by WBDC may be re-geared), initial infrastructure works and a land appraisal. SMDL

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must also take steps to assemble the necessary land interests. Following approval of the Project Plans, SMDL is to prepare a budget for the Infrastructure Costs (for approval by the SG) and an application for outline planning permission in accordance with the Project Plans. Once an outline permission satisfactory to SMDL is obtained, SMDL is to prepare for the SG's approval a Development Strategy and Plot Appraisal for each of the Development Plots. Following such approval SMDL is to use all reasonable endeavours to obtain detailed planning approval for the work covered by each Development Strategy. The securing of an outline planning permission also gives rise to an obligation upon SMDL to prepare an Estate Management Strategy for the SG's approval. Once a Plot Appraisal has been approved, SMDL may elect to enter into obligations to acquire and redevelop the land to which that appraisal relates, but it is under no legal obligation to do so.

128 The DA has a number of features that are important for this case:
(i) It is a matter for SMDL to propose the content of the plans and strategy documents, consistent with WBDC's decision to rely upon the expertise and experience of SMDL and the fact that risks are borne by SMDL not WBDC;
(ii) The Indicative Business Plan provides only a framework for the items to be covered by the plan to be prepared by SMDL. It does not prescribe in any detail the development to be carried out or specify the consideration which is to be paid for disposals by WBDC of interests in its land. The Indicative Master Plan is an outline or broad brush drawing. It does not give, for example, a specification of WMBC's requirements;
(iii) The documents containing proposals by SMDL are subject to the approval of the SG (where SMDL and WBDC have an equal voice) and not the approval of WBDC alone. Where the SG is unable to reach unanimous agreement, the issue is resolved under clause 28 in accordance with the DA and its Objectives;
(iv) It is a matter for SMDL to determine the content of the planning applications it submits, so long as they accord with the plans and strategy documents approved by the SG;
(v) The same approach applies to reviews or variations of the plans and strategy documents under the DA;
(vi) The various plans and development strategies must be consistent with the market conditions prevailing at the time and the Objectives in clause 2.1 of the DA, which include maximizing the returns from the LRIE for WBDC. The DA recognises that the redevelopment of the LRIE will take a substantial period of time to achieve and that market conditions are likely to change during that period. Accordingly, the DA relies upon regular review mechanisms and up to date Plot Appraisals before land can be drawn down by SMDL. The DA is structured so as to ascertain best value as WBDC disposes of interests in individual plots of land, consistent with the Project Plans and Land Appraisal for the whole site;
(vii) SMDL has a choice, not a legal obligation, as to whether to take on the obligations of acquiring a ground lease (or freehold) and carrying out the redevelopment on a plot. Instead, SMDL has a commercial incentive to draw down land because of its substantial commitment to (inter alia) master planning the whole site, preparing development strategies for each plot and obtaining outline and detailed planning approvals and because of the opportunity to carry out a profitable development.
(viii) The DA is structured so that WBDC retains its ability to receive the existing level of ground rents and also increased returns through ground rents payable on redeveloped sites. SMDL's obligation to carry out development on land drawn down is a necessary mechanism, because WBDC's entitlement (inter alia) to receive an increased ground rent begins when that new development is completed and therefore

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available to be let to new occupiers paying enhanced occupational rents." (emphasis added)

8. In relation to the approach for determining the main objective of the contract for the purposes of determining if the contract is subject to the PCR 2015, the Court held that:

"171 It is now a well-established principle that a contract with a "contracting authority" only falls within the scope of the procurement regulation if its main object corresponds to the definition of one of the three types of "public contract". If therefore the execution, or realisation, of "works" is ancillary to the main purpose of the contract, that agreement cannot be a "public works" type of "public contract" (see Gestion Hotelera Internacional SA v Comunidad Autonoma de Canarias [1994] ECR I – 1329 at paragraph 27; Commission v Italy (2008) (case C-412/04 paragraph 46). Likewise, a contract for the transfer of land does not fall within the scope of the Directive and that still holds good if the carrying out of "works" under such a contract is merely incidental to that contract rather than its main object.

172 In Commission v Italy it was also decided that the "main purpose" of a contract must be determined by "an objective examination of the entire transaction to which the contract relates". That assessment "must be made in the light of the essential obligations which predominate and which, as such, characterise the transaction, as opposed to those which are only ancillary or supplementary in nature and are required by the very purpose of the contract" (paragraphs 48 to 49)." (emphasis added)

9. The potential application of the PCR 2015 to a land related development agreement should be analysed by asking the following questions, in the following order (§174):

"(i) What is the main object of the contract having regard to (a) the transaction as a whole and (b) any obligations which are essential to the transaction?
(ii) Does that main object correspond to the definition of one of the three types of "public contract"?
(iii) If the answer to (ii) is no, then the contract falls outside the scope of public procurement legislation;
(iv) If the answer to (ii) is yes, is the contractor under an enforceable legal obligation to carry out that main object (e.g. works) which is legally enforceable by the contracting authority?...;
(v) If the answer to (iv) is no, then the contract falls outside the scope of public procurement legislation. If the answer to (iv) is yes, then the contract may fall within the scope of that legislation subject to applying other criteria (eg. the definition of "public contracts", the threshold values and the exclusions from the procurement regime).

If the issues are approached in that order, the error of pre-determining the object of a transaction by beginning with and simply focussing upon the obligations in the contract is avoided."

10. F contended that the DA imposed a number of direct obligations upon SMDL, which were not dependent upon an election or choice being made by SMDL, dealing with (*inter alia*) master planning, obtaining planning approvals and negotiating for outstanding land interests (see §§118 to 121 of the judgment), and that those obligation lead to an option for SMDL to draw down land which, if exercised, results in SMDL becoming subject to an enforceable obligation to carry out works defined in accordance with the provisions of the DA.

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11. F's case was that this structure should be treated as imposing an "indirect" obligation on SMDL to carry out public works that was sufficient to engage the PCR 2015, based on 4 factors: (a) artificial mechanisms intended to avoid the application of public procurement legislation are to be disregarded, (b) WBDC accepts that it deliberately drafted the DA so as to avoid the procurement regime; (c) according to the evidence before the Court, SMDL considered the possibility of it not drawing down all of the land so as to become obliged to deliver the whole of the redevelopment eventually approved to be "highly remote"; (d) SMDL was not entitled to walk away from the DA without providing any benefit to WBDC at all.. To the contrary it was required to provide planning and strategic services to WBDC and thereby obtains a valuable option to draw down land in order to carry out redevelopment for profit, at which point it would become obliged to carry out the works, but without the DA having been exposed to competition under public procurement legislation..

11. The Court rejected these submissions holding that the procurement directives do not establish any general 'anti-avoidance' principle. Indeed, the Judge suggested that in his view the recital (5) to Directive 2014/24/EU supports that opposite view: *"It should be recalled that nothing in the Directive obliges Member of States to contract out or externalise services that they wish to provide themselves or to organise by means other than public contracts within the meaning of this Directive "*.

12. The Judge stated that he considered his conclusion to be supported by 3 examples of cases F accepted would fall outside the scope of the PCR:

"(i) A contract the main purpose of which is the transfer of land by a public authority to another party, and where any services or works provided by that party to the authority are ancillary…;
(ii) Where the public authority facilitates development solely though the use of planning powers, eg. to approve building plans…;
(iii) Where the contractor is able to walk away from a relationship with a public authority at its unfettered discretion..."

13. The structure used here could not be equated to an approach of simply separating out a land sale and development obligations into two separate documents (§195):

"…although SMDL will become obliged to redevelop in accordance with the relevant Development Strategy if and in so far as it chooses to draw down relevant land…[t]here are significant distinctions. First, when the DA was executed SMDL did not come under any obligation to take a transfer or ground lease of any part of the site. Whether any such disposal takes place in the future is entirely a matter for SMDL to decide. Second, when the DA was entered into SMDL did not become subject to an obligation enforceable by WBDC to carry out "works". Any such obligation is entirely confined to any ground lease or freehold which SMDL opts to take in accordance with the DA. Third, the redevelopment, or likely redevelopment, of the LRIE depends instead upon the commercial experience, aptitude and commitment of SMDL to deliver such a scheme. Fourth, it is common ground that redevelopment of the site will be a long and complex process dependent upon (inter alia) achieving the relocation of existing occupiers, market and best value testing and obtaining planning approvals. Fifth, whether, and if so the extent to which, SMDL exercises its future right to draw down land (on terms that it carries out redevelopment) will depend upon future market conditions and circumstances. In summary, therefore, SMDL is free under the DA to

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"walk away", in the sense that it can choose not to come under an obligation to acquire and carry out works on any of the redevelopment land in the LRIE." (emphasis added)

14. The Judge held that it was not sufficient to bring the transaction within the definition of a public works contract that SMDL was subject to binding obligations in respect of the design of the works. To trigger the application of the PCR 2015 it would be necessary that it was also subject to an obligation to execute the works: §§208-209.

15. In summary, the Judge concluded that (§223):

"…the DA is a contract to facilitate regeneration by the carrying out of works of redevelopment and to maximise WBDC's financial receipts, particularly rent, from the LRIE. The provision of services under clauses 4 to 7 and land assembly do not represent a main purpose in themselves, but simply facilitate the Council's regeneration and financial objectives, the "twin objectives" with which WBDC's process began…WBDC lawfully decided that the DA itself should not impose upon the developer an enforceable obligation to carry out the redevelopment. It is therefore not a "public works contract."" (emphasis added)

(2) Abnormally Low Tenders

FP McCann Ltd v Department for Regional Development [2016] NICh 12

16. The Department tendered a substantial contract (valued at £80-100m) for the first phase of a highways construction project comprising two stages: (i) design, and (ii) construction. The successful bidder would complete the second phase of the project if certain conditions precedent were met, including reaching agreement on target cost for phase 2. The claimant, with a consortium partner, submitted a tender which would have received the highest score and been awarded the contract. However, the Department determined that the bid should be disqualified as abnormally low.

17. The invitation to tender specifically provided (in relevant part):

""4.4.2 The commercial submissions will be reviewed to consider if any of the offers appear to be abnormally low. An initial assessment will be undertaken using a comparative analysis of all commercial submissions. If this analysis leads the CEP (Commercial Evaluation Panel) to consider that a tender may be abnormally low then a written explanation of the offer, or those parts which the CEP considers contributes to the offer being abnormally low, will be requested from tenderer. If the written explanation is not satisfactory then the tenderer may be rejected."

18. When tenders were assessed:

"[the claimant's] tender was significantly lower than the average of the other tenderers in 6 of the 8 areas of assessment (core management, drainage, earthworks, pavements, structures and fees). The overall tender at £14m approximately was also significantly lower than the average of all tenders which was £19m. The figures were also significantly lower than the bench mark figures which had been prepared by Mr Morris although all of the tenderers were significantly lower than this particular bench mark."

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18. The Department was concerned about the consortium's quoted rates for drainage, earthworks, pavements and structures, on the grounds that they might be abnormally low. On 18 November 2009, the Department therefore issued a written clarification request under reg. 30(6) and reg.30(7) of the PCR 2006. On 23 November 2009, the consortium provided a response.

19. On 27 November 2009, a second clarification request followed relating to the same rates, however this did not specifically mention abnormally low rates. The consortium responded again. On 1 December 209, the consortium responded. The Court accepted that both of these requests for clarification were *"reasonable and lawful"* (§40).

20. A commercial evaluation was produced by an external adviser, Chandler KBS. This concluded that the claimant's tender was abnormally low because (§27): (a) the bid was low compared to other tenders, (b) the bid was low compared to the Chandler KBS benchmark, (c) the rates for disposal and deposition were low and based on fuel costs and plant rates below audited actual costs, (d) the rates for pavements were low as no allowance was made for the cost of elements of the mixing plant required, (e) the rate quoted for bitumen was significantly lower than the current market rate, (f) labour and equipment rates for structures were abnormally low compared with historic rates and rates admitted by other bidders, and (g) analysis of drainage, earth works, pavements and structures indicated that the plaintiff's consortium bid was priced at 79% of the second lowest price bid, and 72% of the narrow average of the tenderers.

21. The Department's position was that it was the claimant's tendered rates for earthworks, pavements and structures which led to the decision to exclude the claimant's bid as abnormally low.

22. The Judge held that there were 5 serious "concerns" regarding the process adopted by the Department.

23. First, at the meeting at which the disqualification decision was made, the documents indicated that parts of the commercial submission other than the rates that the Department considered to be abnormally low formed part of the basis for the decision that the claimant should be excluded. The Judge found (at §71) that:

"In my view a fair reading of the documents provided to the Board would support the contention that the prices for core management, fee and drainage contributed to the CEP's recommendation that the bid was abnormally low notwithstanding the evidence that these matters were discounted in that regard."

24. Second, given that the rates for core management etc. were part of the decision ultimately taken, the claimant should have been provided with the opportunity to clarify these rates under reg. 30(6)(a): §74. Further, the authority had some concern about the fact that the consortium was involved in another highways project. This also should have been put to the claimant for clarification, albeit that this point alone would not have led the Judge to conclude the process was unlawful: §75.

25. Third, the Judge noted that the Department's "primary" concern was that it would not be able to agree a target cost for phase 2 based on the prices the claimant had tendered, because those rates were unrealistically low: §81. The Judge noted that the was a "legitimate concern", noting that there was substantial documentary evidence of the consortium 'discounting' rates to the 'lowest credible level' in its tender: §83. However, at the disqualification meeting the Department considered a paper which

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sought to analyse the likely impact of the claimant's tendered rates on the phase 2 Target cost: §§84-85. The Judge held that given the significance this issue played in the Department's decision-making process the claimant should have been given an opportunity to respond to it: §85.

26. As to the obligations which apply in respect of "verification" before a bid is excluded as abnormally low, the Judge held (§86):

"the very least this requires the economic operator to be told of the authorities concerns. Thus it is very difficult to understand why BBMC at the very least were not asked to confirm that their productivity and unit rates provided for drainage, earthworks, pavements and structures would be used as the basis for agreeing the target costs. However, in my view verification also requires an element of engagement between the authority and the operator whereby the authority explains to the economic operator the basis and reasons for its decision. I do not know how Mr Taylor could assert that "further correspondence will not yield anything". As was evident from this trial there was much to be said about the outstanding issues between the parties at that time. In any event proper compliance would have given BBMC the opportunity to submit further information or evidence if it wished and in particular deal with the issue of the potential agreement of target cost which was obviously prominent in the defendant's thinking." (emphasis added)

27. Fourth, the Judge held that the report presented at the disqualification meeting presented the divergence between the claimant's rates and those of the other bidders/the claimant's internal benchmark in a manner that exaggerated its magnitude relative to the overall costs of the tenders: §88.

28. Fifth, the Department also had regard to the rates provided by the claimant's tender for the supply of bitumen, but this too had never been put to the claimant for a response. Further, the evidence showed that the rate was not in fact, objectively, abnormally low: §§89-99.

29. These points led the Judge to conclude t(at §101) that:

"Notwithstanding these matters, there clearly remain concerns about the rates tendered in respect of earthworks, pavements and structures…It seems to me that on these issues I am being asked to assess matters of commercial judgment which I am not well placed to decide. Having heard all the evidence in this matter I was left with the view that there were very real and legitimate concerns about whether these rates were in fact reliable. In my view they were capable of sustaining a conclusion that those parts of the bid were abnormally low with the consequence that it was open to the defendant, properly advised, to come to the view that the whole offer was in effect abnormally low. Therefore, as a fact, I do not find that the defendant was wrong or guilty of manifest error in this regard." (emphasis added)

30. The Judge therefore concluded that *"there was a significant chance that the [Department] may have taken a different decision were it not for those breaches"* but that he did not *"conclude that BBMC would necessarily have been awarded the contract if the concerns I have raised had been dealt with properly, as I take the view that many of the concerns raised by the CEP in relation to the tender could have supported a conclusion that the bid was abnormally low"* (§§103-104).

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31. The appropriate remedy was therefore an award of damages calculated on loss of chance principles: §110.

3. EU State aid and the Market Economy Investor Principle

R (Sky Blue Sports & Leisure Ltd) v Coventry City Council [2016] EWCA Civ 453

32. The case arose from a dispute between a group of hedge fund investors ("SISU") that acquired shares in Coventry City Football Club ("CCFC") and Coventry City Council ("the Council"), concerning the financial arrangements entered into between the Council and the operating company ("ACL") that leased CCFC's stadium ("the Arena") from the Council.

33. At the time the Arena was developed, ACL was a 50:50 joint venture between the Council and the (then) owners of CCFC. In order to finance the development of the Arena, a £22m loan was obtained by ACL from Yorkshire Bank ("YB"). In 2001, CCFC was relegated to the Championship, and the resultant loss of football revenue coupled with the increasing development costs of the Arena led the (then) owners of CCFC to sell their 50% stake in ACL to the Alan Edward Higgs Charity. The claimant subsequently acquired CCFC.

34. In April 2012, CCFC stopped paying rent to ACL for their use of the Arena to play their home games. In January 2013, in order to protect its investment, the Council granted ACL a £14.4m loan, which was used by ACL to repay its remaining debt to YB.

35. SISU, which had been pursuing a strategy of seeking to acquire ACL at a 'knock-down' price, brought judicial review proceedings against the Council's decision to grant the loan to ACL. Amongst other things, SISU alleged that the loan amounted to a grant of unlawful State aid contrary to Art. 108(3), TFEU.

36. In particular, SISU argued that the loan was not consistent with the market economy investor principle ("the MEIP") because of: (i) the degree of risk involved in the loan, (ii) the rate of interest, (iii) the security provided by ACL, and (iv) the term of capital repayment that was agreed.

37. At first instance, these claims were robustly dismissed by the High Court ([2014] EWHC 2089). The Court set out a number of principles derived from the case law for public bodies and Courts to consider when applying the MEIP, at §88. These included, in §88(x), the principle that:
"Although the test is an objective one, the law recognises that there is a wide spectrum of reasonable reaction to commercial circumstances in the private market. Consequently, a public authority has a wide margin of judgment ... or, to put that another way, the transaction will not fall within the scope of State aid unless the recipient 'would manifestly have been unable to obtain comparable facilities from a private creditor in the same situation..."

38. The Judge also emphasised that in applying the MEIP, the correct comparator is a similarly situated private investor, i.e. in this case, a private investor with a pre-existing shareholding in ACL. The Judge went on to conclude that the loan could not be said to be a transaction that no market economy investor would have made.

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39. The Court of Appeal has now affirmed the substantive judgment of Hickinbottom J and robustly rejected all of SISU's grounds of appeal. Giving the only judgment on behalf of the unanimous Court, Tomlinson LJ set out Hickinbottom J's summary of the relevant principles, as referred to above (§16).

40. Importantly, he emphasised that the analysis of risk involved in the application of the MEIP requires public bodies, like private undertakings, to exercise 'entrepreneurial skills' which, because of the very nature of the exercise, necessarily implies a wide margin of judgment on the part of the investor: see, in particular, §§11, 16 and 23-29. In conclusion, Tomlinson LJ observed that:

"The Appellants have not in my view come close to demonstrating that the judge reached an impermissible conclusion. ... My reasons are simply those which the judge developed in much greater detail with a sure eye to the principles by which his decision-making should be informed."

41. The Court of Appeal's judgment will be welcomed by public bodies faced with potential EU State Aid challenges to their commercial decisions.

4. Automatic suspensions

Kent Community Health NHS Foundation Trust v NHS Swale and NHS Dartford, Gravesham & Swanley Clinical Commissioning Groups [2016] EWHC 1393 (TCC)

42. The defendant clinical commissioning groups ("the CCGs") ran a procurement for the provision of adult community services in North Kent. The Claimant ("KCH") had been the incumbent for a number of years. On 22 December 2015, the CCGs informed KCH that it had been unsuccessful and that the contract would be awarded to Virgin Care. KCH had scored better than Virgin Care on quality, but less well on price.

43. The CCGs applied to court to lift the automatic suspension on contract-making ("the suspension") imposed as a result of KCH issuing its claim. It was common ground, for the purposes of the application to lift the suspension, that KCH's claim did raise a serious issue to be tried. Thus, the two issues for the court's determination were the adequacy of damages and the balance of convenience.

44. KCH argued that the procurement should not be treated as an ordinary commercial exercise, and that its true interest in pursuing the litigation was not achieving a financial return. It also contended that its attempts to provide an integrated service would be undermined if the contract were awarded to Virgin Care, and that the interests of its patients would suffer, which could not be adequately compensated in damages. Finally it argued that lifting the suspension would result in a 10% drop in turnover which would require savings to be made elsewhere, with the consequential impact on patient care.

45. KCH relied on the *dictum* of Coulson J in ***Bristol Missing Link*** that *"a non-profit making organisation, which has bid for a contract making no allowance for profit at all, and a minimal amount for overheads, is entitled to say that, in such circumstances, damages would not be an adequate remedy."*. However, Stuart-Smith J disagreed with this statement of principle, holding: *"I can see no reason why damages should be regarded as an inadequate remedy simply because the Claimant, whether as a not-for-profit organisation or for other reasons, has not suffered and will not suffer substantial financial loss."*

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46. ***Bristol Missing Link*** and ***Counted4 Community*** (in which the suspension was maintained by the court) were distinguished on the ground that in the former the lifting of the suspension would have a catastrophic effect on the claimant's ability to provide its services, and in the latter that the claimant would lose its uniquely trained workforce.

47. As to KCH's status as a public body existing solely to serve the public good, Stuart-Smith J held that in the context of public procurement which creates a level playing field between public and private sector bidders, there can be no justification for approaching the question of adequacy of damages differently depending on whether the disappointed bidder was a private or public sector provider. He stated that: *"in purely financial terms, the losses that would be incurred if the Trust fails to win the contract can be assessed without obvious difficulty and can be made the subject of an appropriate award of damages."*.

48. KCH argued that Stuart-Smith J's approach does not do justice to the position of a claimant who does not engage in public procurement in order to make money, by saying that all it can recover is money. The judgment does not provide a direct answer to this point.

49. KCH contended that the case could be brought to trial within 6-8 weeks and that any delay caused to the CCGs would therefore be modest. KCH made clear it would be willing to make use of the better listing availability in the regional TCCs, and informed the Court that a specific listing in the middle of July had been offered by the TCC in Manchester. Despite this, Stuart-Smith J suggested that accommodating the legal teams 'away from home' would result in an increased cost which did *"not sit easily with the Trust's reasonably expressed concerns about the costs of the present exercise for the NHS as a whole"*.

50. Further the Judge held that even if an expedited timetable was achievable, the CCGs had legitimate public interest (patient safety) reasons for wanting mobilisation to commence before the winter period. The judge noted that because he was *"not in a position to conclude that the public interest would be better served by the Trust being the provider of services or Virgin Care [he was therefore] not in a position to bring public interest arguments relied upon by one side or another into account when assessing the balance of convenience."*.

51. On the facts the judge found that the balance of convenience did not weigh substantially in favour of either maintaining or lifting the suspension and that, even if damages were not an adequate remedy for KCH, the *status quo* should be maintained.

52. As to what constituted the *status quo* in these circumstances, the Judge accepted the CCGs' submission that this was, in effect, the position that would obtain if no suspension applied i.e. the CCGs would be free to contract with their preferred bidder.

5. Challenges to contact award evaluation decisions

Energysolutions EU Ltd v Nuclear Decommissioning Authority [2016] EWHC 1988 (TCC) (29 July 2016)

53. This is the largest and highest value contract award challenge to date come before the English Courts. The public contract under challenge, for the decommissioning of a substantial part of the UK nuclear estate, had a value of up to £7 billion, the claimant's

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("ES") damages claim was for in excess of £100 million and the liability trial lasted more than 6 weeks.

54. NDA is a non-departmental public body established by the Energy Act 2004. Its statutory functions include overseeing the decommissioning and cleaning up of designated nuclear sites, and the treatment, storage, transport and disposal of hazardous material.

55. There are 17 designated nuclear sites in the UK. These are operated by four Site Licence Companies ("SLCs"), which are licensed operators of the sites and are responsible for day-to-day decommissioning. The SLCs are owned by Parent Body Organisations ("PBOs"), which are special purpose vehicles. NDA procures the services of PBOs, following which the PBOs take temporary ownership of the SLCs (which also themselves contract with NDA).

56. In 2012 NDA began a procurement process for a new PBO to manage two SLCs – Magnox Ltd and Research Sites Restoration Ltd ("RSRL"). Between them, these two SLCs operate 12 of the 17 designated sites. The PBO contract was of significant size. At the time the procurement began, prospective tenderers were informed that the duration of the contract was flexible, with a maximum duration of approximately 14 years, and the NDA funding limit for the first 7 years of the contract ("Phase 1") was approximately £4.2 billion.

57. The procurement was, inevitably, a substantial and complex one. Part of the procurement involved the bidders bidding a Target Cost for each of Phase 1 and Phase 2. No challenge was brought to that part of the evaluation. The tender requirements relating to bidders' technical proposals were split into a number of categories of 'Nodes': Cost nodes (numbered from 100, and including the Phase 1 Target Cost), Commercial nodes (numbered from 200), Key Enabler nodes (numbered from 300), and Technical Scope and Methodology Underpinning nodes (numbered from 400). Each node was to be evaluated, and the criteria and rules of the evaluation were set out in a document called the Statement of Response Requirements ("SORR"). Across the nodes, there were some 717 'requirements', or individual award criteria, that were to be evaluated.

58. NDA chose the competitive dialogue procedure for the procurement, as is appropriate for a complex contract where a contracting authority cannot stipulate its precise requirements in advance. A body of NDA employees called the 'Core Competition Team' ("CCT"), headed by the Head of Competition Mr Graeme Rankin, ran the competition from day to day, with internal and external oversight and support mechanisms.

59. Five bidders, subsequently reduced to four, took part in a lengthy dialogue process from January to November 2013, during which NDA refined its requirements (and revised the SORR accordingly), and bidders developed their submissions. The evaluation took place between November 2013 and March 2014. Each node was evaluated by a team of three NDA employees known as 'Subject Matter Experts' ("SMEs"), with input from the CCT and from Burges Salmon LLP, NDA's legal advisers as appropriate and necessary.

60. The evaluation was a lengthy process in which evaluators came to preliminary initial conclusions based on their individual reading of the tender responses and consideration of their content against the scoring criteria, before meeting together to debate the issues and determine an appropriate 'consensus' score. All of the

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evaluators' individual notes, and the records of their consensus deliberations, were recorded and preserved in an electronic procurement system known as 'AWARD'.

61. NDA determined that a consortium named Cavendish Fluor Partnership ("CFP") was the successful tenderer (by a narrow margin 1.06%). In April 2014, tenderers were informed of this. The RSS consortium, comprising ES and Bechtel, was in second place. Following the expiry of a standstill period during which NDA no legal challenge was raised, NDA awarded the PBO contract to CFP.

62. ES then brought a damages claim against NDA in respect of the outcome of the procurement and subsequently issued two further claims, which were ordered to be heard together with the first claim. 36 requirements, of the 717 in the procurement, have been challenged by ES in its claims.

63. The judgment in the case runs to more than one thousand paragraphs. This note, therefore, simply draws attention to some of the most important points of principle that emerge from the judgment:

(1) The correct interpretation of any document is a matter for the Court: The Judge applied this approach to the competition rules, the award criteria and the tender responses: e.g. §§356-359. Arguably, if the interpretation the award criteria, and the interpretation of the tender response are both matters for the Judge, it follows that no (or at best little) room is left for any margin of appreciation for the evaluator. To put the point a slightly different way, once the Judge has decided for himself: (a) precisely what the award criterion calls for, and (b) what the tender response is to be taken to mean, the appropriate (lawful) score will follow by a process of direct logic.

(2) Legality of decisions tested by reasons as provided at the date the claim form is issued: The Judge held that when determining whether there is a manifest error, or other illegality, in the scoring of a tender response the Court is primarily concerned with whatever statements of reasons have been provided on or before the date the claim is issued. Any reasons, or other material, provided after this date is only relevant at 'stage 2' of the Court's analysis, when it is determining what lawful score ought to have been awarded: §296.

(3) If a manifest error is found, the lawful score is a question for the Court and no margin of appreciation applies: The Judge considered that the corollary of the preceding point is that if a manifest error is found to have occurred it becomes a question for the Judge to determine what score ought lawfully to have been awarded and that in doing so, he should consider all of the available evidence but should not afford any margin of appreciation to the views of the contracting authority: §§276 and 786.

(4) Duties to record evaluation deliberations: At considerable cost, NDA had procured and used a bespoke electronic procurement system ("AWARD") for the procurement, in which recorded and saved every iteration of both their individual and consensus notes during the tender evaluation. That is to say, NDA deliberately set up a centralised, comprehensive, record of all of these matters that obviated the usual risks of evaluation comments not being retained or going missing, e.g. some members of a team adopting eccentric record keeping practices, paper notebooks being misplaced, damaged or destroyed, email or electronic soft copy notes being deleted or corrupted.

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Surprisingly, the Judge was critical of this approach as inadequate and held, amongst other things, that NDA was also obliged to create written records of any oral conversations relating to the evaluation.

(5) Duties to keep comprehensive notes of dialogue sessions: NDA had carefully considered whether notes of dialogue sessions should be created and retained at the time, and had decided that dialogue notes should not be kept. This had been communicated to bidders at the introductory meetings at the outset of the procurement, so that all bidders were aware of the basis on which the dialogue and evaluation would proceed. NDA's approach was to implement a system allowing bidders to write to NDA requesting explanation or clarification of any elements of the competition rules or award criteria on which they considered clarification to be required. RSS, like the other bidders, utilised this system extensively, submitting some 200 requests for clarification arising out of dialogue sessions. Surprisingly, the Judge appears to have held that NDA's approach amounted to a breach of duty.

(6) Taking legal advice in connection with the evaluation: The Judge was very critical of the fact that NDA asked its legal advisers to conduct a review and provide advice in connection with the evaluation, in respect of which it claimed legal advice privilege. While apparently accepting that no inference could be drawn based on an assertion of principle, the Judge nonetheless appears to have counted the existence of the review and advice as a factor against NDA when assessing the evidence.

(7) Drawing inferences based on evidence not being called from some of the evaluation team: As noted above, each requirement was evaluated by a team of three evaluators, who came to their decisions by consensus. At trial NDA called, in relation to each requirement under challenge, evidence from at least one relevant evaluator in relation to each requirement. The vast majority of the NDA witnesses were lead evaluators for those nodes – where they were not, they were the witnesses NDA considered best-placed to address the particular issues. There was no requirement in dispute on which NDA did not give witness evidence from a relevant evaluator.

In two instances (see §§393 and 790), the Judge explicitly drew adverse inferences against NDA based on the fact that witness evidence was not tendered from individual evaluators whom he considered to be relevant. At other points the Judge criticised NDA for not having called certain additional evaluators as witnesses.

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