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Marking challenge succeeds:

Woods Building Services v Milton Keynes BC

[2015] EWHC 2011 (TCC)

Marking challenges do not succeed; is the conventional wisdom, supported by much authority. Until, that is, ***Woods Building Services v Milton Keynes Council*** [2015] EWHC 2011 (TCC), a ground-breaking recent decision of Coulson J. The Judge conducted a detailed examination of the authority's reasoning for the marks awarded to two competing tenders and concluded that the marks for the successful tender ought to be reduced, from 104 marks to 64; and the marks for the claimant's losing tender increased, from 88 to 94. With the application of weightings, the claimant's tender was – or should have been – the winner, by a significant margin. Therefore, as explained elsewhere in this Bulletin, the contract award decision had to be set aside, the first time that an English Court had reached that conclusion under the Public Contracts Regulations 2006 ("the Regulations").

The tender concerned an £8m, four year, single supplier framework agreement to provide asbestos removal and reinstatement services. The claimant was the incumbent supplier, and submitted the cheapest tender, but lost out by some margin in the 40% marks awarded for quality to the tender of the winning bidder, European Asbestos

Services ("EAS"). The claimant claimed that on each of the 12 different questions for which the Invitation to Tender required answers, EAS had been over-scored and its own tender had been under-scored. These 24 separate challenges were put in the alternative as complaints of lack of transparency (due to the authority misdirecting itself as to the true meaning and effect of the award criteria or adopting undisclosed criteria when marking the tenders), inequality of treatment between the two bidders and manifest error. The outcome of the challenges depended, of course, on the detail of the facts of the case and, in particular, on the strength of the authority's reasons for the marking decisions it had taken. This article focuses upon certain points of general principle which arise out of the judgment of Coulson J which will have a significant impact on future challenges to the marking of tenders.

As for the legal principles applied by the Judge, ***Woods*** amply bears out that the key to a marking challenge is the extent of the discretion or deference which the Court is prepared to afford to the authority's reasoning or, put another way, the extent to which the Court will engage with the detailed arguments and decide for itself how the tenders ought to have been marked.

Coulson J repeated the well-established principles that compliance with the duty of transparency is a hard-edged question which the Court must determine for itself (§8) and, on the other hand, that complaints of manifest error raise questions of judgment or assessment which require the Court to afford a margin of appreciation to the authority (§11). He accepted the authority's submission that there was broad equivalence between this margin of appreciation and the public law standard of *Wednesbury* reasonableness (§14). He also held that complaints of inequality of treatment fall on the transparency side of the line, as permitting no margin of appreciation (§10). Given the different approach to the margin of appreciation depending upon how each marking challenge was put, the claimant understandably emphasised its complaints as to transparency and inequality of treatment over those of manifest error. But

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Coulson J held that he was not required to address each challenge under each of the three rubrics. Rather, he would focus on the argument as to manifest error, which was the main thrust of the allegations, and address transparency and equality of treatment only where these seemed to raise separate issues (§37).

The Judge made a number of general criticisms of the approach adopted by the authority in its tender process. The tenders had been marked in the first instance by a former employee of the claimant who should not have marked them (§39). A different evaluator who was asked to look again at the evaluation had not done so from scratch but had merely reviewed and commented on the original marks (§41). The process produced "next to no contemporaneous documentation or notes" (§30) and the comments noted by evaluators as explaining their marks were "brief and unhelpful conclusions, not reasons to explain the scores given" and often had only paraphrased the scoring criteria so as to be "all but meaningless" (§42). The authority had preferred answers of EAS which were "strong on aspiration and management speak" (§40) but which on close analysis committed to and promised nothing (§120) over answers of Woods which "could fairly be said to bristle with detail and commitment" (§40). Most of these criticisms did not translate into specific breaches of the Regulations but the Judge made clear that they made him more sceptical of the marks which had been afforded to the respective tenders.

When it came to the detail of the criticisms levelled by the claimant, it is clear that the legal standard of irrationality set by the Judge was little protection for the authority where he considered its explanations to be unsatisfactory. In some instances, his decision is portrayed in the judgment as relatively straightforward: on four occasions, EAS had been awarded high or full marks for answers which the authority's main witness accepted in cross-examination (expressly or by implication) were non-compliant with the authority's requirements (§51, §63, §108, §140). The authority's failure to award zero marks for these answers was not

capable of rational explanation. On other occasions, the authority had marked down the claimant on a particular ground but had not adopted a similar approach to EAS (paras 73 and 85). There was no margin of appreciation to be afforded on an equality of treatment claim, so the Judge increased the claimant's score to match that of EAS. Where the claimant had the most difficulty was in seeking to raise its score on grounds that a manifest error had been committed. Save on one occasion (where it had already succeeded in an equality of treatment challenge), these complaints were rejected based on the margin of appreciation to be afforded by the court to the authority. Significantly, these challenges failed even where the Judge recognised that the authority's explanations had been "muddled and confused" and did not stand up to scrutiny (§56).

One complaint of lack of transparency succeeded, and may provide fertile ground for claimants in the future. The tenderers had been asked to specify members of staff who would work on the project, including their roles and responsibilities. EAS had been awarded 8 marks to the claimant's 6 on account of proposing a dedicated contract manager who would not be engaged in any other work. In fact, no such proposal had been made, hence an equality of treatment complaint succeeded. But on transparency the Judge held that if having a dedicated manager was of sufficient importance to the authority as to justify giving different scores to different tenders, that ought to have been disclosed to tenderers (§72). The difficulty lies in drawing the line between a legitimate marking judgment as to why one response is better than another, and the application of an undisclosed sub-criterion. As a matter of language, many such marking judgments could be characterised in the latter way, yet if everything which will be regarded as significant by tender evaluators has to be spelled out in the tender documents, authorities will receive very similar tenders (*McLaughlin & Harvey Ltd v Department of Finance & Personnel* [2009] Eu LR 82, §48) and thus have reduced scope for applying their judgment to the marking of those tenders.

Comment

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Woods is a significant case. In many respects, the authority faced the perfect storm. A committed challenger backed by a persuasive tender, a deeply flawed tender process, a shifting and unconvincing defence, a Judge who was prepared to engage with the merits of the tender responses and a lead witness who was compelled to agree with the cross-examination put to him on many important issues. As the case is portrayed by the Judge, its most surprising feature is that the authority allowed it to come to trial at all (although the reality is, no doubt, more complicated than that). But however it came about, the judgment in Woods offers important lessons to authorities on how to mark tenders, and important encouragement for marking challenges in the future.

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Following the liability decision in Woods, discussed in Jason Coppel QC's piece above, the case returned to Coulson J for a hearing on the appropriate remedy. The Council's original decision to award the contract to EAS was, inevitably, set aside. Against the background that it had now been established that the Council should have given Woods the highest mark in the evaluation, Woods also asked for an order that it should be awarded the contract, or alternatively for damages to be assessed. The Council argued that it should be entitled to abandon and re-run the procurement without any damages liability.

Coulson J refused to order that Woods should be awarded the contract, but determined that it was entitled to damages.

Apart from a pleading point, the Judge gave three reasons for not requiring the Council to award the contract to Woods. First, whilst he accepted that he had jurisdiction to make a mandatory order, he considered that that would be an exceptional course. He referred to authorities in which the courts have declined to order specific performance of long-term contracts where that would require personal service, or constant supervision by the court. Secondly, he felt that it would be inappropriate to order the award of a contract on the basis of an evaluation process which he had held to be entirely unsatisfactory. Thirdly, damages would be an adequate remedy on the facts.

Coulson J dismissed briefly the Council's argument that no damages should be awarded because the position was analogous to a voluntary termination of the procurement, where no damages would ordinarily be paid. He held that it would be "absurd" if the Council could avoid the natural consequence of its breaches. This must be right, in circumstances where there was apparently no suggestion that a correctly conducted procurement would have led to anything other than a contract award at the time, or that there would have been any valid reason to regard the Woods offer as incapable of acceptance, or that damages were otherwise inappropriate. There are potentially interesting questions as to how far an authority may escape any

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Remedies following a successful marking challenge

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damages liability by abandoning a procurement in the face of legal challenge before the case reaches court, but the Council had clearly missed that boat here.

In the circumstances, it may be seen as somewhat surprising that the Council chose to resist awarding the contract to Woods, and preferred to expose itself to the high risk of having in effect to pay for the contract twice (once to the winner of the new procurement, and once by way of a damages award to Woods – although that is a risk rather than a certainty since, as Coulson J implied, the quantum of the damages claim would presumably reduce if Woods won the new procurement).

The reasons given by the Judge for declining to order the award of the contract to Woods are perhaps more debateable. The adequacy of damages is certainly a factor in the choice of remedy at trial (cf. *Mears v Leeds CC (no 2)* [2011] EuLR 764), but it is submitted that it ought not to be decisive in itself – it might be thought that the public interest would normally point towards the true winner (where it has been identified) having the contract, rather than the public purse paying twice.

It is understandable that the generally flawed nature of the evaluation on the facts in *Woods* might have made the court think it was better (or at least legitimate) to start again, although of course the flaws had not prevented a finding as to what the outcome ought to have been. But was Coulson J right to start from the premise that such a remedy should be exceptional? It is true that the courts will not normally force unwilling parties into an ongoing contractual relationship where mutual trust and confidence is necessary but lacking. But is that any reason not to enforce the correct outcome of a procurement where the only dispute is as to the conduct of the evaluation, and (so far as the judgment shows) there is no reason for the authority to lack confidence in the true winner, and no other specific reason why the passage of time or changing commercial circumstances should have made a new procurement more appropriate? Even in relation to contracts of employment, the court will grant specific enforcement

if there is no sensible reason advanced for saying that trust and confidence have been lost: see e.g. *Powell v Brent LBC* [1988] ICR 176.

However that may be, there seems little doubt that the courts are instinctively reluctant positively to require the award of contracts to successful claimants in procurement challenges. The present case can be seen as an even stronger example of that than *Resource NI Ltd v Northern Ireland Courts and Tribunals Service* [2011] NIQB 121. In *Resource*, McCloskey J identified a clear error in the marking, but was unwilling in the context of a flawed evaluation to put that right without the whole evaluation being reconsidered by the authority. In this case, Coulson J felt he could say what the outcome of the evaluation should have been, but was still unwilling to make an order giving mandatory effect to that outcome.

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Contract variations under the 2015 Regulations:

Edenred (UK Group) Limited v Her Majesty's Treasury and others [2015] UKSC 45

The Supreme Court has rejected a procurement challenge based on what was claimed to be a “*substantial modification*” of an existing contract. The existing contract had been procured by competition, but the modification - which involved the addition of new services worth around £133m - was to be effected without a new procurement procedure. The Supreme Court found that this was not a substantial modification since the advertised initial contract and related procurement documents had envisaged such an expansion of services, had committed the contractor to undertake them and had required it to have the resources to do so.

The facts and the decisions below

The case concerned the procurement law implications of the Government’s new policy for Tax Free Childcare (“**TFC**”). HMRC is principally responsible for the scheme, which requires extensive administration of “*childcare accounts*”. The government planned the following arrangements for that administration.

- HMRC was to enter into a memorandum of understanding (“**the MoU**”) with the Director of Savings, the statutory officeholder responsible for running National Savings & Investments (“**NS&I**”), a

Government department and executive agency of the Chancellor of the Exchequer. Under the MoU, the Director and NS&I would be responsible for providing childcare accounts and the associated services necessary to deliver TFC.

- NS&I already outsources its operations to Atos IT UK Limited (“**Atos**”), under a contract entered into following a competitive procurement. That outsourcing contract was to be varied so as to add the services necessary for the delivery of TFC.

Atos is to be paid an additional £133m for performing the new services required under these arrangements. Edenred’s fundamental complaint was that HMRC and NS&I were procuring those services without any advertisement or competition.

Edenred’s challenge was dismissed by both the High Court [2015] EWHC 90 (QB) and the Court of Appeal [2015] EWCA Civ 326. (Those decisions were covered in the May 2015 edition of 11KBW’s Procurement & State Aid Briefing). In summary:

- The High Court and the Court of Appeal found that the MoU was not a “*public services contract*” since it did not place NS&I under any binding and legally enforceable obligation to deliver the services.
- The High Court found that the proposed changes to the outsourcing contract between NSI and Atos did not amount to a variation of that contract, since the “*new*” services fell within the scope of the services described in the tender documents. The Court of Appeal’s reasoning was a little different: it found that the modification was provided for by change provisions in the initial contract, and that those provisions were sufficiently “*clear, certain and precise*” in anticipating potential amendments to mean that the amendments were not a new public contract (applying **Pressetext Nachrichtenagentur GmbH v Austria** (C-454/06) [2008] ECR I-4401).

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Supreme Court proceeds on basis that 2015

Regulations will apply

The first notable aspect of the Supreme Court's decision was that it tested the validity of the proposed amendment by reference to the new regime under the Public Contracts Regulations 2015 (see §§6 and 30), which codify, in regulation 72, the circumstances in which contracts may be changed without a new procurement procedure being held. Its basis for doing so was that the amendment was yet to be effected (NS&I was injunctioned from concluding the amendment); the 2015 Regulations came into force on 26 February 2015; and therefore the amendment, if NS&I proceeds with it, will post-date the coming into force of the 2015 Regulations.

The Supreme Court took this approach with the consent of both parties. But there is an argument, at least, that the 2015 Regulations do not apply to a post-26 February 2015 amendment to a pre-26 February 2015 contract. Regulation 118(5) of the 2015 Regulations states: "*Nothing in these Regulations affects a contract awarded before 26th February 2015.*" On its face, this means that a variation to a pre-February 2015 contract is unaffected by the 2015 Regulations.

The counter-argument is that a material variation to an existing public contract is, in substance, an entirely new public contract. (That was the approach taken by the ECJ in **Pressetext**.) If a variation fails to be treated as a new contract, and this "new contract" post-dates 26 February 2015, then it is not caught by regulation 118(5). The difficulty with this counter-argument is that the 2015 Regulations do not treat variations as new public contracts. Instead, regulation 72(9) simply provides that substantial "*modifications*" of existing contracts must generally be achieved via a new procurement procedure.

This is not an issue of mere academic interest. Regulation 72 does not merely codify existing case-law. It amends the existing law, for example by relaxing the requirements for modification in the light of unforeseen needs. (Compare regulation 72(1)(c) with regulation 14(1)(a)(iv) and 14(1)(d) of the 2006 Regulations).

The approach taken by the Supreme Court is, then, not obviously correct. But while this aspect of its decision is not binding, since it was not the subject of argument, lower courts will almost certainly find it persuasive. Moreover, it is consistent with Government guidance (see the Crown Commercial Service's '*Guidance on amendments to contracts during their term*', 25 March 2015), which may also prove persuasive.

Supreme Court rules that there is no modification

Under regulation 72(1)(e), a modification to an existing contract requires a new procurement competition only if it is "*substantial*". Regulation 72(8) sets out various types of modification which are deemed substantial. Edenred argued that the modification to the Atos contract would fall within one of these categories, in that it "*extends the scope of the contract ... considerably*" (regulation 78(8)(d)).

The wording of regulation 72(8) is based on the ECJ's decision in **Pressetext**, which the Supreme Court used as an aid to interpretation. Paragraph 36 of **Pressetext** had used a slightly longer formulation of the test in regulation 78(8)(d), stating that "*an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered*".

Applying that wording, the Supreme Court concluded (at §34) that the proposed modification to the Atos contract would not extend the existing contract considerably, for the following reasons. First, the OJEU notice and other procurement documents made it clear that the contract might be expanded to include "*business-to-business*" services which NS&I might in future provide to other public bodies, up to a maximum value of £2bn ("**B2B services**"). The TFC modification fell within the expansion which had been envisaged. Second, while the contract as initially concluded had a value of only £660m, it too "*envisaged*" expansion to include new B2B services (it contained a change mechanism to include them), and "*required*" Atos to provide such services. Third, the original procurement required Atos to have the resources necessary to deliver expanded B2B services. Lord Hodge concluded at §36:

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"I do not accept that one should read the prohibition from modifying a contract to encompass services not initially covered as banning the modification of a public contract which extends the contracted services beyond the level of services provided at the time of the initial contract if the advertised initial contract and related procurement documents envisaged such expansion of services, committed the economic operator to undertake them and required it to have the resources to do so."

In the May 2015 edition of this Briefing, I suggested that the Court of Appeal's decision, if upheld by the Supreme Court, would mean that the Government had established a very effective mechanism for potentially bypassing EU procurement law. The provisions in the Atos contract for future B2B services had been described by counsel for Edenred as permitting "*an ongoing roving commission to go around the public sector hoovering up business that would otherwise be competed for*" (§64 in the Court of Appeal's judgment). At §36 the Supreme Court sought to address such concerns. It pointed out that a contract might be challenged on the ground that it had been designed as a means of avoiding obligations under EU law (see the anti-avoidance provision in regulation 18(2) of the 2015 Regulations); and stated that the scale and nature of NS&I's aspirations to provide additional B2B services to other public bodies "*appear to be within a reasonable compass.*" However, there are cogent reasons for arguing that those points do not answer the concern that the arrangements being considered in this case could be used to avoid EU requirements for competitive procurement. First, a challenge to a contract such as that between NS&I and Atos would be difficult to sustain when the Supreme Court has endorsed such arrangements. Second, the Supreme Court did not explain why it considered the potential to add services to the Atos contract to be "*within a reasonable compass*" and no evidence had been presented on this point. The OJEU notice envisaged the addition of services up to a limit of £2bn, i.e. up to three times the value of the original contract which had actually been concluded.

No ruling on whether the modification was lawful under a "*clear, precise and unequivocal*" review clause

Regulation 72(1)(a) provides that contracts may be modified without a new procurement procedure if they are provided for in the initial procurement documents in "*clear, precise and unequivocal review clauses*". NS&I argued that the proposed modification would be lawful on this basis. In the event, the Supreme Court did not need to resolve this argument, since it found that there was to be no "*substantial*" modification to the Atos contract.

Nonetheless, the Court stated that it was "*inclined*" to the view that the contract amendment provisions in the Atos contract were sufficiently defined to pass the "*clear, precise and unequivocal*" test. In particular, they: confined the B2B opportunities to those within the scope of the OJEU notice; and set out the principles that governed the incorporation of a new B2B service into the agreement, including restricting any increase in Atos' profit margin and prohibiting the alteration of the allocation of risk.

However, the Court concluded that the necessary qualities of review clauses were not "*acte clair*". It therefore refrained from expressing any definitive view on this issue. The Supreme Court implicitly acknowledged the difficulty, all too familiar to practitioners, of knowing exactly what is required in order for a review clause to be "*clear, precise and unequivocal*."

Edenred's alternative argument

The Supreme Court rejected Edenred's alternative argument that there was in substance a new public services contract between HMRC and Atos, since most of the provisions in the MoU were repeated in the proposed Atos contract variation, and HMRC would in effect be the customer of Atos. The Supreme Court held that that the MoU and the Atos contract were legally distinct; that it was NS&I, and not HMRC, that could enforce the Atos contract; and that there was no legal basis for "*airbrushing NS&I out of the picture*" (§48).

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**Comment**

Despite the concerns outlined above about the potential for such arrangements to be used as a mechanism for avoiding EU requirements for competitive procurement, the authoritative judgment of the Supreme Court means that contracting authorities may lawfully add substantial new services to existing contracts, as long as they fall within the scope of services “envisaged” in the procurement documents (including the OJEU Notice) and initial contract, and the contractor is required to undertake them and to have the resources to do so. There is likely to be wide interest amongst contracting authorities in adopting such arrangements as a means of alleviating the burdens of procurement law.

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Early specific disclosure refused in respect of “back of an envelope” tender evaluation.

Geodesign Barriers Ltd v The Environment Agency
[2015] EWHC 1121 (TCC)

One of the difficulties faced by unsuccessful contractors contemplating a claim is the dearth of information available as to why it has lost. An early application for specific disclosure might well be appropriate to fill the gap although such applications need to establish a *prima facie* case, and the request for disclosure must be tightly drawn and properly focused so as to avoid a fishing exercise designed to shore up a weak claim: ***Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust*** [2013] EWHC 933 (TCC). However, what should the Court do where, despite a *prima facie* case and a focused request, the authority provides evidence that there is nothing further to disclose? That was one of several procedural issues determined by the High Court (TCC) in this case.

The Claimant, G, had submitted a bid for a temporary flood barrier system. The bid failed and the Claimant was told that another bidder, IAB, had won. The initial information from the Defendant, EA, suggested that

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G had scored the same as IAB in respect of technical considerations but had lost on price. G issued proceedings and served Particulars claiming that the tender process was fundamentally flawed and that IAB's bid should have been disqualified on the basis that it failed to comply with the mandatory technical specifications.

The Judge thought the claim appeared weak, not least because: (a) G would have to show that EA had made a manifest error in determining that IAB's design met the mandatory technical specifications, and (b) G had finished sixth overall, and so was compelled to argue that all 5 tenders that were scored more highly were non-compliant with the tender specification and ought to have been disqualified.

As to (a), the Judge noted that the EA would have been expected to demonstrate fairly easily that IAB had met the requirement. However, the EA was not able to do anything of the sort.

On G's request for disclosure of, *inter alia*, documents relating to the evaluation undertaken in respect of the bids, EA only managed to produce something of a "rag-bag" comprising documents prepared for a post-selection debriefing/feedback exercise and some manuscript notes of the evaluators "*written on the back of an old notebook*". However, nothing was disclosed in relation to the actual evaluation meetings. On G's application for specific disclosure, EA's evidence to the Court was that there were no contemporaneous tender evaluation documents at all, that everything was "*oral, informal and ad-hoc*" and that G had already been provided with everything that EA had. Unsurprisingly, the Judge considered that evidence to be "*extraordinary*" and such as to raise serious questions as to the transparency and fairness of the procurement exercise. Notwithstanding that, the Judge did not consider that he should go behind the witness statement served by EA asserting that no documents existed:

"On an application for specific disclosure, if a lawyer has said in a signed witness statement that a number of searches have been undertaken and that these documents do not exist then there is very little further that the court can or should do...."

Accordingly, the Court held that no order should be made for disclosure of tender evaluation documents. However, Coulson made clear that if it subsequently emerged that EA's evidence was inaccurate, and that relevant documents did in fact exist, "*significant consequences*" would probably follow for the solicitor who made the witness statement. It appears from the judgment (§§27-31) that if such documents had existed Coulson J would have ordered that they must be disclosed.

The Judge went on to order that EA must disclose: (a) any relevant guidance and/or instructions provided to the evaluators, and (b) copies of the tenders of the bidders who scored more highly than G. The Judge ordered that the tenders should be disclosed into a confidentiality ring which would include lawyers and experts: §§51-56. The Judge rejected an application for disclosure of any communications with referees on the ground that such material was of only peripheral relevance. It is to be noted that the Court rejected EA's contention that disclosure should be limited to lawyers only, noting that in procurement litigation "*all too often, detailed issues arise out of the subject matter of the bid which the lawyers are simply unable to address*".

Comment

Whilst the case does not establish any significant new principles relating to disclosure, it does highlight the limitations of a specific disclosure application in the face of evidence (which is not unusual in such cases) that there is nothing more to disclose. However, although the Court is more than likely to accept such evidence at the interim stage, parties are warned that, "*significant consequences would probably flow*" from any late disclosure of material that fell within the requested categories as that would show that the evidence that there was nothing else was simply untrue.



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Disclosure and Manifest Error in Luxembourg

T-536/11 European Dynamics Luxembourg SA and others v European Commission

This, the latest European Dynamics challenge, concerned a procurement for computer services, consultancy and assistance for IT applications for use in the EU Publications Office ("the PO"). The call for tenders invited appointment to framework contracts divided into lots. For each lot, four year frameworks would be concluded with the three best bidders for that lot: when the PO sought to call off contracts from the framework, it would offer the opportunity to the first-ranked bidder, and then pass the opportunity down the chain if the first-ranked bidder was unable or unwilling to provide the services. The tender itself had a three-stage process: a first stage involving only exclusion criteria, a second stage where selection criteria would be applied, and the application of award criteria at the third stage involving a technical evaluation.

The applicant consortium members (all European Dynamics subsidiaries) challenged the award decisions on three of the lots: lot 1 ('support and specialised administrative applications'), lot 3 ('production and reception chains'), and lot 4 ('consultancy and assistance services regarding management of information technology projects'). They had been placed third in lot 1, second in lot 3, and third for lot 4.

The applicants were informed by the PO of their ranking on 22 July 2011, together with the identities of the successful tenderers, the successful tenderers' scores at technical evaluation stage, their proffered prices and their price-quality ratio, together with the claimants' right to seek additional information. On the same day the applicants sought a large amount of additional information: (i) the names of the successful tenderers' subcontractors and the percentage of each contract allocated to subcontractors, (ii) the individual scores for the technical award criteria for the claimants and the successful bidders, (iii) a comparative analysis of the strengths and weaknesses of the claimants' bids and the successful tenderers' bids, (iv) a statement of the relative advantages and additional/better services offered by the other successful tenderers in their bids, (v) a detailed copy of the evaluation report, and (vi) the names of the evaluation committee members (who had made the award decision).

The PO gave a limited response, providing only (i) the names and contract percentages of the subcontractors, and (v) an extract of the evaluation reports containing information on the bids of the applicants and the other successful tenderers. It expressly informed the applicants that the names of the committee members could not be disclosed.

The applicants proceeded to challenge the award decisions before the General Court on three grounds: (a) that the failure to provide additional information contravened the obligation to state reasons, (b) that the PO had applied an award criterion contravening the procurement rules and breaching the tender specifications, and (c) that numerous manifest errors of assessment had been made.

Failure to State Reasons

The Court gave the 'reasons' argument short shrift. The limit of the PO's obligation was to inform any eliminated tenderer of the reasons for rejection of its tender, together with the characteristics and relative advantages of the tender selected and the name of the successful tenderer.

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This was sufficient in order to “make the persons concerned aware of the reasons for the measure and thereby [to] enable them to defend their rights, and on the other, to enable the Court to exercise its review” (at [38]-[39]).

The PO had provided sufficient information for the applicants to know the characteristics and advantages of the successful tenderers. This was particularly so given that non-disclosed aspects of the successful tenderers’ bids were confidential: although the applicants argued that these should be disclosed, the right of access to information had to be balanced against other economic operators’ rights to the protection of their confidential information and business secrets. It was also relevant that the decision had not been taken solely on the basis of the technical award criteria but on the price-quality ratio, that the contracting authority was under no duty to provide a detailed comparative analysis of tenderers or explanation of the treatment of the applicants’ tender, nor to carry out an independent review of the evaluation committee’s decision.

Award Criterion Not Aimed At MEAT

The applicants’ second argument was directed at two award criteria which each concerned the ‘overall quality of the presentation of the tenderer’s response’. The applicants argued that this concerned the quality of the content of the presentation, rather than the stylistic presentation, and in any event did not go to the question whether the applicants’ tenderer was the most economically advantageous.

The Court considered it clear that the evaluation committee had taken into account the stylistic presentation of the tender: the comments made were eg. that the ‘layout was not always reader friendly’, that the characters per page limit was not respected, and that there were typographical errors. Moreover, it considered that this was a legitimate award criterion for two reasons: firstly “*the formal and stylistic presentation of a tender necessarily has an impact, either positive or negative, on the level of comprehension and thus the*

evaluation of that tender by the body having the task of examining it”, while secondly the contract itself includes services such as ‘documentation drafting’ and ‘studies and proof of concept’, so that the tender’s stylistic quality could be a legitimate indicator of the tenderer’s ability to provide the relevant services. The latter justification is plausible: if a contract involves document presentation, then a poorly-presented tender may be evidence of poor presentational skills. But otherwise, it is submitted, it is hard to see why the stylistic quality of the tender should be relevant to the award.

Manifest Errors

The applicants numerous allegations of manifest errors were comprehensively rejected by the Court over almost 40 pages. The majority of these are fact-specific and disclose no issues of principle. Perhaps the most interesting concerns the PO’s decision to penalise the applicants’ bid as not containing sufficient language coverage in the working languages of the PO. The applicants argued that, since the capacity of the individual experts of the team and the experts’ CVs had been evaluated in the selection phase, they could not be evaluated at the award stage under the principle in C-532/06 *Lianakis*.

The Court rejected this contention. It accepted that award criteria, unlike selection criteria, had to be “*aimed at identifying the tender offering the best value for money*”, rather than “*the evaluation of the tenderers’ technical and professional capacity to perform the contract*”. The tenderers’ experience naturally fell into the latter category. However, it considered that professional experience could constitute an award criterion, particularly where the services were highly technical and their precise subject-matter had to be determined progressively during the currency of the contract. In such situations “*the technical skills and professional experience of the members of the team proposed are liable to have an impact upon the quality of the services rendered ... may therefore determine the technical value of a bidder’s tender and, consequently, its economic value*”.

[Article continued >](#)



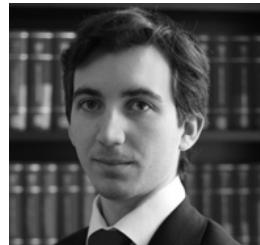
The language proficiency of the proposed team was thus an aspect of technical merit, apt to be considered at the award stage. The Court thereby maintained its position, stated in a chain of previous *Europaiki Dynamiki* authorities, that it is permissible - notwithstanding the difficult *Lianakis* decision - to take into account the qualifications and experience of a tenderer's project personnel. That position has been confirmed for the Member States in Article 67(2)(b) of the Directive 2014/24/EU.

Comment

The main interest of the judgment is the relationship between the limited disclosure/reasons found to be necessary, and the weakness of the manifest error challenge. Notwithstanding the Court's finding that the applicants had sufficient information to challenge the impugned decision, it is clear from the Court's reasoning on the manifest error allegations that the applicants had hoped for significantly more ammunition than the Court considered them entitled to receive.

The Court's reiteration that unsuccessful tenderers should be provided with sufficient information to facilitate a proper challenge is an important one: as *Geodesign Barriers v Environment Agency* [2015] EWHC 1121 (TCC) shows, public authorities do not always provide (or, in that case, even possess) proper records of the decision taken. Beyond that, however, the judgment provides for only relatively limited disclosure: while the rejection of the argument that the PO was required to produce additional post-decision reasoning directed specifically to the applicants' tender (items (iii) and (iv) of the applicants' request) is unsurprising, it is noteworthy that no consideration was given to mechanisms such as confidentiality rings which, in domestic proceedings, would be an obvious way round the 'business secrets' concerns relied upon by the Court to limit European Dynamics' access to details of the successful tenderers. Nor is it clear why the fact that the award criteria were determined on price as well as technical quality is relevant to the extent of reasoning required, given that technical quality was

certainly part of the assessment. Domestic procedural rules of disclosure (particularly early specific disclosure, applying the guidance in *Roche Diagnostics Ltd v Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC), and the use of confidentiality rings) may in practice provide more information to potential challengers than the European obligation to state reasons requires of the Community institutions.



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Procurement challenges are not insurance policies against bad business judgments

Medicure Ltd v The Minister for the Cabinet Office [2015] EWHC 1854 (TCC)

Last month the High Court roundly rejected a challenge to a procurement exercise carried out by the Cabinet Office in 2012 in respect of a Framework Agreement ('FA') to govern the supply of locum doctors to various NHS trusts. In *Medicure Ltd v The Minister for the Cabinet Office* [2015] EWHC 1854 (TCC), Coulson J dismissed the challenge as "misconceived", "simply wrong" and "wholly out of time". In short, the claim "fail[ed] at every level" (§71).

[Article continued >](#)



The underlying facts were “relatively unusual” and “arose in a rather odd sequence” (§3). Back in 2012, the Claimant had unsuccessfully submitted an independent bid, which was excluded at the PQQ stage, but had successfully obtained an FA as part of a consortium. However, as a result of “extensive problems” within the consortium (which were nothing whatsoever to do with the Defendant), the Claimant had not been called on to supply any services under the FA.

In January 2014, some sixteen months after the conclusion of the procurement exercise, the Claimant initiated proceedings challenging both its exclusion from the tender process for the FA and Defendant’s management of the FA. The central allegation was that the tender documents contained an “emphatic representation” that the services would be limited to managing the supply of locum doctors provided by third party agencies and that the FA had been amended or varied and was now being used to allow tenderers to supply locum doctors directly from their own resources. This, it was said, was neither envisaged in nor permitted by the original tender process. In the alternative, it was argued that the Claimant’s independent bid had been wrongly excluded on the ground that it could not demonstrate experiencing of managing staff supply services.

Coulson J found that the basic assumption underpinning the Claimant’s first challenge, and its construction of the tender documentation, was plainly incorrect. The contract notice, the PQQ, the FAQs and subsequent correspondence between the parties, all made clear that the provision of direct services was included within the possible scope of the FA, along with the management of a supply chain in appropriate circumstances (paras 34, 50, 71). Indeed, the Claimant’s counsel had been forced to concede that her “pleading was wrong to say that there was an emphatic representation in the tender documents” (§20). The Judge accepted that there could be a material amendment to a contract simply by virtue of it being performed in a manner which departed from its express terms, and without any efforts by the parties formally to vary it (§64). But the assertion that the FA had been amended or varied, even *de facto*, was “simply not made out” (§63).

The Claimant’s alternative claim was equally hopeless. The Defendant was entitled (and indeed obliged) to test for the provision of managed services as part of the PQQ and had done so in a “palpably transparent” way (paras 27-28). Further, it was factually incorrect to say that the inability to demonstrate the provision of managed services was the reason for the Claimant’s failure to win a FA (§31). In reality, having obtained very low scores across the board, the Claimant was “nowhere near being awarded a FA” (§12). Its failure to demonstrate experience of managing sub-contractors was “just one of many” within the PQQ (§29). In any event, the Claimant was wholly out of time as it had been aware of the relevant facts from late August 2012 (paras 33-34).

Comment

The *Medicure* case holds a number of simple lessons. Rather than raising any complex or novel question of law, the decision serves as a useful reminder of two aspects of the courts’ attitudes towards procurement challenges. First, most obviously, any challenge must be brought within the prescribed time limits. Having initially accepted the Minister’s decisions, and hoping to obtain commercial benefit under a FA concluded by the consortium, Medicure chose not to bring court proceedings to challenge the exclusion of its independent bid. Procurement challenges are not to be used as insurance policies against bad business judgments.

Second, a similarly strict attitude may be seen in the lack of weight attributed to policy arguments, whereby claimants seek to demonstrate that a procurement was misconceived, poorly designed or simply has not achieved what was intended for it. Contracting authorities are free to take bad decisions in this regard. Coulson J allowed himself to express “some sympathy with the claimant’s position” (§72). The FA seemed to favour larger organisations with greater capacity to supply locum doctors directly from their own resource pool. In reality, although the tender documents also mentioned the management of a supply chain, that was always what the customers wanted.

[Article continued >](#)

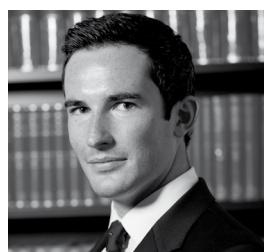


This raised the wider policy question whether the “lengthy and doubtless expensive” procurement exercise “has actually improved the supply of locum doctors, let alone saved the public money”. However, “none of that is ultimately of any assistance to the claimant” (§74).

State Aid practitioners to give State Aid arguments the attention that they deserve. The Judge stated (§300):

‘State aid issues arise in public law litigation not infrequently. Article 107 TFEU is an important provision of law but it has acquired a reputation as an argument of last resort because it is often thrown in at the end of a long list of other arguments and is not always given the level of attention that is required if the arguments are to be made good. The present case is an illustration.’

Those observations might also be picked up by anyone seeking to challenge the Judge’s summary of the relevant legal principles, although – as will be seen below – those principles are consistent with existing EU authority.



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Legislative measures have winners and losers – but that does not render them all State Aid

R. (British Academy of Songwriters, Composers and Authors) v Secretary of State for Business, Innovation and Skills [2015] EWHC 1723 (Admin)

The High Court’s judgment in this case contains a useful summary of the legal principles to be applied at stage two of the test for State Aid, when the Court considers whether or not an advantage has been granted ‘through state resources’.

The issue of State Aid arose in somewhat peculiar circumstances, as the point was only taken late in the day by an Intervener, the Incorporated Society of Musicians (**ISM**), rather than by any of the three Claimants. Green J lamented the fact that the issue had arisen in that way, in what should be a warning to

The Facts

The Claimants sought to challenge the Secretary of State’s decision to introduce Section 28B into the Copyright Designs and Patents Act 1988. This new section created an exception to the law of copyright for personal private use. In particular, anyone who had purchased content – in the form of music, film or books – could now copy that work for their own private, non-commercial use without infringing copyright. ‘Private use’ was defined to include, ‘the making of a copy – for the purposes of storage, including in an electronic storage area accessed by means of the internet ...’, such as ‘the cloud’ (§45).

The Secretary of State had introduced this new Section in the exercise of his discretion under EU Directive 2001/29. Importantly for the Court’s State Aid analysis, that Directive also provided that if the now permitted use caused more than *de minimis* harm to the copyright owner, then the Member State should also make provision for compensation to be payable to the owner for the harm that they suffered (§5). 21 out of 28 EU Member States had introduced a private copying exception coupled with a scheme for compensation for rightholders, which was funded through levies charged on consumers of blank storage media and equipment (§6).

Article continued >



However, unlike the position in those Member States, the Secretary of State did not make any provision for compensation to be payable to copyright owners, whether by way of a levy on consumers or otherwise. The Secretary of State's stated justification for this was that the new private use exception would not cause any harm to rightholders for which compensation could be required under the Directive (§15).

The State Aid Argument

ISM argued that the new s 28B conferred an advantage on the 'tech-industry', and in particular 'cloud service providers', and therefore constituted a State Aid under Art. 107 TFEU. If so, then that section would be unlawful under Art. 108(3) TFEU, having not been notified to the EU Commission before it was introduced.

The impact assessments obtained by the Secretary of State estimated that the benefit of the new section to the tech-industry would be worth about £258m over a 10-year period (§289). In particular, cloud storage providers were expected to benefit from the removal of the requirement to pay rightholders for licenses to store private copies.

The Secretary of State chose to contest this issue on what the Judge described as a 'limited battle ground', by arguing solely that there had not been any grant directly or indirectly 'through state resources'. This argument ultimately succeeded, but Green J also observed that, 'I have doubts as to whether other conditions of the definition are in fact met ...' The Judgment contains an interesting – albeit necessarily perfunctory – analysis of those other conditions.

Relevant Law

Green J summarised the legal principles relevant to the second stage of the State Aid analysis at §306 and §§311–312. In particular, the Judge held that "aid" can arise where the State foregoes revenue ...', but that there are at least two important caveats to this principle.

Firstly, 'Even where an advantage can properly be categorised as revenue foregone if it is "inherent" in a regulatory instrument then that foregone revenue still does not amount to an "aid" ...' (§306(e)).

Secondly, citing the European Court's recent judgment in *Eventech Ltd v London Borough of Camden* (C-518/13, 14th January 2015, §34), '... it is necessary to establish a sufficiently direct link between, on the one hand, the advantage given to the beneficiary and, on the other, a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget.'

The Judge's Conclusions

Applying those principles, Green J concluded that, 'The facts of the present case fall some considerable distance away from the Article 107(1) TFEU line ...' (§309). This was for broadly two reasons.

Firstly, the Judge rejected the submission that 'there is revenue foregone because the State could have imposed a levy in order to neutralise the advantage ...' or because 'the State is said to be "liable" for breach' of the Directive by not introducing any provision for compensation for rightholders. The Judge held that, 'These are not, in my view, the sorts of linkages which the Court of Justice would view as remotely sufficient' (§309).

The second reason, which was sufficient with or without the first, was that, 'the alleged benefit ... is "inherent" in section 28B; it is merely an incidental consequence of the introduction of a measure designed to meet other legitimate aims and objectives' (§313). In this connection, the Judge applied the rule adopted by the European Court, 'that benefits which are "inherent" in general legislative measures do not create "aid" simply because the benefit might in some loose way be described as revenue foregone by the State.' This conclusion places an important limit on the scope of EU law on State Aid because, as the Judge also observed, 'If the Intervener's case was correct then many pieces of legislation would be capable of amounting to an "aid" ...'

Article continued >



Comment

Green J's summary of the legal principles applicable at the second stage of the test for State Aid is likely to be useful to State Aid practitioners as the only such summary in domestic case law to date. However, that summary – and its application to the facts of the case – reveal that this condition can be as open-textured and fact-sensitive as the other limbs of the test.

The judgment is also interesting for the Judge's observations about the standard of review to be applied when the Court is applying the State Aid test, albeit that some of those observations were *obiter*. In relation to the second stage, the Judge held that, 'the question whether there is aid "through State resources" is an objective question for the Court and does not involve the conferral of any margin of appreciation upon the decision maker' (§284). However, in relation to the other limbs of the test, the Judge observed that:

'It is possible that the Court, in another case involving other component parts of the definition of "aid", might need to adopt a more limited review. So, for instance, if the issue was whether the market investor test was satisfied and it could be shown that on one reasonable analysis the test was met a Court might be loathe to substitute its own view for that of the decision maker. I do note in this regard however that the Court of Justice has stated that even where the analysis of whether "aid" exists is "technical or complex" the Court ... must conduct a "comprehensive review" ...'



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