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Evaluators' flexibility

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The question

- Where is the latitude for evaluators to shift their initial views during moderation or in response to clarifications and presentations?

General evaluation principles

Starting point:

- Reg 18 of the Public Contracts Regulations:

  "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

Principles from the case law:

- A CA must follow the procedure it has set itself (*EnergySolutions EU Limited v Nuclear Decommissioning Authority* (2016) at para 255)

- Evaluators entitled to act within margin of appreciation (*Letting International Ltd v London Borough of Newham* (2008))

- Manifest error not established merely because on mature reflection a different mark might have been awarded (*Letting International; Woods v Milton Keynes* (2015)*; Bechtel Limited v High Speed Two (HS2) Limited* (2021))

- The test for manifest error is a high one - broadly equivalent to Wednesbury irrationality (*Woods Building Services v Milton Keynes Council* (2005) at para 14; *EnergySolutions* at para 312)

- Court recognises the competence of evaluators, particularly subject matter experts (*Bechtel* at para 25)

- Claimant must show a manifest error impacted the result of the procurement

Having summarised those principles, approach adopted in *Siemens v HS2* (2023) at para 146:

- Tender documents must be construed objectively – RWIND tenderer

- Court must consider whether criteria and process applied objectively, uniformly, without discrimination or undisclosed criteria and proportionately

- Court must consider whether there was any manifest error in the evaluation – eg failure to consider all relevant matters, consideration of irrelevant matters or decision that is irrational (outside range of reasonable conclusions open)

- Court must not substitute its own assessment for that of the CA – role limited to review of process to determine whether published rules were followed

Changing individual scores at moderation

- Key cases: *Bechtel* and *Siemens*

- Key points:
  - Draft scores are just steps along the way
  - Changes are to be expected and may demonstrate care
  - Challenger cannot just rely on helpful initial score of one evaluator to show manifest error

Bechtel (Fraser J):

- At para 100:

  "although changes of score without explanation might initially look puzzling, when one considers that the original scores were only initial draft scores, and were reached by evaluators in isolation, the fact that the final score was different simply demonstrates, in my judgment, how carefully the evaluators were performing their task…….

  In my judgment, one benefit of requiring draft scores first, reached independently, was that each evaluator would be fully prepared for the meeting with their co-evaluator. But the evaluation and moderation process was not intended only to require one score reached in isolation by each evaluator. It was designed to achieve a final score that was jointly agreed by the two evaluators, following discussion and agreement between them. The draft scores were merely steps along the way to achieve that."

- At para 308, 417 - 418:
  - Seeking to have the more favourable draft score substituted for the final score, without proper justification, has no sensible foundation
  - Fundamental element of B's case amounted to "*unwarranted reliance on draft scores*"
  - Draft scores are not correct or binding such that they have to be wrong to be changed
  - Criticism of "*downward moderation*" of the scores elevates draft scores to a status they do not merit

- At para 19, 28, 256 - 258:
  - It is not sufficient to identify subjective disagreements with scores awarded
  - There is no judicial remedy for subjective dissatisfaction
  - Procurement law does not impose a counsel of perfection on contracting authorities

- *Siemens* at para 244:
  - Siemens simply relied on areas of concern in one of evaluators' initial assessments
  - Not sufficient to identify the initial score and comments produced by one of 3 assessors without also taking into account scores and comments of other 2, the consensus score and the consensus rationale – all of these were capable of justifying the score awarded
  - Siemens failed to establish any manifest error

Changing after clarifications or presentations

Factors to consider:

- Rules in the tender documents on clarifications and presentations
- General principles on duty to clarify as summarised in *R (Hersi) v Lord Chancellor* (2018) (para 17)
  - Duty does not arise when clarification provided would *"in reality lead to the submission of a new tender"*

- Reg 56(4):
  - *Where information submitted is or appears to be incomplete or erroneous or where specific documents are missing, CAs may request EOs to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, provided that such requests are made in full compliance with the principles of equal treatment and transparency*

Not changing after moderation - averaging

Bromcom Computers PLC v United Learning Trust (2022)

Analysis of facts:

- Moderation meeting but average scores computed prior to meeting and unchanged after it
- No real discussion – no questioning of evaluators' individual scores – asked if they had "*strong feelings*"
- No reasons for score
- Moderation meant to be a discussion leading to a consensus, not an adoption of pre-produced average scores
- Averaging builds in outlying scores which in discussion to reach consensus would be disregarded or taken into account for some persuasive reason

Conclusion:

- Nothing in Regulations requiring moderation or precluding use of averages
- But – averaging was breach of transparency, which requires giving of reasons for the score
- No reasons given because there was no reasoning process undertaken
- No sufficient discussion of scores with give and take and reasoned basis for scores

  "Inherent in the requirement for the contracting authority to give reasons for what, in the end, were <u>its</u> scores, is the undertaking of a process that can yield such reasons"

Recording the process

Importance of moderation meetings:

- Moderation meetings are:

  "solemn exercises of critical importance to economic operators and the public and must be designed, constructed and transacted in such a manner to ensure that full effect is given to the overarching procurement rules and principles"

  (*Resource (N) v NICTS* (2011) para 35, adopted in *Lancashire Care v Lancashire County Council* (2018) and *Bechtel)*

Importance of recording decisions made and reasons given at moderation meetings:

- *Lancashire Care* (paras 54, 58, 59)
  - A procurement in which the CA cannot explain why it awarded the scores which it did fails the most basic standard of transparency
  - Notes did not provide a full, transparent or fair summary of discussions that led to the consensus scores sufficient to enable Trusts to defend their rights or Court to discharge its supervisory jurisdiction
  - Reasons were in play which were not reflected in notes
  - No or no sufficient account of reasoning and reasons that led evaluators to resolve their differences (if they did) so as to arrive at consensus scores
  - Positive and negative points are not, without more, reasons or reasoning

Limits on what is necessary:

- Not necessary to keep complete record of what was said or comprehensive note of every point made (*Lancashire*, para 59)

- No CA is required to take a verbatim note of moderation sessions; there must be a sensible limit to what is required of CAs in terms of recording evaluations; Court's role is one of supervisory jurisdiction, not micro-managing (*Bechtel*, para 311)

- But: the lack of explanation as to why changes of mind occurred is something that can be taken into account when considering whether a score has been reached manifestly erroneously (*EnergySolutions*, para 165)

- No CA is required to assume an enormous procedural burden, with associated high costs, to protect itself to the nth degree from a challenge; proportionality means a sensible balance and limit is what is required (*Bechtel*, para 313)

- Transparency requires a CA to maintain suitable records of its procurement process to enable (i) an EO to understand the reasons decisions were taken and (ii) the Court to exercise its supervisory jurisdiction but isolated lapses of compliance do not automatically lead to a finding of breach of equal treatment or transparency (*Siemens,* para 504, relying on *Bechtel*, paras 274 - 280)

Procurement Act

Change to the fundamental principles:

- No longer an express duty of transparency
- Equal treatment explained: CA must treat suppliers the same unless a difference between the suppliers justifies different treatment (section 12(2))

- New duties (section 12(1)):

"In carrying out a covered procurement, a contracting authority must have regard to the importance of –

(a) Delivering value for money;

(b) Maximising public benefit;

(c) Sharing information for the purpose of allowing suppliers and others to understand the authority's procurement policies and decisions;

(b) Acting, and being seen to act, with integrity"

Conclusion

- Evaluators can – and should where necessary – shift their views in moderation
- Care is needed with changes after clarifications and presentations
- Reasons must be clear and recorded……