The Duty to Clarify after *Optima*:

What counts and will sway the court over the "Duty to Clarify" following Optima v DWP [2025]? When does it arise, where are its limits, and how will it impact practice going forward?

Azeem Suterwalla KC

Monckton Chambers

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Three questions left by *Optima*

- When does a discretion to clarify become a duty?
- Where is the boundary between correction and a new bid?
- What does equal treatment require?

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The facts: a small error, a major consequence

- Call-off competition for occupational health services
- Approximately 190 individual prices
- Three prices above framework maxima
- Two described as cut-and-paste errors
- Approximately 0.02% impact on price evaluation
- Optima excluded without first being asked to clarify the three prices
- Optima otherwise the strongest bidder

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The Court of Appeal's conclusion

- **Tender provisions:** DWP was wrong to treat Optima's non-compliant pricing schedule as requiring automatic exclusion.
- **Discretion to clarify:** The tender documents permitted DWP to seek clarification rather than reject the bid.
- **Failure to exercise discretion:** DWP had failed properly to consider whether clarification should be sought.
- **Duty to clarify:** On the particular facts, DWP was under a positive duty to seek clarification.
- **Limits of clarification:** Clarification was permissible where it did not involve submitting a materially new or improved tender.
- **Outcome:** Optima's appeal was allowed; DWP had acted unlawfully in rejecting its tender without seeking clarification.

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The Legal Framework – and the case for the COA

- Regulation 56(4) PCR 2015: permissive language:

> *"(4) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous, or where specific documents are missing, contracting authorities may request the economic operators concerned 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."*

- Clarification may be lawful without being obligatory
- When is declining to clarify actually unlawful?

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The first difficulty: discretion → duty

- Obvious mistake? Materiality? Consequences of exclusion?
- A defect can be trivial for scoring but decisive for exclusion
- Failure to consider discretion is different from a reasoned refusal

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The second difficulty: what is "obvious"?

- Take an example: Maximum permitted price: £100
- Tendered price: £150
- Was £150 a mistake — or the intended offer?
- Was the intended price £100, £95 or £75?
- How does the contracting authority decide?

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Asking the question ≠ accepting the answer

- Bidder replies: “We meant £95” — can that be accepted?
- What if the answer is £80?
- What objective evidence establishes original intention?
- A duty to ask may arise before the authority knows whether it can accept

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Equal treatment: the apparent winner

- Bidder A: compliant tender
- Bidder B: defective tender; would win if corrected
- Bidder C: identical defect; would still lose
- What is the obligation? Clarify B but not C? What about A?

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Proportionality and hindsight

- Harsh consequences do not necessarily make a rule unlawful
- Courts assess evidence after the event, as in *Optima*
- Authorities decide without knowing the clarification response
- There should be respect for a rational, contemporaneous decision

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Six practical lessons

- Read the tender documents and exclusion wording
- Identify the true nature of the defect
- Consider authority-created confusion
- Separate scoring, compliance and outcome materiality
- Require objective support for any correction
- Record the decision and reasons contemporaneously

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The Procurement Act 2023

- No directly equivalent general provision to Regulation 56(4)
- Section 12: value, public benefit, transparency, integrity, equal treatment
- Competitive tendering requirements remain important
- Does Optima create a general duty under the new regime? A duty to consider clarification? Or a duty actually to seek clarification?
- The answer under the 2023 Act cannot simply be assumed

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A triumph of common sense?

How can an authority know, before asking the question, whether the answer will fall on the right side of the line?

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