

Evaluation and Margin of Discretion

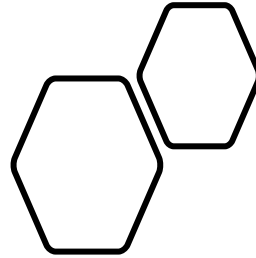
PARISHIL PATEL

KC

NOVEMBER

2022

Introduction



- Context
- Two situations
 - Choice of criteria
 - Process of evaluation against those criteria

The meaning of the Margin

- In the choice of criteria:
 - EVN AG v Wienstrom GMBH Austria [2003] ICR I-14527, para 39

“... provided that they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evaluation to be made of the criteria applied in order to identify the [MEAT].”

- Lion Apparel Systems Limited v. Firebuy Limited [2007] EWHC 2179 (Ch) at para 93

“ ... The fact that one scoring system favours one bidder compared with an alternative system does not, ipso facto, make it manifestly wrong. There must be something else wrong with the system before the court could reach the conclusion that it is manifestly wrong.”

Meaning of the Margin (2)

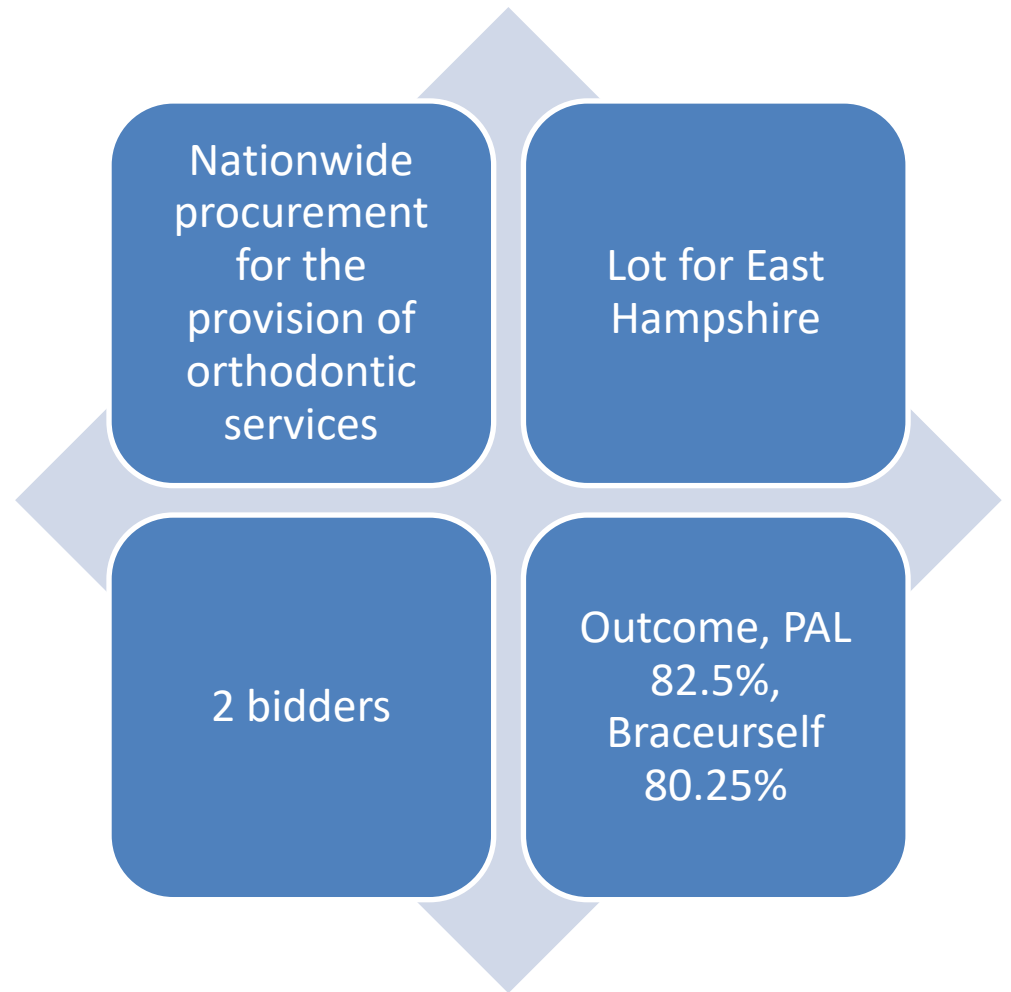
- Evaluation
 - Bechtel Limited v. High Speed Two (HS2) Limited [2021] EWHC 458 TCC
 - Evaluators are entitled to act within what is called a ‘margin of discretion’
 - Court’s function is not to substitute its view of the bid or remark
 - It has a supervisory jurisdiction/not an appeal of the evaluator’s assessment
 - Thus, interfere only where there has been a manifest error
 - Manifest error is a clear and obvious error, broadly equivalent to irrationality
 - Such an approach pays regard to “suitable recognition of the institutional competence” of the evaluators
 - SMEs



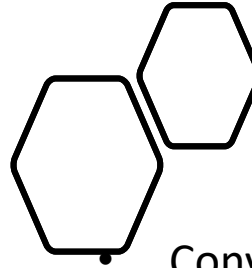
Braceurself

- Alexander Nissen KC , [2022] EWHC 1532 (TCC)

Braceurself



Evaluation methodology



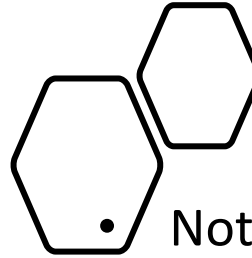
Conventional

- Individual evaluation by (different) SMEs against scoring table
- Not comparative but on bid's own merits
- Moderation to consensus score
- Then apply weighting
- Training provided to evaluators

Manifest error?

- CSD02: Clinical and Service Delivery
 - Misunderstanding by evaluators of bid
 - Stairclimber not stairlift
 - Availability of alternative premises
 - Bid assessed on factually incorrect premise

Margin of
discretion/appreciation



- Not relevant in determining whether a straightforward factual misunderstanding of the bid had taken place
- Because not a question of judgment or assessment
- But relevant in determining the causative impact of that mistake on the evaluation of the overall score for that question

Braceurself- conclusion

- Adopted general observations made in Bechtel
- AND Procurement was carefully planned and well-organised
- AND aside from the errors in CSD02, evaluation conducted without error
- BUT the margin of discretion afforded to evaluators had its limits given the clear factual misunderstanding on which the evaluation had been conducted
- AND although a margin of discretion had been afforded to evaluators in respect of the overall score, but for the errors, the score would have been different
- THUS manifest error in the score given (as it was based on the clear factual errors)

Abbvie
Limited

Choudhury J
[2019]
EWHC 61
TCC



Unequal treatment

- Abbvie complaint - two aspects of the criteria by which the bids were to be assessed conferred an unfair advantage on certain bidders
 - Dummy Price Mechanism (DPM)
 - Unmetered Access Model (UAM)
- NHS England's response
 - Application of the DPM does not involve treating like situations differently
 - UAM applied equally to all bidders

Abbvie - conclusion

- DPM, bidders were treated differently
- BUT not in a comparable position
- In the determination of whether there is unequal treatment of like cases or similar treatment of un-like cases, the authority has a margin of discretion
- Is the difference in treatment “arbitrary or excessive”?
- Otherwise any difference in treatment would be unequal treatment unless objectively justified, regardless of context, scale or purpose (para 62, 65-66)

Abbvie – conclusion (2)

- BUT no room for margin of discretion once failure to confer equal treatment has been established
- i.e. to the question of objective justification of that differential treatment (para 67)

Pushing it!



Conclusions

Factual misunderstanding of the bid gives no room for a margin of discretion

Important therefore that moderation process identifies correct factual basis of the bid

Other alleged misunderstandings? Evaluative assessments and decisions to be judged having regard to margin of discretion.

Margin of discretion in determining whether there is a differential impact in the choice of criteria – is the “difference” arbitrary or excessive?

No margin of discretion to the authority in determining if there is objective justification for the treatment