

## White Paper Conference

### Where are the limits to evaluators changing their initial views on moderation or in response to clarifications and presentations?

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#### 1. INTRODUCTION

- 1.1 The title of my talk today is “Where are the limits to evaluators changing their initial views on moderation or in response to clarifications and presentations?”
- 1.2 This is an important question, because evaluation of tenders clearly goes to the heart of any procurement exercise. Alleged failings in evaluation are invariably a core component of every challenge of a contract award.
- 1.3 The question is particularly relevant in complex procurements because the evaluation process in these procurements is often structured in stages in which, first, individual evaluators carry out a preliminary assessment of tenders against the tender criteria and, secondly, evaluators come together in a “moderation” session to decide upon the score that will be awarded.
- 1.4 The moderation process is usually designed, and indeed expected, to result in a consensus score that all evaluators are satisfied with, having discussed the relevant elements of the tender and the evaluation criteria between themselves. Moderation does not, for example, involve merely taking the average score given by several evaluators. Sometimes the process provides for a “moderator” to take part in the discussion to help guide the evaluators in addressing relevant issues and to keep a record.
- 1.5 This approach is seen to be desirable as giving rise to a robust outcome. The approach gives evaluators an opportunity to consider tenders individually, so that they turn their minds fully to the tender responses and evaluation criteria, while also providing a forum (ie, the moderation meeting) to test their assessments and pick up any points that may have been overlooked.
- 1.6 However, unless evaluators all happen to arrive at the same score when considering tenders individually, one or more of them will end up agreeing to a different score from their original assessment, at moderation. This gives rise to a risk of arguments that an individual assessment was the “correct” one, or that one or more evaluators has had undue influence over others.
- 1.7 Clarifications and presentations, which are referred to in the title, raise additional considerations. Here evaluators are addressing new information in relation to a tender, not available to them when they formed their initial views. Sometimes clarification responses may be available at moderation but not at the preceding review by individual evaluators. The extent of information it is permissible for a contracting authority to take into account by way of a clarification, or indeed a presentation, raises difficult questions turning on the terms of the tender invitation and principles of equal treatment and transparency. Those matters are not the subject of my talk today. My focus is on the limits there may be upon evaluators changing their views expressed at an earlier stage of the evaluation – whether or not that be with reference to new information available only after the initial assessment.

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- 1.8 To address this question, I am going to look at the law and consider some examples from the cases. From that, I shall give a brief summary of key elements of what may be regarded as good practice in evaluation process. I will also touch by way of postscript upon the new Procurement Bill, which contains some intriguing changes from the current Regulations.

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## 2. THE LAW

- 2.1 The core principles are contained in Regulation 18(1) of the Public Contracts Regulations 2015, which provides:

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

- 2.2 The equivalent provision is contained in Regulation 36(1) of the Utilities Contracts Regulations 2016.

- 2.3 These principles apply generally throughout a procurement. However, for our present purposes they apply particularly to structuring tender evaluation criteria and processes, and to the evaluation exercise itself.

- 2.4 Provided a contracting authority is clear about what it intends to do, there can be no objection in principle to structuring an evaluation process that involves a stage in which evaluators consider tenders individually, and a stage in which they decide upon a score in a moderation meeting. Such a process cannot be said in itself to favour or disadvantage any particular bidder.

- 2.5 However, the principles of equal treatment, non-discrimination and transparency require a contracting authority to follow the procedure it has set for itself. Changing the decision-making procedure during the process of assessment risks arbitrariness and favouritism. (*EnergySolutions EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) (“**EnergySolutions**”) at [255].)

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### Substantive evaluation

- 2.6 When it comes to conducting the substantive evaluation exercise, the following principles are well settled in case law:

(a) First, evaluators are entitled to act within what is referred to as a “margin of discretion” or a “margin of appreciation”, and the court will only interfere in an evaluation if there has been a “manifest error” in the assessment. Absent manifest error or breaches of other obligations (such as equal treatment or transparency) there is no basis for the court to interfere with evaluations. (*Letting International Ltd v London Borough of Newham* [2008] EWHC 158 (QB); *Woods Building Services v Milton Keynes* (No.1) [2015] EWHC 2011 (TCC).)

(b) Second, it is not the task of the court in dealing with a challenge of the evaluation to embark on a remarking exercise, and a manifest error is not established merely because on mature reflection a different mark might have been awarded. (*Bechtel Limited v High Speed Two (HS2) Limited* [2021] EWHC 458 (TCC) (“**Bechtel**”).)

- (c) Third, the test for manifest error is a high one. The test for manifest error is broadly equivalent to the domestic law concept of irrationality (see *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC) at [14]; *EnergySolutions* at [312].)
- (d) Fourth, "*The High Court recognises the competence of evaluators, in particular those who are what is called Subject Matter Experts or SMEs. SMEs evaluate details in a tender that are in their specialist fields; that is why they are experts. They are likely to know the subjects in which they are expert. That is not to say that they can never be wrong. However, the court will recognise their competence.*" (per Fraser J in *Bechtel* at [25].)
- (e) Fifth, if there is a manifest error, the challenger must show that it impacted the result of the procurement. This is a point about causation.

2.7 These principles clearly give a considerable degree of protection against challenges for a contracting authority. It has been said that procurement law does not impose a counsel of perfection on contracting authorities (see, for example, *Bechtel* at [28]). To bring a successful challenge, a bidder must demonstrate not only that there is an error in assessment, but that the assessment is manifestly wrong.

2.8 However, the protection is clearly not absolute and although evaluators may be experts in their subject, that subject is often not procurement. Subject matter experts are typically asked to perform an evaluation role as an adjunct to their day job. They may have limited familiarity with what is required or time to perform the role. This means that evaluator training is essential for any complex procurement, so that the evaluators clearly understand the process they are required to follow and the importance of following it.

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#### Recording the evaluation process

2.9 A contracting authority must not only ensure that evaluations are carried out without manifest error, but must also ensure that adequate records are kept of the evaluation.

2.10 In particular, the principle of transparency requires that a contracting authority maintain suitable records of its procurement process to enable (i) an economic operator to understand the reasons for which decisions adverse to it were taken in the course of that process and (ii) the Court to exercise its supervisory jurisdiction. (*Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC) at [53], *Bechtel* at [274] and *EnergySolutions* at [292]. However, see *EnergySolutions* at [296] regarding causation.)

2.11 Meetings of contract procurement evaluation panels have been described as something considerably greater than merely formal events. They 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. (As above and *Resource (NI) v NICTS* [2011] NIQB at [35].)

2.12 As we shall see, how the Court will approach a change of score by an evaluator during the evaluation process is linked to the state of the written records of the evaluation.

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- 2.13 Two cases in which the contracting authorities made mistakes are instructive. The first is EnergySolutions and the second *Lancashire Care NHS Foundation Trust and another v Lancashire County Council* [2018] EWHC 1589 (TCC) (“Lancashire”).
- 2.14 EnergySolutions is the well-known case in which the Nuclear Decommissioning Authority (“NDA”) invited tenders to decommission several nuclear facilities. EnergySolutions successfully challenged the lawfulness of the contract award to another bidder and the NDA settled for substantial damages. The case provides an extreme example of how not to run a procurement. Early training pack slides for evaluators gave an instruction to shred any notes not included in the electronic system used to record scores. Although these slides were said by NDA not to have been used and to have been replaced with guidance which removed the reference to destroying notes, the Judge, Fraser J, was critical of NDA’s disregard of the obligation of transparency and his findings included that:
- (a) the head of procurement at NDA *“was ... perfectly happy to conduct unrecorded, though very important, conversations which led to the SMEs changing scores or deciding on threshold issues, knowing these were not recorded (and without taking even the most basic steps to have such conversations noted, even in headline or bullet point terms).”* [130]
  - (b) *“In circumstances where there is an express obligation of transparency upon the NDA, this approach to note and record keeping, and sensitivity about retaining written material, simply does not seem to me to be justified. That is putting the point at its most favourable for the NDA.”* [211]
- 2.15 The Judge did however note the following in relation to scores that had been marked complete by subject matter experts (SME’s) in the electronic system used to record scores by NDA:
- “That is not to say that “Complete” makes the view at that time wholly determinative; SMEs can change their minds and often did so. However, the lack of any explanation as to why such changes of mind occurred is something that in my judgment can be taken into account when considering whether any particular score has been reached manifestly erroneously.”* [165]
- 2.16 The Lancashire case is perhaps less extreme, but equally instructive. The procurement in the Lancashire case concerned a public contract relating to provision of Public Health Nursing Services for persons aged 0-19 in Lancashire. The Council awarded the contract to Virgin Care Services, rejecting the Trusts’ tender. The Trusts challenged the award.
- 2.17 The Council had engaged a panel of evaluators. Each evaluator scored individually and set out a summary of the relevant points in their score sheet. When it came to the moderation meeting, a Mr Fairclough took notes on his laptop. The evaluators could see that he was working on his laptop but could not see what he was doing, whether noting or deleting. The court concluded from the evidence that a consensus was reached on the scores, but there was not necessarily or even probably congruity of reasoning that led each evaluator to subscribe to the consensus score. It was also clear that the moderated discussion was such that evaluators might change their minds as particular points they had previously found influential in their original evaluation became less so, or the other way round. That was to be expected, but it meant the original score sheets were not a reliable guide to the reasons for the consensus scores. However, Mr Fairclough’s notes were not a complete record of the points that were made in moderation or even the points that were considered material at some point during the discussion. Generally there was no consistency either in identifying what were said to be key points or in highlighting points to

show that they had been influential. It did not help that that the Council's Tender Panel Guidance to ensure all evaluation comments, justifications, marks and amendments were "fully documented" had been ignored.

- 2.18 In the unsatisfactory state of the written record, the Judge considered it was not possible to determine which points were consensus points or points on which some but not all members of the panel relied. He was satisfied that the notes did not provide a full or accurate account of the reasons or reasoning that led either individual panel members or the panel as a whole to reach the consensus scores that were reached. As a result he concluded the reasons given were not sufficient in law.
- 2.19 Further, the pervasiveness of the Council's breach meant the Court could not determine the issue of manifest error without conducting a full re-mark. The Court declined to do that, instead setting aside the award decision.
- 2.20 The Judge, Stuart-Smith J, accepted the submission that "*A procurement in which the contracting authority cannot explain why it awarded the scores which it did fails the most basic standard of transparency.*" ([54])
- 2.21 However, the Judge also stated that he was not suggesting that it was necessary to keep a complete record of what was said or a comprehensive note of every point that was made. Fraser J made a similar observation in *Bechtel*, saying: "*However, "short of tape-recording every hour of moderation – which would be entirely disproportionate – minutes of moderation will inevitably not amount to a verbatim note. But no contracting authority is required to take a verbatim note of all such moderation and evaluation sessions. There must be a sensible limit to what is required of contracting authorities in terms of recording its evaluations. The court's role is one of supervisory jurisdiction, not one of micro-managing.*" (*Bechtel* at [311].)
- 2.22 Therefore, the state of record keeping is clearly a factor that may play into an assessment by the Court of whether there has been a manifest error.
- 2.23 Assuming good records are kept in moderation, where are the limits in evaluators changing their minds?
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- 2.24 In *Bechtel*, Fraser J held:
- (a) Simply moving from a draft score, in moderation, is not of itself evidence of a manifest error.
  - (b) Nor does the earlier award of a different score shift the burden in some way on to the contracting authority to demonstrate why the final score was correct, or to justify movement from a draft score reached by an evaluator in isolation from other evaluators. The tenderer has the burden of proof of showing a manifest error in the score finally awarded, although an earlier and different draft score might make that burden easier to satisfy in evidential terms.
  - (c) Draft scores are not correct or binding such that they have to be "wrong" in order to be changed. (*Bechtel* at [418])
- 2.25 These observations suggest that a change of mind is not, in itself, prohibited. It is the final score (or scores) that must be free from manifest error. However, significant changes from a draft or initial view may put a spotlight on the final score, and rationales must be recorded.

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### 3. SUMMARY AND RECOMMENDATIONS

- 3.1 So, the answer to the question “where are the limits to evaluators changing their views on moderation” is as follows:
- (a) It is permissible for evaluators to change their assessment in a moderation exercise.
  - (b) However, evaluation and moderation must follow the published award criteria, weighting and evaluation methodology. The final score awarded must be free from manifest error.
  - (c) Contracting authorities must ensure that the evaluation process is adequately documented so that the reasons for the scores awarded may be understood.
  - (d) That does not mean it is necessary to keep a verbatim record. But it does require a record of all reasons for the score awarded, and preferably any changes in score from the original scores awarded by evaluators should be explained.
  - (e) All of the above requires dedicating enough time and resources to the evaluation exercise.

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### 4. POSTSCRIPT - THE PROCUREMENT BILL

- 4.1 The most recent news we have is that progression of the Procurement Bill through Parliament is taking longer than anticipated and that the plan is now for an October 2024 commencement.
- 4.2 There are some interesting changes from the general principles set out in the existing Regulations in the way in which the Bill is worded.
- 4.3 For example, Regulation 18(1) of the PCR (“*Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner*”) has gone.
- 4.4 The Bill does not impose duties on contracting authorities in the same terms.
- 4.5 The duty of equal treatment is still there, albeit section 12(2) states it in these terms:

*“In carrying out a covered procurement, a contracting authority must treat suppliers the same unless a difference between the suppliers justifies different treatment.”*

This wording is derived from the classic statement of equal treatment in the case law, so that it appears that the equal treatment duty will continue to apply.

- 4.6 However section 12(1) of the Bill provides:

*“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 decision;

(d) *acting, and being seen to act, with integrity."*

4.7 The wording is rather different from the PCR and on the face of it the obligation "*to have regard to the importance of*" sharing information is weaker than the obligation (actually) to act transparently. However, whether there will be any difference in practice remains to be seen.

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