

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

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Introduction and Agenda

- The law
 - Regulations
 - Application to evaluation from the caselaw
- The answer to the question – Summary and Recommendations
- Postscript: the Procurement Bill – does it change things?

The law

Principles

- Public Contracts Regulations 2015 (“PCR”), reg 18(1):

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

Procedure

- These principles require a contracting authority to follow the procedure it has set itself (*EnergySolutions EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) (“**EnergySolutions**”) at [255])

The law

Evaluation

- Evaluators entitled to act within “margin of appreciation”
(Letting International Ltd v London Borough of Newham [2008] EWHC 158 (QB); Woods Building Services v Milton Keynes (No.1) [2015] EWHC 2011 (TCC))
- Manifest error 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”)
- The test for manifest error is a high one (broadly equivalent to *Wednesbury* irrationality
(Woods Building Services v Milton Keynes Council [2015] EWHC 2011 (TCC) at [14]; EnergySolutions at [312].)
- The Court recognises the competence of evaluators, particularly subject matter experts
(Bechtel at [25])
- The challenger must show a manifest error impacted the result of the procurement

The law

Recording the evaluation process

- The principle of transparency requires a contracting authority to maintain suitable records to enable:
 - (i) an economic operator to understand the reasons for which decisions were taken, 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)

The law

- Inadequate records:
 - *EnergySolutions*
 - Early training pack slides instructed evaluators to shred any notes not included in the electronic system for recording scores
 - Nuclear Decommissioning Authority’s head of procurement had conversations which led to SME’s changing scores knowing these were not recorded
 - The Court considered that the approach to record keeping, and sensitivity about retaining written material, was not justified
 - SME’s were entitled to change their minds, but the lack of any explanation for the changes was something that “*could be taken into account when considering whether any particular score [had] been reached manifestly erroneously*” (at [165])
 - *Lancashire Care NHS Foundation Trust and another v Lancashire County Council* [2018] EWHC 1589 (TCC)
 - Moderator’s notes were not a complete record of points made upon moderation and were not consistent in identifying key or influential points
 - Reasons or reasoning for reaching consensus therefore not provided by the notes
 - Pervasiveness of breach led to Court setting aside the award decision

The law

- Changing scores at moderation:
 - *Bechtel* (at [418])
 - Moving from a draft score, in moderation, is not of itself evidence of manifest error
 - A challenger 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
 - Draft scores are not binding such that they have to be “wrong” in order to be changed

The answer to the question – Summary and Recommendations

- Permissible for evaluators to change their assessment in a moderation exercise
- However, the final score awarded must be free from manifest error
- Contracting authorities must ensure that the evaluation process is adequately documented so that the reasons for the scores awarded may be understood
- Not necessary to keep a verbatim record. But a record should be kept of all reasons for the score awarded. Preferably any changes in score from the original scores awarded by evaluators should be explained
- All of the above requires dedicating enough time and resources to the evaluation exercise

Postscript – the Procurement Bill

- Express general duty to act transparently has gone
- Section 12(1) 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.”*
- Weaker than transparency obligation under the PCR. But whether there is any difference in practice remains to be seen



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