

Transparency: NDA & potential appeal issues

Valentina Sloane
Monckton Chambers

Issue 1: Transparency & the reasons for the decision

- *NDA*, para 292

“Regulation 32(2)(b) imposes an express obligation upon an authority to provide reasons. The purpose of requiring such reasons is two-fold. One is to enable the persons concerned to be aware of, and consider, the reasons so that they can, if necessary, defend their rights. The second is to enable the court to exercise its supervisory jurisdiction. That latter purpose would be wholly undermined, or rendered of no effect, if those reasons could arbitrarily be substituted or replaced throughout the proceedings”.

Detailed reasons: challenge on basis of new criteria

- T-477/15 *European Dynamics v European Chemicals Agency (ECHA)*, 1 Feb 2018
- Challenge to criticism that the tender contained insufficient number of examples
- No requirement that negative comments “*correspond literally to one explicit requirement of the technical specifications*”
- See also T-481/14 – rejected challenge to use of focus, specificity and overall value. Fine to use “*generally accepted evaluation criteria*”

Woods Building Services v Milton Keynes Council [2015] EWHC 2011 (TCC)

“In fact, at all three stages, the notes on the spreadsheets were extremely brief. They amounted either to a brief conclusion (rather than a statement of reasons) or a paraphrase of the scoring criteria. Thus, by way of example, for an answer where Woods scored 6, the evaluators noted that the response was generally of a good standard with no significant weaknesses, issues or omissions. That was simply a repetition of the scoring criteria. There was no explanation as to why Woods had achieved that score, much less anything to indicate why it had not received a score of 8 or 10. Similarly, for some of the EAS scores that received 10, the notes simply said "the panel were of the opinion that the response provided was to a very high standard, robust and will add value to the contract". This was another paraphrase of the scoring criteria. It offered no reasons for the score awarded”.

Lancashire Care NHS Foundation Trust & Anor v Lancashire County Council [2018] EWHC 1589 (TCC)

- *“a procurement in which the contracting authority cannot explain why it awarded the scores which it did fails the most basic standard of transparency”*
- *“the negative and positive points are not, without more, themselves reasons or reasoning...The bullet points may provide material that was relevant to the Panel’s reasons and reasoning, but they do not themselves provide the rationale for the consensus scores. And, even where there are comments in addition to the positive and negative points, they do not adequately reveal the panel’s reasons or reasoning”*

Lancashire: standard of record keeping

- *“Lest there be any doubt, I am 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. I also accept that the amount of detail that an authority is required to provide when giving its reasons may vary from contract to contract, depending on all the circumstances relevant to the contract in question. Although the Tender documents adopted a rather simplistic format and structure, this was a substantial and complex contract and procurement”.*

Lancashire: consequence

The Council submits that any breach of Issue 1(a) is not causative since the Trusts have received far more information and documentation by virtue of disclosure than it was entitled to under the 2015 Regulations and this information would have had no bearing on the scoring of the tender. I do not accept the implied submission that the information that the Trusts have received is a substitute for the provision of proper reasons that fulfil the statutory functions of transparency and equal treatment of economic operators. The Council relies upon the notes of the moderation as providing the requisite reasons, and they do not. Furthermore, this is not a case where evidence provided later has plugged the gap, for the reasons already given about the deficiencies of the Council's witness evidence. The failure to provide transparent and comprehensible reasons prevents the Court from making a reliable assessment of material error in circumstances where only a very modest adjustment in scores (for either Tenderer) would be decisive. That is sufficient to demonstrate the materiality of the breach under Issue 1(a), in which case it is common ground that the decision of the Defendant to award the tender to Virgin must be set aside.

C-376/16P *EUIPO v European Dynamics* (3 May 2018)

- EUIPO argument: *“no legal obligation to attach a deduction of points to every negative comment and to give a detailed explanation of how many points were in fact deducted on the basis of that comment”*
- CJEU: EU law *“does not, in principle, require a specific weighting to be attached to every negative or positive comment in the evaluation. That being said, in a situation where the procurement documents contain specific quantified weightings attached to criteria or sub-criteria, the principle of transparency requires a quantified evaluation to be given in respect of those criteria or sub-criteria”*.

Determining weightings after tender submission

- **T-299/11 *European Dynamics v EU Intellectual Property Office***

Rationale indicated that EUIPO had given particular weight to 2 of the 7 sub-criteria; those weightings had not been disclosed

General Court found breach, annulled decision and granted compensation

- **Case C-677/15P, judgment of CJEU (20 Dec 2017)**

CA may determine weightings for sub-criteria after submission of tenders but must not (i) alter criteria; (ii) contain elements which could have affected preparation; (iii) be likely to give rise to discrimination

No “automatic causal link”

No breach unless economic operator shows that conditions are not met

When are the conditions not met?

Interesting discussion by AG in Case C-6/15 *TNS*

Dimarso:

- 2nd condition “seems to be particularly flexible and easily met, since there would always appear to be scope for arguing that each element taken into account by the contracting authority would have been *capable* of having an effect or impact on the preparation of tenders if it had been communicated to tenderers in advance”.
- *Commission v Ireland* (C-226/09, paragraph 48): the existence of such an effect on the preparation of tenders subject to its being ‘significant’, a condition which enabled it to dismiss in part the action for annulment brought by the Commission.
- incumbent on the unsuccessful tenderer, which bears the burden of proof, to demonstrate, by reference to specific examples, the differences (substantive as well as purely formal) which its tender would have exhibited if the elements which the contracting authority neglected to communicate, had been adequately disclosed before the tenders were prepared

Issue 2: Transparency, compliance and clarifications

- *NDA*, para 871:

T-40/01 Scan Office Design SA v European Commission:

"However, even if the contracting authority has a certain margin of discretion in the context of a negotiated procedure, it is always bound to ensure observance of the terms and conditions of the tender specifications, which they have freely chosen to make mandatory."

"Any supposed "disproportionality" could only arise as a result of the direct application of the rules".

Compliance and clarification

- *NDA* differs from approach in earlier cases of *Leadbitter* and *Azam* (Court of Appeal)
- *NDA* is consistent with C-336/12 *Manova*
- Strict approach to adhering to ITT rules (and excluding scope for discretion) also works against the contracting authority: *MLS (Overseas) Ltd v The Secretary of State for Defence* [2018] EWHC 1303 (TCC)

When the ITT stipulates there is discretion to reject

- When does the exercise of the discretion (to reject the tender or to waive non-compliance) breach principles of equal treatment?
- Does the CA have to identify the governing principles in advance?
- Can CAs resist disclosure on basis of legal privilege?

Clarifications

- PCR, Reg 56(4) – “*submit, supplement, clarify or complete*” subject to equal treatment and transparency
- C-599/10 SAG and C-131/16 Archus
- “*To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment*”

Valentina Sloane

Monckton Chambers
vsloane@Monckton.com

