

4 OCTOBER 2023

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Whitepaper Procurement Conference Edinburgh 2023

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Where is the wriggle room for evaluators to shift their initial views during moderation or in response to clarifications and presentations while upholding tender process integrity?

OUTLINE

- Why?
- When?
- How?
- Issues in moderation
- Review of recent cases

What is the purpose of moderation?

PUBLIC PROCUREMENT PRINCIPLES

- 1. Transparency
- 2. Equal treatment
- 3. Non-discrimination
- 4. Proportionality

Must a contracting authority have a moderation stage in every procurement?

Evaluating unclear bids

When evaluating a bid, a submission may be considered to be unclear or an evaluator may feel that they need further information to enable them to evaluate the response properly. In this situation, the public body must ensure that it is **fair** and treats all bidders **equally** in the way that it seeks to clarify these matters. For example, if two bidders have both been vague in different ways about the provision of a service, both should be asked to clarify their answers.



How to request clarifications in a way that upholds integrity?

- Clarifications and responses on clarifications should always be in writing and made through one channel (*Deane Public Works Limited v Northern Ireland Water Limited* ([2009] NICh8), judgment of 28 August 2009)
- It is a good idea to record the clarification questions and answers in a log which is regularly circulated to all bidders. Statements made in clarification questions and answers which relate to the performance of the contract should be incorporated into the final contract to ensure they are binding.

DUE PROCESS DURING EVALUATION

- **Risk of bias** must be reduced to a minimum
- Evaluation **methodology** must be clearly established and communicated to all evaluators
- Ideally, evaluators should consider tenders **separately** before coming together to moderate their scores.

ON WHICH
GROUNDS CAN
THE
TRANSPARENCY
AND INTEGRITY
OF THE
MODERATING
PROCESS BE
CHALLENGED?

- Clarity
- Failure to provide adequate reasons
- Manifest error

HOW CAN
ADJUSTMENTS AT
MODERATION
REFLECT A
TRANSPARENT
AND FAIR
EVALUATION
PROCESS?

- Reasons for the changes are **clear**, **comprehensive**, and **well-documented**, and relate to making sure the scores are **correct**, and assessed in conditions of **effective competition**
- There is **no conflict of interest** within the moderation panel
- The **moderation methodology** is adequate

*LANCASHIRE
CARE NHS
FOUNDATION
TRUST V
LANCASHIRE
COUNTY COUNCIL
[2018] EWHC 1589
(TCC)*

- Moderation of scores was not compliant
- Poor and misleading record keeping: the notes of the moderation were never agreed upon/signed off by the evaluators
- While there is no requirement to disclose a full account of each individual moderating decision, the **reasons given** and the **account of the moderation process** must still be **sufficient to allow a claimant to understand** what has been done in the evaluation/moderation **and why.**

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- Amending of scores cannot take place (administratively) after the moderation exercise has concluded and been signed off
- Poor and misleading record keeping: the notes of the moderation were never agreed upon/signed off by the evaluators
- While there is no requirement to disclose a full account of each individual moderating decision, the **reasons given** and the **account of the moderation process** must still be **sufficient to allow a claimant to understand** what has been done in the evaluation/moderation **and why.**

*BECHTEL
LIMITED V HIGH
SPEED TWO
(HS2) LIMITED
[2021] EHCW
458 (TCC)*

- “...it might be thought that procurement law imposes a counsel of perfection upon contracting authorities, and that any failure to achieve perfection will result in the court’s interference. That would not be an accurate depiction of what procurement law requires, and it is not the approach that the court has adopted in this case”

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MANIFEST ERROR?

- Bechtel also reiterated that manifest error has a broad equivalence to **irrationality** and held that establishing a manifest error is a “high hurdle” to overcome; it requires something more than a disagreement with a score that was awarded.

*BROMCOM
COMPUTERS PLC
V UNITED
LEARNING TRUST
[2022] EWHC 322
(TCC)*

- A contracting authority has to give reasons for its scores, and where it uses several evaluators, there has to be some form of **moderated discussion** leading to **reasoned agreement on the overall scores**.

*OLM SYSTEMS
LIMITED V FIFE
COUNCIL [2020]
CSOH 95*

- Pursuer challenged the transparency of the moderating phase due to a "clear absence of any methodology or transparent procedure for the 'consensus scoring approach' adopted by the Council" from a purely **procedural** standpoint
- Held: the lack of a stated policy does not preclude the contracting authority to apply the award criteria objectively and uniformly and is not inherently more likely to give rise to discrimination in the tender procedure, when the moderating process has been **substantively** conducted in a proper, thorough, and well-documented manner

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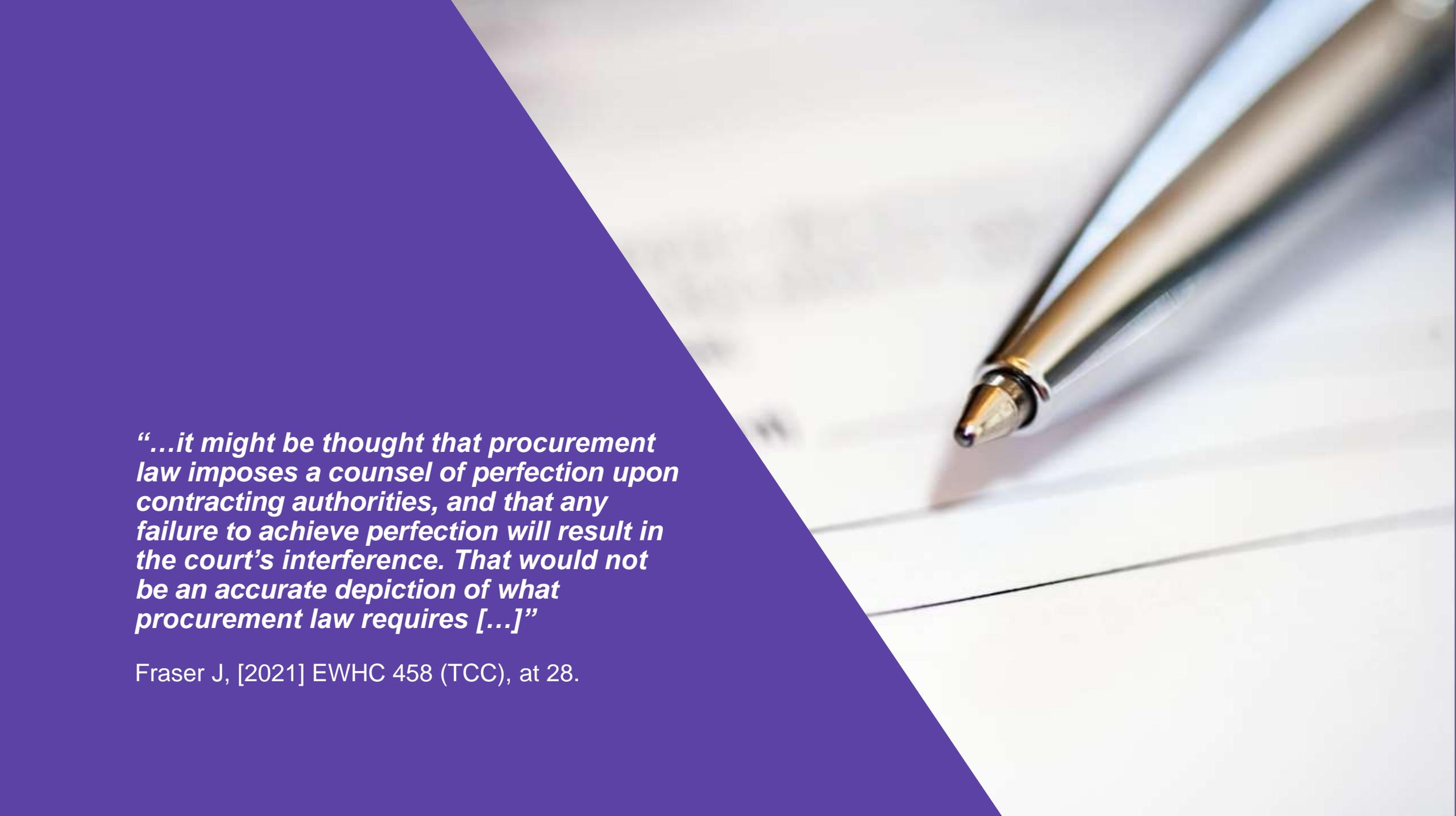
*ENERGY
SOLUTIONS EU
LIMITED V NUCLEAR
DECOMMISSIONING
AUTHORITY [2016]
EWHC 1988*

- Changes to scores made at moderation should be recorded contemporaneously to avoid gaps in records and inconsistencies in rationale
- Don't change scores after closure of the consensus process
- Don't destroy records.

*BRACEURSELF
LTD V NHS
ENGLAND [2022]
EWHC 1532 (TCC)*

- Manifest error in moderation
- Evaluators misunderstood basis of answer
- As a consequence, NHS took into account matters which they should not have taken into account and moderated score from 4 to 3
- The court re-scored the bids for 3 to 4 and determined that the challenger would have been the successful bidder as a consequence of that increased score

In sum: views can shift so long as there is a **clear and discernible rationale**, and as long as the changes are in the interests of the **scores' accuracy** and continue to comply with the **awarding criteria/evaluation method as originally published**, ensuring **effective competition**.



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Fraser J, [2021] EWHC 458 (TCC), at 28.



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Q&A

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