

Learning lessons from NHS procurement litigation : a case study

Fiona Scolding QC

25 September 2018

Why are these cases relevant?

- Both cases provide practical examples of what can go wrong in procurements
- Both provide valuable guidance as to how to avoid those mistakes
- Both show how even with the “light touch regime” process does matter.
- Don't forget: you can never run a perfect procurement.
- Don't also forget: even public bodies without a profit margin get cross when they lose and these days challenge procurement decisions.

Lancashire Care NHS Foundation Trust v Lancashire CC



- 2 judgments

First: automatic suspension under the PCR 2015 [2018] EWHC 200

Second: after an expedited trial a final decision which quashed the procurement process [2018] EWHCC 1589

Background Facts



- All local authorities are responsible for the delivery of 0-19 Public Health Nursing Services. These services included developmental checks, baby services , antenatal and perinatal services for mothers and babies. It also included the School Nursing service and other public health services including mental health services. The services are community based. The contract under challenge here was for the vast majority of such services within Lancashire, and amounted to £104 million pounds over 5 years (or approximately £20 million per year).
- The Foundation Trust, along with Blackpool Teaching Hospitals NHS Foundation Trust had provided the services to date (2017)

Background facts (2)

- The Trusts lost the bid for these services : it was won by Virgin Care.
- The procurement process was short: procurement opened on 29/09/2017 and the decision was announced on 27/11/17. The contract was due to start on 1/3/2018.
- The Trusts lost the bid by a score of 78.5% - 74.43% . Prices were within 0.07% of each other, and the 4% difference represented 2 marks difference in the evaluation of bids.
- The tender process was under the “light touch” regime (as it was for nursing/social care services) .

The light touch regime



- Regulations 74 – 76 of the PCR
- Regulation 74: provides that those contracts set out under Schedule 3 (for these purposes health and social care contracts but also includes education services, social services, social security and benefit services, hotels, administrative services, some prison services , some fire and rescue services, international services and postal services and some legal services) of the Regulations
- Regulation 75: provides that a contract notice should be published, either in line with the Directive or by way of a prior information notice and must specify what is being procurement, when and that no further notice will be given prior to the award. Also provides that a contract award notice shall be provided setting out who has won as set out in the relevant Directive and sent to the EU publications office (see Reg 51 of the PCR 2015)

The light touch regime – Reg 76 of the PCR 2015



This case concerned Reg 76:

76(2) – Provides that the process must ensure compliance with the principles of transparency and equal treatment (i.e. basic procurement principles) of bidders

76(3) – if a contract notice has been published, must conduct the procurement in line with the conditions set out in the notice re: time limits, conditions for participation and the award procedure to be applied

Light Touch Regime – Reg 76 (continued)

- Can depart from the information set out in the notice of procurement as long as:
 - (a) Would not infringe the principles of transparency and equal treatment
 - (b) The authority thinks about and documents how it has considered (a) above
 - (c) It has informed those bidding /expressing an interest in the contract of the changes it proposes to make.
- Any time limits imposed upon bidders as part of the bidding process have to be reasonable and proportionate.
- Can use processes set out in the Regulations or other processes
- Can take account of any relevant considerations when evaluating the bids including:
 - (a) Need to ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services.
 - (b) The specific needs of different categories of users, including disadvantaged and vulnerable groups.
 - © The involvement and empowerment of users
 - (d) Innovation.

Automatic suspension – lessons to be learnt (1)

- The judge refused to lift the automatic suspension (which is unusual)
- Judge assessed the claim on the basis of the “usual” test i.e. (a) was there a serious issue to be tried? (b) were damages and adequate remedy? (c) where did the balance of convenience lie?
- How far does the court at this stage have to take into account the need to demonstrate that a procurement breach is “sufficiently serious” to be awarded damages at this initial stage, when deciding whether or not to lift the suspension? (This is because the case of *NDA v Energy Solutions* [2017] UKSC 34 found that damages should only be awarded if the conditions set out in “*Francovich*” were met – i.e. that (a) the law must have been intended to confer rights of individuals (b) the breach must be sufficiently serious and (c) there must be a causal link between the breach and the damage sustained.

Automatic suspension – lessons (2)

- Judge fudged it: said that this would need “further and more detailed consideration” in the future.
- But the parties agreed that the point should (and to my mind) has to be taken into account in determining the adequacy of damages as presenting an additional requirement which any claimant had to satisfy in order to recover any damages (as we all know – can be very difficult to formulate a claim for damages in these contexts, and relatively little case law on how damages are approached).
- Council argued that to extend the contracts beyond their term would be illegal as the original contracts were placed without reference to procurement law. Judge dismissed that argument and said as only a short period for the purposes of litigation about the tender that this argument could not succeed

Automatic suspension (2)

- The fact that the incumbents were a public body was a relevant factor, as it fed directly into the question of whether damages would be adequate in this specific case (as obviously no “profits” would accrue to a public body) .
- The fact that a trial could be held quickly (was held some six weeks later) was also a point towards maintaining the suspension.
- Identified that the balance of convenience was overwhelmingly in favour of the Trusts because (a) there was evidence they would have to restructure themselves for a second time (having already done so to deliver the contracts they were providing as incumbents recently) (b) would make it more difficult to deliver other public services (cc) will involve significant loss of skilled staff thus again compromising the delivery of other children’s health services and loss of senior staff who managed all contracts.

Automatic suspension (3)

- By contrast, damages would be adequate for the council – in particular given the limited difference in the costs of provision.
- And the actual services would be uninterrupted to trial.
- A desire by the council to get on with things and start the new contract does not weight much in the balance in contrast to the nature of the services, their subject matter and who the services are for.

Disclosure



- Local authority had refused to provide disclosure in relation to the evaluation of Virgin's bid
- Trust made an application for specific disclosure in the light of the TCC Guidance note and case law
- The judge said that the parties should strive to save collective public purse unnecessary expenditure on legal costs and arguing about disclosure is one way in which such can readily be incurred.
- Stated that should be disclosure in respect of evaluation of the bids (this is in line with TCC Guidance note)

Substantive Judgement

- Four day trial
- The relevant evaluators and those in charge of the process at the Council gave evidence at the trial – included a public health expert who had not public procurement experience as an evaluator, and the CCG lead who again had no experience of procurement evaluation .
- A lesson may be to send those evaluating contracts on a course on procurement/evaluation of tenders/identifying principles.

Issues which the Court determined

- That the reasons given by the Council for the scores awarded when evaluating quality were not “sufficient in law” (i.e. good enough) – so therefore a breach of the duty of transparency.
- That this breach was so pervasive that the Court could not decide whether or not there was a “manifest error” in the evaluation of tenders so that there would need to be a full remark undertaken by the Court, which the the Court refused to do (in other cases, the court would have done so)
- The decision was therefore set aside.

Transparency



- Judge provides a helpful summary on the established position on transparency .
- Be clear about what your process will involve : this means within the tender documents should state what procedure is to be followed and how the bids will be marked. This must be in terms that can be objectively assessed and understood by the “reasonable well informed and normally diligent” tenderer.
- Make sure that the process ensures transparency and equal treatment of suppliers
- Sticking to the process you decide to run
- Be clear about the award criteria to be used and the weightings to be given to both criteria and sub criteria within your tender documents.

Reasons for the decision – Have an audit trail

- Imperative that bids are scored
- That there is a final rationale for the score awarded
- If the evaluation process is staged, it should be carried out at every stage.
- The panel had reached agreement as to what the scores were, but there was no agreement on reasoning that lead each evaluator to subscribe to that consensus.
- You need to be able to justify the decision that you made: failure to do so fails “the most basic standards of transparency”
- The evaluation notes should be able to show which scores were arrived at an on what basis: in this case the notes did not contain a full, transparent or fair summary of the discussion that led to the consensus scores to enable the Trust to defend the decision or the Court to examine why things had been decided.

Have a fair moderation process – and have an audit trail



- The council had identified within the ITT points which bidders were meant to cover as part of a satisfactory answer to each question – for example, the question on social value identified that need to show
 - (a) How a bidder will promote equality and raise living standards
- It then set out a list of expected areas to be covered. These included:
 - (a) How to achieve co-production
 - (b) How to utilise local assets, including third sector
 - © How to integrate feedback into service development
 - (d) Create employment opportunities
 - (e) Tackle social isolation

There was an overall weighting, but not a weighting ascribed to each bullet point

Moderation – audit trail (2)



- The judge accepted that it was not necessary to ascribe a score or mark to each bullet point or to tick matters off mechanistically
- But the records of the moderation meeting should show which of those bullet points had been considered and the moderators views on those issues and how this amounted to the points which justified the score to be awarded.
- It was the absence of a comprehensive record of the discussions at moderation so cannot tell what bullet points were/were not discussed.
- Not a record of the points made by the various markers or even what was considered.
- No consistency in the manner in which discussion or decision making processes were recorded.

Moderation – fresh notes

- At the end of the moderation meeting, the officer began to prepare notes on the strengths and cc
- Comparative advantages of the Virgin bid (obviously to then form the contract award notice).
- They were added to the moderation notes without clearly identifying that these were additions, so it looked like the 2 bids had just been compared against each other (which was not the approach adopted in the bid) .
- Moderation – need reasons why the moderated score has been agreed and the rationale for that score to be recorded.

Following the process

- The council's own guidance on running the tender had stated that the chair at the moderation would ensure all evaluation documents , marks scores , evaluations comments and amendments should be fully documented and agreed by both the members of the Panel and the Chair. This did not take place.
- In fact, no-one agreed the notes of the moderation and they were never agreed as an accurate record

Who cares about names: tell us what you are marking



- The judge made the sensible point, after a discussion about what were criteria and what were sub criteria that the authority simply needs to identify in the bid:
 1. What the tenderer is required to address
 2. How marks are going to be awarded
 3. Tenderers must be aware of all the elements to be taken into account when seeing which offer is the most economically advantageous offer and their relative importance.
- And then stick to what it has said it will do. It doesn't matter whether you call the assessment criteria that or sub-criteria.

Don't try and make things look better after the fact



- The Council was criticized in this case for creating documents which were redacted and backdated, which created a misleading impression that the documents had been signed earlier in the process
- Make sure that you recognise that your procurement documentation is prepared as part of a formal, legally reviewable process and that considerable care should be taken to ensure that documents accurately reflect the reality of the process as actually conducted.

Moderation – having an idea of what the key issues are



- Judge also found that there was no consistency in identifying what were the key points (in the bullet points, or overall)
- Also now discussion or or highlighting which areas had been the most influential