

**Learning lessons from NHS procurement litigation : the
Lancashire Care case study**

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Lancashire Care NHS Foundation Trust v Lancashire CC



2 judgments:

- automatic suspension under the PCR 2015: [2018] EWHC 200
- an expedited trial a final decision which quashed the procurement process: [2018] EWHCC 1589

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.
- Moderation is a major risk area - the NDA litigation lessons are not being applied
- Even public bodies without a profit margin will litigate when they lose

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) .

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 (c) 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 weigh much in the balance in contrast to the nature of the services, their subject matter and who the services are for.

Substantive Judgment

- 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 no public procurement experience as an evaluator, and the CCG lead who again had no experience of procurement evaluation.
- Extensive and detailed cross-examination of witnesses

Issues which the Court determined

- That the reasons given by the Council for the scores awarded when evaluating quality were not “sufficient in law” – 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 it needs to 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.

Moderation processes and the need for 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
 - (c) 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 mechanically
- 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 and audit trail (3)

- 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

Conclusions



- *Lancashire Care* another example of procurement processes going wrong at the moderation stage
- Accurate record of the moderation stage and reaching consensus scores is as critical as retention of the individual evaluators own notes
- Distinction between criteria and sub-criteria largely a matter of form not substance: what matters is what tenderers are required to address and how marks are going to be awarded