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Public procurement and evaluation of bids: case law update

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What are the topical issues over the last year?

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- Abnormally low bids: *SRCL v NHS England*
- Equal treatment: *AbbVie v NHS England*, and *Proof IT SA v EIGE*
- Abandoning a procurement competition as a result of a challenge to the bid evaluation: *Amey v West Sussex Council*

A. Abnormally low bids

- SCRL Limited v NHS England [2018] EWHC 1985 TCC

- Key facts:
  - Challenge to outcome of call off “e-auction” for clinical waste disposal contract for GP/pharmacies in NE
  - E-auctions were a reverse auction on price between 4 framework bidders, with Framework agreement acting as upper ceiling
  - Winning bid offered price of £310K. SRCL offered price of £479K.
  - SCRL was receiving £1.2m for same services as incumbent operator and gross profits exceeded 50%
  - Auction held in April 2017, proceedings issued 30 June 2017 (2 main grounds – breach of Reg 69 PCRs, and that the ITT misled bidders regarding non-application of TUPE).

Regulation 69 of the PCRs: is there a general duty to reject a tender on basis that it is AL, what is the extent of the duty, and who decides what is AL?

"69(1) Contracting authorities shall require tenderers to explain the price or costs in the tender where tenders appear to be abnormally low in relation to the works, supplies or services"

…

(4) The contracting authority may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2)

(5) The contracting authority shall reject the tender where it has established that the tender is abnormally low because it does not comply with the applicable obligations in regulation 56(2)"

A duty to reject or a duty to investigate: 3 possible interpretations of Reg 69

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- A general duty to investigate in all cases, and a duty to reject when a tender is abnormally low
- A general duty to investigate in all cases but no general duty to reject if tender is abnormally low (only a power)
- A duty to investigate only if authority wishes to reject a tender and no duty to reject any tender if AL

Confusion regarding old Reg 30(6) PCRs 2006: did it impose a duty to investigate in all cases where a tender appeared abnormally low?

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- **Reg 30(6) PCRs**: "*If an offer for a public contract is abnormally low the contracting authority may reject the offer but only if it has….*". Old Directive stated "*before it may reject*".

- Conflict between Varney & Sons v Herts County Council [2010] EWHC 1404 (QB) and Morrison Facilities Services v Norwich City Council [2010] EWHC 487 in relation to the 2006 PCRs

- Flaux J in Varney at [156] – [157] : "*the thrust of the both provisions [Directive and PCRs] is that an authority cannot reject a tender which is abnormally low unless it does certain things in terms of investigating that tender… there is nothing in either provision to support the contention that there is a general duty owed by the authority to investigate so-called "suspect tenders" which appear abnormally low*…"

- Arnold J in Morrison: general duty to investigate, whether the intention of the contracting authority was to reject the abnormally low tender or not

- Not helped by CJEU in C-599/10 SAG ELV Slovensko determining an issue not before it: "*the European legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that these tenders are genuine*", and the 2014 Directive appearing to codify Slovensko!

Abnormally low bids and Regulation 69 (1): no duty to investigate in all cases where it appears that bid abnormally low

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- SRCL: Fraser J followed Varney re old Reg 30(6) and held that Reg 69(1) not materially different
  - No duty to reject tenders on basis of AL bid, only a power
  - No general duty to investigate all bids. No requirement to determine whether each tender it receives "has the appearance of being AL" [at 203].
  - Duty to investigate only arises where the contracting authority wishes to reject bid on basis of AL:

"*I consider that there is no basis for imposing a general duty to investigate such tenders in all cases. If, in any particular competition the contracting authority considers that a particular tender has the appearance of being abnormally low and the contracting authority considers that the tender should be rejected for that reason, there is a duty upon the contracting authority to require the tenderer to explain its prices. Absent a satisfactory explanation, it is obliged to rejected that tender…[for] non-compliance with certain legislation is the specified fields of environmental and social legalislation. Otherwise it is entitled to reject it if the evidence does not satisfactorily account for the low level of price, but it is not required to do so" (at [193])*

Who ultimately decides whether a bid is AL: the Court or the contracting authority subject only to manifest error?

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- SCRL at [197] confirms that the court will not substitute its own view for that of the contracting authority on whether a tender "has the appearance" of being abnormally low: the Court will only interfere where the contracting authority has been manifestly erroneous in deciding that it does not have that appearance.

- So what does AL mean?

"*There is no definition of what the words "abnormally low" mean. However the expression must encompass a bid which is low (almost invariable lower than the other tenders) and the bid must be beyond the range of anything which might legitimately be considered normal in the context of the particular procurement* (at [204]).

B. The principle of equal treatment

- EU principle of equal treatment reflected in Regulation 18 of the PCRs

- Case C-21/03, C-34/03 Fabricom v Belgium:

  "the equal treatment principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified"

- Case C-243/89 Commission v Denmark:

  "*It is necessary to have regard to the purpose of equal treatment in this context. In general, this is to "ensure the development of effective competition", leading to the selection of the best bid*" (at [33]).

- The fact that one scoring system favours one bidder as compared to an alternative system does not ipso facto make it manifestly wrong : Lion Apparel Systems v Firebuy [2007] EWHC 2179 (Ch)

Equal treatment - when is differential treatment permissible to nullify incumbent operator advantage?

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- Differential treatment to neutralise an incumbent operator's advantage does not amount to unequal treatment, where technically feasible, economically feasible and does not infringe the rights of the existing provider: C-T-345/03 Europaiki Dynamki v Commission.

- T-211/17 Amplexor v Cmn (3% funding allowance for new tenders to finance take over costs, 0.3% to incumbent was lawful) – another case of the ET principle neutralising a competitive advantage where to do so would encourage healthy and effective competition. Test is whether that differential treatment was "arbitrary or excessive"

Incumbent operator advantage: Proof v EIGE

- CaseT-10/17 Proof IT SA v European Institute for Gender Equality (16 October 2018).
- Framework contract for IT services
- Award Criterion 1 stated “Understanding the objective of the framework contract”
- Proof complained that an alleged advantage was enjoyed by the successful tenderer on account of knowledge which it is said to have acquired when it participated in a similar contract concluded with EIGE in 2014 (Dynamiki v Commission, T-345/03, paragraph 70).

Case T-10/17 Proof IT SIA v EIGE

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"It should be pointed out that the alleged advantage of the successful tenderer, on the assumption that it is proven, is not the consequence of any conduct on the part of the contracting authority. Unless such a contractor were automatically excluded from any new call for tenders or, indeed, were forbidden from having part of the contract subcontracted to it, it is in fact inevitable that an advantage will be conferred upon an existing contractor or the tenderer connected to that party by virtue of a subcontract, since that is inherent in any situation in which a contracting authority decides to initiate a tendering procedure for the award of a contract which has been performed, up to that point, by a single contractor. That fact constitutes, in effect, an 'inherent de facto advantage' (judgment of 12 March 2008, Evropaïki Dynamiki v Commission, T-345/03, EU:T:2008:67, paragraph 70)."

Abbvie Ltd v NHS England [2019] EWHC 61 (TCC)

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- Procurement for the supply of Hepatitis C treatments
- £1bn contract value (5 years)
- Challenge to the Invitation to Participate in Dialogie ("ITPD") and "Invitation to Submit Final Tenders" for up to three three lots/contracts on grounds that they were unlawful due to a breach of equal treatment
- Dummy Price Mechanism ("**DPM**") imputed (or "credited") a price to a bidder for a particular treatment that a bidder in fact does not produce (the credited score was the lowest price of any other bidder). Abbvie claimed that this conferred an unfair advantage on bidders unable to supply that treatment
- Unmetered Access Model ("**UAM**") – fixed fee for a committed number of patients to be treated in the contract. Other bidders had to make up any shortfall in treatment without additional compensation.

Is there a margin of appreciation available to contracting authorities when assessing whether there has been a breach of the equal treatment principle?

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- Lion Apparel: "*If the authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the authority to have a margin of appreciation as to the extent to which it will or will not comply with its obligations*" (at[36])

- Abbvie: "*if the difference in treatment falls outside of that margin and/or is considered to be 'arbitrary or excessive', then the Authority has no further margin of appreciation. The unequal treatment must be shown to objectively justified and if it is not then the breach would be established*" (at [67]).

Abbvie (1) : no breach of equal treatment in the use of the DPM

- Claimant claimed (1) reason bidders (who had all qualified) were not in a similar position was because of the way that the Defendant had structured the evaluation and (2) alternatively, if bidders were genuinely in different situations, that same evaluation methodology had been applied.
- Defendant submitted that DPM was simply a means to compare the relative economic value of each of bids on a like for like basis, and nothing deprived Claimants of achieving a bid lower than “credited” bidder
- Court held no breach of ET:
  - **difference in position** between bidders was not the result of the assessment mechanism or procurement design, but a function of the market and the fact that the Claimant was first to market with the particular drug in question. Situation was similar to “incumbent operator” cases (at 76[iv]).
  - **Different treatment** had been applied: no price imputed to bidders who could supply the drug in question.
  - **No unfair advantage** arose: it was a dummy price, and nothing to stop Claimants winning overall.

Equal treatment and whether it is objectively justified

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- Final question arose in Abbvie as to whether or the differential treatment in the DPM was “objectively justified”.
- Claimant argued that the aim of the procurement was “purely economic”, and therefore this aim could not justify any breach of the equal treatment principle (in reliance on C-322 **DocMorris NV**: “aims of a purely economic nature cannot justify restricting the fundamental freedom to provide services”.
- On the facts held:
  - that this was not the sole aim, which included making drugs more affordable, increased competition, and maximising health benefits
  - DPM was suitable for achieving the stated aims and did not go beyond what was necessary (even though no modelling done).

Abbvie (2): whether the UAM contractual mechanism constituted a breach of equal treatment

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- Fixed fees in the UAM comprised terms of the contract being procured, which Claimant held were inherently unfair if awarded

- Court held that this claim fell with the scope of the PCRs even though it did not concern the procedure governing the procurement of those contracts.

- HELD: "*the proposed terms of the contract being procured are very much subject to the same obligations of equality and transparency as the procedural aspects of the Procurement…a contractual change which benefitted one supplier unfairly would clearly be material and could be challenged as a breach of, amongst other matters, the Pressetext principle. It would if that same fair unfair contractual provision could not be challenged a a breach of the equality principle merely because it was included at the outset*" (at [150]).
- On the facts, difference in popularity in treatments offered by Claimant and the other bidder did not mean that these two bidders were not in a comparable position for the purpose of the tendering exercise. There was no fixed market share and no controls on prescribing. So just because Claimant happened to have a more popular product was a difference in competitive position and did not need to be catered for in the rules (at [156], and the fixed fee package was in any event objectively justified.

C. Abandoning a procurement exercise

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- Amey Highways Ltd v West Sussex County Council [2019] EWHC 1291 (TCC)
- Highways maintenance contract, Amey was scored 85.48, Ringway scored 85.51
- Challenge was brought to the bid evaluation seeking damages (£28m loss of profit, £1m wasted bid costs). Suspension was not lifted and contract not entered into. After failing to strike out Amey's claim, Council then gave notice it was abandoning the procurement due to the litigation risk and in the hope of superseding Amey's claim. Amey challenged the lawfulness of that withdrawal in an additional claim.

What are the principles relevant to a decision to abandon a procurement competition?

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- A contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and therefore in respect of any decision not to award a contract and abandon a procurement (see Embassy Limousines & Services v. European Parliament T-203/96 [1999] 1 C.M.L.R. 667 at [56]);

- The exercise of that discretion is not limited to exceptional cases or has necessarily to be based on serious grounds (see Metalmeccanica Fracasso SpA v. Amt de Salzburger Landesregierung [1999] ECR I-5697, [2000] 2 CMLR 1150 at [23]);

- There is no implied obligation under the Public Contracts Directive or the Regulations to carry the award procedure to its conclusion (see *Metalmeccanica* supra. at [24] and [33]);

Abandonment (2): general principles

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- The decision is "subject to the fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services" (see Hospital Ingenieure ("HI") v. Stadt Wien [2004] 3 CMLR 16 at [42] and [47]);

- A contracting authority has power to abandon a procurement without contract award "when it discovers after examining and comparing the tenders that, because of the errors committed in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of Community law on public procurement such as the principle of equal treatment" (see Kauppatalo Hansel v. Imatran Kaupunck [2003] ECR I-12139 at [36]);

Abandoning the procurement exercise does not affect a pre-existing claim for damages

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- Council argued that “it was a critical element of the cause of action created by the PCRs that the public law decision or action challenged by the claimant retains its legal status and effect and is capable of being set aside”
- HELD:
  - private law remedy of an award of damages subsist whether or not any public law remedies are available [at 57];
  - Accrued cause of action is fundamentally different from an inchoate claim that might become enforceable at some future date [61]. So abandoning a procurement can prevent private law claims coming into existence thereafter (for example if a contracting authority realises that awarding a contract would not be the most economically advantageous and so abandons at that point). But it cannot extinguish an accrued cause of action.
  - Principle of equal treatment does not require the cancellation of an existing accrued cause of action, on the basis that they accepted that risk when bidding for the contract in the first place. (at [61]

Was the abandonment decision manifestly erroneous?

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- On the facts, hope of withdrawing the procurement would cancel Amey's cause of action was only one element of the reasoning behind the abandonment. It was a "rational attempt to preserve public funds taking into account a number of factors including potential costs to be saved if First Action could be disposed of… and need to secure provision of critical services over the winter, and developing a more advantageous solution on re-procurement" (at [83])

- No breach of equal treatment – no binding commitment to bidders and all bidders accepted the risk of a rational decision to withdraw the procurement (at [85]).

- **SO**: not irrational to take into account savings if abandonment may make it easier to settle litigation, but care has to be taken not to suggest that sole reason of abandonment is to nullify a claim already filed (a subtle but important distinction).

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