

Abandonment

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- Weighing up the different legal and practical options, how can clients control - and overcome - the risks of abandoning a procurement following the *Amey* judgment?

There is a wide discretion to abandon a procurement (*Metalmeccanica Fracasso* (1999)):

- Not limited to exceptional cases
- Does not necessarily need to be justified by serious grounds

- A decision to abandon is subject to the principles of transparency and equal treatment (*Hospital Ingénieure* (2002))
- There is no obligation to carry a procurement to its conclusion provided that the principles of transparency and equal treatment are complied with (*Croce Amica* (2014))

Reasons must be given:

- Regulation 55
- To ensure a minimum level of transparency and hence compliance with the principles of equal treatment (*Hospital Ingenieure*)

Discretion often expressly included in tender documents e.g.

- The Authority reserves the right not to award a contract and/or to cancel the process in its entirety
- The Authority shall not be liable for any costs incurred by any party tendering for the contract

A very useful discretion with a wide ranges of uses? Yes – if:

- Authority's requirements change
- Authority cannot afford to proceed
- Authority has set the procurement up wrong/unclearly (e.g. *Federal Security Services v Northern Ireland Court Service* (2009))

A very useful discretion with a wide ranges of uses?

- Not – if the Authority doesn't like the identity of the winner
- What about – if the Authority wants to dispose of risky litigation?

Amey Highways Ltd v West Sussex County Council (2019)



The facts:

- Procurement under the PCR 2015 - the Council decided to award to Ringway
- Amey's score was 0.03 lower
- Amey started the First Action claiming that it should have been awarded the contract as a result of breaches

- Amey's monetary claim was £28m loss of profit and/or £1m wasted tender costs
- The Council applied to strike out critical parts of the claim but failed
- The Council then decided to abandon the procurement

The abandonment notice:

- *The procurement has been subject to a legal challenge, which raises a number of issues and risks. The Council is aware that litigation of this sort is expensive, protracted and inherently uncertain in terms of outcome. The Council has carefully considered the overall position. With regret, it has come to the view that, in the circumstances the termination of the procurement is the most appropriate action*

- Amey started a Second Action, challenging the lawfulness and effect of the abandonment
- The actions were consolidated
- The Court ordered a trial of the Second Action – on the assumption that Amey would succeed in the First Action in showing that it should have been the highest scoring tenderer

There were 7 issues:

- Issues 1 – 4: Was the abandonment decision unlawful (whether manifestly erroneous or in breach of the principles of equal treatment and/or transparency)
- Issue 5: Did the breach cause Amey loss – in particular, would the Council have decided to abandon the procurement on a lawful basis in any event?
- Issue 7: What was the effect of the abandonment decision on the First Claim?

Findings of fact included:

- The Council hoped and intended that the abandonment would have the effect of terminating Amey's claim in the First Action – but did not believe that it was bound to have that effect
- The driver for the decision to abandon was Amey's legal challenge and the terms of the strike out judgment – there was no other rationale driving the decision to abandon

Issue 5:

- No evidence to cast doubt on the proposition that Amey would have been awarded the contract if it had scored higher than Ringway
- No argument by the Council in First Action that Ringway's score was too low

- No evidence to support a finding that the Council would have abandoned the procurement on a lawful basis in any event

- Conclusion:
 - Council would not have abandoned lawfully in any event and

 - Amey (assuming it was right in the First Action) would have suffered loss and damage

Issue 7:

- The Judge summarised the issue as whether a lawful abandonment has the effect of depriving a tenderer of an accrued cause of action where, before the procurement is abandoned, a breach can be proved to have caused the tenderer loss and damage

- The Judge accepted that a lawful abandonment:
 - would prevent further causes of action from accruing in the future
 - Would terminate the procurement

- But there was no basis in the Regulations, case law or principle of equal treatment for the abandonment to have the effect of cancelling an existing accrued cause of action

Para 76:

- The acknowledged broad discretion has considerable value even without the cancellation of accrued causes of action
- The inherent nature of an accrued cause of action means that the power to cancel it by termination of the procurement requires either clear statutory sanction, cogent policy justification or binding prior authority – all lacking

Issues 1 – 4 (lawfulness) :

- The Judge rejected Amey's primary case that the premise for the Council's decision was that it would extinguish the claim – in fact was a misplaced hope and belief that it would do so
- In any event, the decision was not irrational
- It was rational attempt to preserve public funds

- There was no breach of the principle of equal treatment because all bidders took the risk of a rational decision to abandon
- Council could have explained its reasons more fully or in different terms, but there was no breach of transparency

What are an authority's options now?



Abandonment is still *“of considerable value”* and of use in a *“wide range of circumstances”*

- If continuing would mean awarding a contract which was not the MEAT
- If proceeding to award would not be expedient from the point of view of the public interest
- If it becomes apparent that continuing will mean that the authority will act in breach of private or public law duties

What are the options if the problem is a risky claim?

- Settle
- Proceed with the litigation
- Reverse the decision
- Re-mark
- Argue that the winning bidder should have scored higher

- Prevent the risky claim arising?
 - Training and guidance
 - Review the scores before issuing the contract award decision
 - Check list of dos and don'ts

- More transparency during the course of the procurement
- Ensure there is a proper audit trail of decision making
- Ensure there are clear evaluation notes

What can the winning bidder do?



- Seek more extensive Interested Party status?
- Make its own claim?

- Abandonment is still useful but is not a cure for all breaches
- Get your procurement right
- Consider Brexiting?