

Evaluation: How much leeway do suppliers have to challenge an evaluator's judgment in applying the assessment methodology to the award criteria?

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The departing EU law derived regime

- PCR 2015, reg. 18 – EU law derived duties of transparency, equal treatment, proportionality etc. are no more
- Similarly, ‘manifest error’ is an EU law concept and should be retired
- But how much of any of this really matters, given TCC increasingly recognised that manifest error, equal treatment and proportionality in substance amount to applying a domestic public law rationality test?
- See:
 - *AbbVie*, §§59-67 (specifically considering and disapproving *Firebuy* and *Woods v Milton Keynes* on this point), *Ryhurst*, §§38-43 and *Bechtel*, §§302-304: Equal treatment principle involves significant margin of appreciation at both stages (i.e. comparability and objective justification for differential treatment)
 - *Bechtel*: The Court “*will only interfere in an evaluation if there has been ‘manifest error’*” (§19). The test for ‘manifest error’ is “*simply another way of expressing “irrationality”*” (§23). Contracting authorities are entitled to act within a “*margin of discretion*” (§19). This reflects, the “*institutional competence of those charged with the decision-making process*” (§25), including the competence of “*Subject Matter Experts*” (§25). The Court must respect the “*subjective professional judgment*”, or “*subjective judgment calls*”, of the contracting authority: §§141-142; 409-410.

- What (i) grounds of challenge are available to C, and (ii) the standard of review the Court will apply, are central to how effective the Procurement Act 2022 (“**the Act**”) regime will be in practice
- Surprisingly, the Act is generally silent on these issues
- Neither self-evident or inevitable that the Court’s approach will be consistent with existing case-law under the EU derived regime
- The reality is that a great deal will be up for grabs in the first 2-3 cases under the Act that make it to trial and judgment, i.e. (i) are the challenges strong or weak, and (ii) are the parties properly resourced/represented.

The new regime

- Cabinet Office guidance (on remedies) assumes, albeit without any real analysis, that there will be little (if any) substantive change:

*“56. By ensuring that those involved in carrying out procurements are aware that **public law principles** require public bodies to act **fairly and rationally** when making decisions and that they must have regard to the objectives in section 12 of the Act (to share information and act, and be seen to act, with integrity), contracting authorities can assure suppliers that the procurement is robust and fair and that they can have confidence in the procurement.”* (emphasis added)

- Suggests: (i) (unspecified) ‘public law principles’ apply, and (ii) these require (at least): (a) substantive fairness (not a domestic public law principle at all...), (b) rationality, and (c) compliance with the s. 12 duties (i.e. ‘regard’ to statutory objectives and equal treatment)

- Necessary to consider specific provisions and legislation scheme of the Act as a whole
 - s. 11 Contracting Authority (“**CA**”) may not carry out a procurement except *“in accordance with Act”* and may not enter into public contract unless award *“in accordance with”*...s. 19
 - s. 23(3) CA *“must”* specify award criteria and how tenders to be assessed against them
 - *hook to complain about any failure correctly to apply evaluation criteria/methodology*
 - S. 21(1) Before awarding public contract... CA must carry out a competitive tendering procedure *“in accordance with a tender notice and any associated tender documents”*
 - *hook to complain about failure to apply rules stated in tender documents*

- CA “*must treat suppliers the same unless a difference between them justifies different treatment*” – so s. 23 criteria, methodologies and rules must be applied **consistently** to all tenders
- **s. 19(2) The MAT is the tender “CA considers”: (a) satisfies the requirements, and (b) best satisfies the award criteria...assessed by reference to the s. 23 “assessment methodology” – links to ss, 21 and 23 and recognises role of **judgment** of the CA
- s. 19(1) CA “may” award to the MAT – i.e. CA **cannot** award to bidder other than the MAT, i.e. cannot lawfully award if made error of sort addressed above

- Fundamental principle is that all duties/powers and discretions in legislation are subject to public law principles
- *Rooke's case* (1598) 5 Co Rep 99b *per* Lord Coke “...notwithstanding that the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law.”
- *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 *per* Lord Reid at 1030: there is no such thing as an unfettered discretion in administrative law. Parliament always confers a discretionary power with the intention that it should be used to promote the policy and objects of the Act concerned; and the policy and objects must be determined by construing the Act as a whole.

1. Misdirection in respect of meaning of written documents

- *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13 at §35:

“We are concerned here with a particular provision in the...documents to which the respondents are required to have regard by the statute. The meaning to be given to the crucial phrase is not a matter that can be left to the judgment of the authority. Nor, as the Lord Ordinary put it in his opinion at [2010] CSOH 128, para 23, is the interpretation of the policy which it sets out primarily a matter for the decision maker. As Mr Thomson for the interveners pointed out, the challenge to the respondents’ decision to follow the Director’s recommendation and approve the proposed development is not that it was Wednesbury unreasonable but that it was unlawful. I agree with Lord Reed that the issue is one of law, reading the words used objectively in their proper context.” (emphasis added)

- Misdirection as to meaning of tender documents/tender responses most frequent/potent ground of challenge in my experience

1. Misdirection as to meaning of written documents

- However, critical to distinguish (i) interpretation of the written documents, and (ii) judgmental application of the tender rule/criteria (once properly construed) to a particular set of facts
- *R v Monopolies and Mergers Commission, Ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23: decision by the Monopolies and Mergers Commission that the acquisition of certain bus companies might operate contrary to the public interest. MCC only had jurisdiction if the reference area (South Yorkshire) was “a substantial part of the United Kingdom”

1. Misdirection as to meaning of written documents

- At p32:

“The respondents say that...the question of jurisdiction...is a hard-edged question. There is no room for legitimate disagreement. Either the commission had jurisdiction or it had not. The fact that it is quite hard to discover the meaning of section 64(3) makes no difference. It does have a correct meaning, and one meaning alone; and once this is ascertained a correct application of it to the facts of the case will always yield the same answer. If the commission has reached a different answer it is wrong, and the court can and must intervene.”

- Lord Mustill explained the correct analysis in the following terms:

*“I agree...only in part. Once the criterion for a judgment has been properly understood, the fact that it was formerly part of a range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ becomes a matter of history. The judgment now proceeds unequivocally on the basis of the criterion as ascertained. So far, no room for controversy. **But this clear-cut approach cannot be applied to every case, for the criterion so established may itself be so imprecise that different decision- makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational...**” (emphasis added)*

2. Procedural fairness

- Potentially the most significant addition/change for purpose of evaluation challenges
- *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194: “although there are no positive words in a statute requiring that the parties shall be heard, yet the justice of the common law will supply the omission of the legislature”
- *Ex p Doody* [1994] 1 AC 531 at 560 per Lord Mustill:

(1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances...(3) ...What fairness demands is dependent on the context of the decision...(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) **Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.** (6) **Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.**” (emphasis added)

2. Procedural fairness

- Critically, procedural fairness is an objective question for the Court (no margin of discretion)
- *R v Criminal Injuries Compensation Board ex p A [1999] AC 330 at 345* per Lord Slynn:
“It does not seem to me necessary to find that anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness ”
- Huge scope for argument as to whether, and to what extent, principles of procedural fairness should/should not be read into different contexts/areas of the Act. However, two obvious candidates:
 - Disqualification (or pass/fail) decisions
 - Clarification

2. Procedural fairness - disqualification

- Some useful recent examples from Northern Ireland (award processes outside the EU derived regime)
- *EP Kilroot [2024] NIKB 105*: NI Utility Authority, electricity capacity auction, DQ'd C from participation based (in part) on concern re. ability complete construction before start of capacity year (notable that all other grounds of challenge failed)
- *Prime Power Generation [2024] NIKB 102*: NI Utility Authority, electricity capacity auction, DQ'd C from participation based (in part) on concern re. whether proposed capacity unit was eligible for participation.
- Judgments make clear application of procedural fairness highly fact sensitive, but obvious application to any substantial negotiated/competitive dialogue type procedure.

2. Procedural fairness - clarification

- *Optima v SSWP*[2025] EWCA Civ 127 at §91: “Common sense is therefore required when applying the rules to achieve those ends: experienced evaluators working for contracting authorities should know when a response to a request for clarification is a simple adjustment of the kind they generally expected, and when it is an attempt to have another go. The latter is a new bid or a substantial change to the original bid.”
- Unhelpfully, the Act is silent on clarification
- S. 12 (equal treatment) certainly applies. However, If procedural fairness is the applicable principle then question as to whether there is an obligation/entitlement to clarify is an objective question for the Court

3. Rationality vs manifest error: does it matter?

- In most cases, likely **not** because: (i) legal principles are similar (if not identical, see slide 1), and (ii) what most often determines the outcome of procurement challenges is not the legal principles or standard of review the Court applies, **but rather how the CA witnesses perform when cross-examined**
- Most significant feature of the Act is that it continues to give effect to procurement law claims as actions in tort for breach of statutory duty. Consequences of this are that: (i) conducted as part 7 proceedings, not judicial reviews, (ii) extensive documentary disclosure, and (in particular) (iii) ability to cross-examine responsible decision-makers
- Impossible to over-state how fundamental cross-examination is to outcome of these cases: see *Woods*, *EnergySolutions*, *Consultant Connect*, *Bromcom* etc.

3. Rationality vs manifest error: does it matter?

- Some examples from *Woods v Milton Keynes* – (successful, wide-ranging, evaluation challenge)
- Q2.1 ‘Provide a method statement (of two A4 pages maximum) setting out your proposals to meet the requirements of the service information.’
- £8 million contract for (i) asbestos removal work from homes, and (ii) reinstatement of premises (40% of total value)
- In cross-examination Mr Pink accepted PB provided no adequate proposals for reinstatement (§49):

“There was then this exchange:

Counsel: Is it really acceptable for £3 million of public money to be spent on reinstatement works in response to a tender where you have not received a single proposal in relation to how that £3 million worth of work is going to be done?

Mr Pink: [Pause] If you put it like that, No.”

- Any difference under the Act? Unlikely – error in interpretation of tender documents/irrationality

3. Rationality vs manifest error: does it matter?

- Q2.3 ‘specify the members of delivery/project team, including their roles and responsibilities (including CVs)’
- PB awarded higher score because it referred to team leader as “Contract Manager” while C referred to Project Director. D inferred PB’s leader would be exclusively dedicated to contract and C’s would not
- In cross-examination Mr Pink agreed there was no basis for this inference/assumption (§73):

“That element of the cross-examination concluded as follows:

“Q: The fact that Woods used the title Project Director rather than Contract Director or Project Manager cannot provide any proper basis to penalise the Woods tender, can it?”

A: [pause] At the time we looked at it, that is how we looked at it.

Q: I’m not asking you that question Mr Pink. We have looked at the tenders properly now. This did not provide any proper basis, did it, to penalise the Woods tender?”

A: [pause] No.”

- Any difference under the Act? Unlikely – error in interpretation of tender responses/irrationality

3. Rationality vs manifest error: does it matter?

- Q3.3 *'please describe how you would manage the defect correction period...'* . KPIs required complaints acknowledged within 24 hours and a reasonable response made within 5 working days
- PB awarded higher score despite proposing complaints would be dealt with *within 10* days. In cross-examination Mr Grace agreed that proposal failed to satisfy the KPIs (§107):

"Q: There is no mention, is there, of queries and complaints being acknowledged within 24 hours? A: No.

Q: There is no mention, is there, of a reasonable response being made within five working days? A: No.

Q: So if it is not complex, it has to be...dealt with within five working days, yes? A: Yes...

Q: .If you have a non- complex complaint and EAS acknowledges it after 7 days, logs it after 8 days and remedies it on day 9, that is in breach and clearly non-compliant with the contractual KPI requirement, is it not? A: I did not see that, I thought I saw –

[Repeat question]

A: Correct."

- Any difference under the Act? Unlikely – error in interpretation of tender documents or response/irrationality

3. Rationality vs manifest error: does it matter?

- I have repeated this exercise for each of the successful scoring grounds of claim in *Woods*, *EnergySolutions v NDA*, *Consultant Connect* and *Bromcom v ULT* (so that you don't have to...)
- Have not identified an example where I consider it more likely than not a different conclusion would have been reached under the Act
- (If you would like the full table, send me an email: joseph.barrett@11kbw.com)

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