Note on *(1) Lancashire Care NHS Foundation Trust and (2) Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council*

Brendan McGurk, Barrister, Monckton Chambers

1. This case concerned the procurement by the Defendant of a public contract relating to the provision of Public Health Nursing Services for persons aged 0-19 in Lancashire. The Claimants were the incumbent providers. On the procurement (which was conducted under the light touch procedure and which therefore was required to comply with Regulations 74-76 of the PCR 2015) the contract was awarded to Virgin Care Services Ltd. In essence, the Trusts challenged the Authority's evaluation of the bids, the scoring methodology applied, and the transparency of the award criteria. The TCC (Stuart-Smith J) found that the reasons given by the Authority for the scores awarded to the Claimants and to Virgin were insufficient in law. That finding was itself sufficient for the contract to Virgin to be set aside.

2. The OJEU Notice by which the contract was advertised cross-referred to the procurement documents for a statement of the award criteria. It followed that Regulation 74(3) of the PCR 2015 applied to the procurement. It further followed that the tender documents were required to state the process to be followed, including how marking of bids would be carried out, in terms that could be objectively assessed and understood by a reasonably well-informed and normally diligent tenderer (a RWIND tenderer); and, having done so, the contracting authority would be required to stick to that procedure. The Judge stated that what mattered was "that the authority should identify (a) what the tenderer is required to address and (b) how marks are going to be awarded. Once it does that, it must (subject to exceptions that do not apply in this case) stick to what it has said it requires of tenderers and how it has said it will mark the tenders…Put another way, "potential tenderers should be aware of all the elements to be taken into account by the contracting authority in identifying the economically most advantageous offer, and their relative importance, when they prepare their tenders…": see Case 532/06 ***Lianakis*** [2008] ECR I-251 at [36]."

3. The case specifically concerned the "Stage 2 Award Evaluation criteria (for each lot)" which detailed that the non-price (i.e. quality) criteria would account for 80% of the marks and that price would account for 20% of the marks. The case concerned only one lot, Lot 1, which was worth over 95% of the value of the procurement. The overarching Award Evaluation document set out the award criteria for Lot 1, the maximum pre-weighted score for each (non-price) award criteria and the weighting factor to be applied, giving a maximum percentage score for each of those criteria.

4. The seven award criteria were further specified in Appendix G of the ITT where it became apparent that each non-price criteria was the subject of a question. Under each of the seven (award criteria) questions was a further set of bullet points (to which no marks were separately attributed). In instructions given to the evaluators, it was suggested that "Scores must be based on the evaluation sub-criteria identified directly under each question." The Judge found each bullet was to carry equal weighting and was thus to be assessed qualitatively within the quantitative evaluation of each question. T The judge observed:

"23 In their initial statements for trial, the Council's witnesses generally referred to the Appendix G questions as "criteria" and the bullet points as "sub-criteria". In doing so they followed the language of Appendix G. In supplemental statements shortly before trial, two evaluators (Ms Jones and Dr Slade) and Mr Fairclough shifted their ground so as to suggest that there were two "criteria" (quality and pricing) and seven "sub-criteria" (Q1 to Q7). In doing so they adopted the approach of Appendix K. I do not know what provoked this change of heart and evidence; but I do not think it matters. Applying the principles I have outlined above, it is clear that questions Q1 to Q7 and the bullet points under each question were basic elements in the approach to be adopted and applied consistently by tenderers and the authority alike. In other words, the Council was required to assess the tenderer's answers in the manner set out in the tender documents and, specifically, ensuring that the mark awarded for each question took into account how the tenderer had covered the bullet points under the question being marked."

5. The judge then described the evaluative methodology adopted by four evaluators (paras 24-26) and the process of moderation that followed (para 27). The judge found that the process of moderation was such that the evaluators' original score sheets were not a reliable guide to the reasons that ultimately caused the group to reach their consensus scores (para 28). The evaluators instituted a system whereby each bullet point was discussed in turn. However, the discussion in relation to each question was initiated by reference to the comments (negative and positive) that the evaluators brought to the discussion as a result of their previous evaluations. The judge found that:

"they had the bullet points before them and had them in mind during the moderation process, even if one or more was not expressly spoken about. Although the moderation notes do not demonstrate that express consideration of each bullet point was undertaken, the range of views and the thoroughness in the approach of the five panel members in their initial evaluations means that the views they expressed in the moderation were informed by their consideration of all the bullet points even if, as may have

happened, some were not expressly mentioned."

6. The judge then compared how the process of moderation was applied to both the Claimants' bids and Virgin's bid, highlighting various contrasts in the notes of the evaluators' approach to each. The judge noted (para 36) that there was no consistency either in identifying what were said to be key points or in highlighting points to show that they had been influential. He further noted (para 37) that *"The lack of clarity in the manner of recording the discussion and reasoning of the panel is compounded by the interpolation of comments which, on their face, appear to indicate that the scoring was done by comparing the Trusts' answers with Virgin's, which was not the permitted approach."*

7. It was found that the moderator, at the end of the process, used some of the standstill feedback at the same time that the evaluators were discussing the relative advantages of the highest scoring tender. The judge, having accepted that the moderator did not adopt a comparative approach when reaching the consensus scores, nevertheless – and having considered the discussion of the standstill feedback - "went back and either deleted or overwrote some of the positive comments." It is that that led to the use of comparative language in the notes recording how consensus was reached on the scores. The judge observed (para 39):

   "The weakness of the approach that was adopted is highlighted by the fact that the moderator] cannot now remember which parts of the passages in question were added as part of the standstill feedback gathering process. I have no confidence that the only points that were altered during this latter stage were those where a relative comment is to be found."

8. The Court also found that the Authority failed to follow its own Tender Panel Guidance in relation to the records of the evaluation. The notes of the moderation were never agreed as such by the evaluators. More damming was the finding that when the Claimant subsequently pressed for information, the Authority misled them by first redacting the dates and then backdating three of the individual members' evaluation notes. The judge said (para 43) "to describe this (as the Council did) as merely "a regrettable episode of poor administration" is, to my mind, an unacceptable understatement."

9. The Judge applied the familiar principles in the two well-known ***European Dynamiki*** [1] decisions as to the need for an adequate statement of reasons

[1] Case 272/06 ***Evropaiki Dynamiki*** [2008] ECR-II 00169 and Case 447/10 ***Evropaiki Dynamiki***. He also referred to Lord Reed's observations in ***Healthcare at Home Limited v The Common Services Agency*** [2014] UKSC 49 at para 17 and McCloskey J's observations in ***Resource (NI) v NICTS*** [2011] NIQB at para 35.

to enable a bidder to understand whether or not a decision was well-founded such as to enable a that bidder to assert its rights and for the Court to exercise its power of review. The need to provide 'reasons' and 'reasoning' was not the same as providing as list of factors that were taken into account. That is because not all such factors were accorded equal weight (and the evidence indicated positively that they were not afforded equal weight).

10. Having considered the statements of principle in the cases, the Judge looked for the reasons why the Authority awarded the scores that it did. In that regard the judge accepted the submission (para 54) that "a procurement in which the contracting authority cannot explain why it awarded the scores which it did fails the most basic standard of transparency." He also noted that although an Authority is not obliged to disclose its moderation notes, "where, however, the authority relies upon those notes as setting out the written reasons for the evaluators' decisions, it is to those notes that the Court must look for the reasons and reasoning adopted by the Authority". (Para 55). He thus found as follows (paras 56-59):

"56…The inconsistency in approach in the recording of the moderation of different questions in each tenderer's bid means that it is not possible to identify a structure in the notes which reveals the reasoning process adopted by the panel that led to and explains their consensus scores on a given question. Furthermore, although the witnesses called by the [Authority] gave broadly similar accounts of the process that was followed, their evidence was not congruent either as to the process or the reasoning that was deployed in the course of the process. This is not surprising; nor is it intrinsically a criticism of the panel members or [the moderator]: see [32] above. But it does emphasise the critical importance of being able to find the reasons and reasoning that led to the scores in the notes themselves.

58…viewed overall, I am satisfied that the notes do not provide a full, transparent, or fair summary of the discussions that led to the consensus scores sufficient to enable the Trusts to defend their rights or the Court to discharge its supervisory jurisdiction. First, there is evidence, which I accept, that other reasons (including some agreed reasons) were in play and are not reflected in the notes. Second, pervasively there is no or no sufficient account of the reasoning and reasons that led panel members to resolve their differences (if they did) so as to arrive at consensus scores.

59 Lest there be any doubt, I am not suggesting that it was necessary to keep a complete record of what was said or a comprehensive note of every point that was made. I also accept that the amount of detail that an authority is required to provide when giving its reasons may vary from

contract to contract, depending on all the circumstances relevant to the contract in question. Although the Tender documents adopted a rather simplistic format and structure, this was a substantial and complex contract and procurement. I reject each of the main limbs of the Council's response as set out at [48] above. In summary, the negative and positive points are not, without more, themselves reasons or reasoning and the written reasons do not adequately set out the panel's reasons or reasoning. While the notes record lists of positive and negative points, they do not do so "as comprehensively as possible" or in a way that enables either the Trusts to defend their rights or the Court to exercise its supervisory jurisdiction. The bullet points may provide material that was relevant to the Panel's reasons and reasoning, but they do not themselves provide the rationale for the consensus scores. And, even where there are comments in addition to the positive and negative points, they do not adequately reveal the panel's reasons or reasoning."

11. On the basis of the same findings, the judge found that the pervasive inadequacy of the account of the panel's reasoning and reasons prevented any reliable assessment of the extent or materiality of any error in the reasons and reasoning actually adopted. The Court found against the Claimants on two other grounds but that was not material since, based on the findings made as to the insufficiency of the reasons for the scoring of the non-price questions, the decision to award the contract to Virgin was set aside.

12. The case is a salutary reminder of the need to ensure that the basis on which evaluators come to score bids is properly and clearly explained to evaluators and that the approach to applying the award criteria is maintained and recorded during the moderation phase. Moderation should proceed by reference to the pre-established scoring criteria and not as a form of negotiated compromise or consensus between evaluators on the basis of a wider set of positive and negative considerations that arise during moderation (and certainly not by reference to the relative strengths of rival bids). Moderation should record, by reference to the scoring criteria, why the consensus score was as it came to be during that process, and again by reference to the scoring criteria. If the moderated score rationale provides clear reasons as to why a score was attributed on the application of the scoring criteria, it will not be necessary to produce even the notes as to why an individual moderator agreed to the raising or lowering of pre-moderated scores. That said, the judge made it very clear that what was required did not extend to keeping a complete record of what was said at a moderation meeting. The case thus provides an unfortunate check-list of what not to do at the moderation stage of scoring bids. It is hoped that such a reminder will prevent Authorities falling into similar – basic - errors in the evaluation of bids in future.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

Monckton Chambers
1 & 2 Raymond
Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com