

Important TCC judgment on interested parties' costs

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Bechtel Ltd v High Speed Two (HS2) Ltd ((No.2) Costs of the interested party) [2021] EWHC 640 (TCC)

Michael Bowsher QC and Ligia Osepciu were instructed for Bechtel.

Anneliese Blackwood and Will Perry were instructed for BBVS, the interested party. Philip Moser QC was also instructed for BBVS at an earlier stage of proceedings.

In a judgment handed down on 24 March 2021, the TCC (Fraser J) has provided important guidance on the circumstances in which interested parties to public procurement litigation may recover their costs, including costs incurred to protect commercially confidential information and comply with confidentiality ring provisions.

Though the proceedings in question were brought as a Part 7 claim in the TCC, Fraser J appeared to indicate that the principles outlined apply equally when a claim is commenced in the Administrative Court by way of judicial review. The judgment also states that one of the legal principles outlined will be relevant to whether a person can be joined as an interested party to proceedings in the first place.

The TCC's application, on the facts of the case, of the principles from the House of Lords' judgment in *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR may also be of wider relevance to other areas of litigation, in particular non-procurement claims for judicial review.

Background

In 2018 a consortium of three companies, referred to as 'BBVS', won a procurement competition to become the "Construction Partner" with High

Speed 2 Ltd (**'HS2'**) to build Old Oak Common, a “*super-hub*” station, which will connect the HS2 line with the West Coast Main line, Heathrow Express and Crossrail. Once completed, Old Oak Common will be one of the largest and most expensive stations ever built in Europe.

Following the announcement of the outcome of the procurement, Bechtel Ltd (**'Bechtel'**) issued proceedings in the TCC, triggering the application of the automatic suspension under Regulation 110(1) of the Utilities Contracts Regulations 2016 (**'UCR'**). The suspension was later lifted (by consent and on certain terms), and litigation proceeded to a liability trial in Autumn 2020. Before the suspension was lifted, BBVS had successfully applied to be joined to proceedings as an interested party. The precise terms of the order joining BBVS can be found at §13 of the judgment. As explained below, the wording of the order was of central importance to the TCC's rulings.

In the main judgment on liability - [\[2021\] EWCH 458 \(TCC\)](#) – the TCC dismissed Bechtel's claim. For the purposes of BBVS' costs application, there were two important features of how Bechtel had pleaded its case. First, Bechtel had argued that BBVS' tender was 'abnormally low' and therefore incapable of being properly staffed or administered by BBVS. Second, Bechtel sought a declaration of ineffectiveness which, if granted, would effectively have unwound the Old Oak Common contract.

Following the handing-down of the liability judgment, BBVS applied for two particular heads of costs: (1) costs incurred to comply with the confidentiality ring provisions and protect its own confidential information; and (2) costs arising out the plea by Bechtel for a declaration of ineffectiveness. BBVS did not apply for all costs it had incurred in the course of proceedings.

General principles for interested party costs applications

Having considered at §10 that *“there are some important points of principle that arise upon this application, in respect of which there is only limited direct authority”*, Fraser J went on to set out the applicable principles at §§17-30 of the judgment (see §25 in particular, which is quoted below).

The starting point for the TCC's analysis was section 51 of the Senior Courts Act 1981. Subsection (3) states that the Court has *“full power to determine by whom and to what extent the costs are to be paid”*. Subsection (1) states that, subject to the provisions of the statute, other enactments and to rules of court, costs are in the discretion of the court.

The TCC considered that this discretion has been recognised in Appendix H to the TCC Guide, which addresses procedures for procurement cases. §61 of Appendix H confirms that *“[an] interested party can recover or be required to*

pay costs". This paragraph contains a footnote to the House of Lords' decision in *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR, a planning appeal concerning the costs of a developer. The key paragraph of Bolton relied on by BBVS was as follows (TCC's emphasis – see §20 of the judgment for the full quotation):

(2) The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case.

After referring to Bolton, the TCC went on to consider Akenhead J's judgment in *Group M UK Ltd v Cabinet Office* [2014] EWHC 3863 (TCC), one of the few previous decisions on the subject of interested parties' costs in procurement proceedings. Bechtel relied on *Group M*, particularly §4(x) of the judgment, to draw a distinction between "costs reasonably incurred by a party purely in defence of its own interests (the example used was the costs of a noting brief), which generally ought not to be recoverable; and costs reasonably incurred by an interested party in providing assistance to the court on a matter to be determined" (judgment, §23).

The TCC considered that *Group M* was of limited assistance because it concerned a different situation – namely whether an interested party "had submitted its own evidence, and had attended and made submissions, on the substantive application to lift the automatic suspension". In the present case, BBVS had "not participated at all in any of the substantive hearings" and did "not seek to recover costs in respect of the application to lift the suspension, which was not heard in any event" (judgment, §24).

The TCC proceeded to draw the following general principles from Bolton, which it considered "are of general application to costs applications by interested parties in procurement challenges" (judgment, §25):

- 1. The court evidently has power to order costs under the statute, and such costs are discretionary. The power must however be exercised in accordance with the Civil Procedure Rules, and in particular CPR Part 44 which deals with costs (and Part 44.2 dealing with the court's discretion as to costs).*
- 2. Ordinarily, an interested party (who for these purposes will usually be the winning bidder) must be able to show that there is a separate issue on which he was entitled to be heard, that is to say an issue not covered by the contracting authority; or that he has an interest which requires*

separate representation, in order to recover costs.

3. The mere fact that a party has won the bid does not automatically entitle him either to become an interested party in the litigation, or indeed, to recovery of his costs if the challenge by the claimant fails.

4. The court will, for procurement proceedings under the Regulations, when granting a winning bidder the status of interested party, have made an order in this respect. That order will clearly state the extent to which that interested party is entitled to participate. The order formalises the involvement of the interested party in the proceedings. This is a matter of active case-management. Simply because an interested party is involved at one stage of the proceedings does not entitle that party to participate in later stages of the same proceedings.

5. Simply having been made an interested party by way of such an order does not automatically, of itself, entitle the interested party to its costs.

6. There may be specific and unusual features of any particular case upon which an interested party may rely when it seeks an order for its costs in these circumstances. There can be no exhaustive list of these prescribed in advance. The court will, when exercising its discretion, take all the relevant factors into account, but the presence of one or more of these unusual features will make it more likely that an interested party can obtain a costs order in its favour.

The TCC stated that it considered these principles to be consistent with the provisions at part 23.6 of the [Administrative Court Guide](#) (judgment, §§27-28). Though Fraser J did not say so explicitly, the strong inference is that the above principles will apply equally to public procurement proceedings commenced in the Administrative Court.

Importantly, the TCC considered that principle (2) “*will also form part of the consideration by the court when an application is made by someone to be added to procurement proceedings as an interested party*” (judgment, §29).

Application of the general principles to BBVS

Consistent with principle (6), the TCC considered if there were any “*specific and unusual features*” of the litigation. Having considered the three special features recognised on the facts of the case in *Bolton*, the TCC went on to consider (judgment, §31, emphasis added) that “*In the instant case, the following specific and unusual features exist, which will not be present in most procurement challenges*”:

1. *“The scale of the project that was the subject matter of the procurement was of exceptional size”*
2. *“The project is extremely high profile, and the reputational impact on BBVS would have been considerable, had liability been established and remedies granted to Bechtel.”*
3. *“A major element of the challenge brought by Bechtel was that the BBVS tender was ‘abnormally low’ and that the project could not be properly staffed or administered by BBVS”. This issue “required detailed consideration of, and evidence in respect of, the Fee submitted by BBVS ... which included the profit percentage. This was confidential information of the most commercially sensitive type.”*
4. *“Such confidential information relates not only to future bidding on other projects generally in the course of business, but could relate to future bids that BBVS itself, any of the four companies individually, or any combination of them, may make on the HS2 project itself going forwards.”*

The TCC also considered the application of principle (2), concluding that *“BBVS was entitled to take the view that, on the facts, they had a sufficiently independent interest so far as their confidential information was concerned, requiring protection, that justified separate representation”*.

TCC also held that, in the circumstances of the case, it was immaterial that: (a) BBVS had not been subject to costs budgeting (judgment, §33), and (b) Bechtel's case had focused on the potential inadequacy of BBVS' resourcing (judgment, §34).

(1) Confidentiality costs

Applying the general principles to the two categories of costs sought by BBVS, the TCC awarded BBVS' costs relating to its commercially confidential information.

The TCC began its analysis by concluding that these costs were *“plainly included within the participation of BBVS as an interested party, as set out in express terms”* in the relevant court order. Interestingly, Fraser J then went on to consider *“the existence of such an order to be a requirement for an interested party in the position of BBVS to recover its costs”* (judgment, §36, emphasis added).

The TCC concluded as follows (judgment, §36):

Given the particular features of this case, which I have explained at [31] above, it was entirely justified, and both legally and commercially sensible, that BBVS incur its own legal costs in this respect. Confidential information must be protected, and confidentiality provisions in cases such as this can become highly complicated. Further, the necessity for Confidential Appendix II to the substantive judgment makes it clear that the confidential information in this case was one of the central elements of the evidence. It was also clearly provided for in the Order of 1 July 2019.

(2) Costs arising from the declaration of ineffectiveness plea

The TCC went on to consider the costs of “*considering, or dealing with, the plea by Bechtel for a declaration of ineffectiveness*”. Fraser J stated that these costs were “*in an entirely separate category*” because “*there was no order of the court permitting BBVS to participate in that aspect of the case in any respect*”, and “[*i*]t was not an interested party in the wider sense in the litigation” (judgment, §39).

The TCC therefore held that the absence of a relevant court order was dispositive of the application for these costs (judgment, §§36 and 39). However, Fraser J considered, in the alternative, that “*the absence of such an order is a powerful factor to be taken into account when considering the exercise of the court’s discretion*” (judgment, §40). In considering further relevant factors in the alternative, the TCC concluded that, although a declaration of ineffectiveness, “*if granted, would have had an extraordinary impact upon BBVS, and also upon the entire HS2 project as a whole ... BBVS’ role in that would have been as the exact counter-part to the interests of HS2 itself*” (judgment, §41).

In summary (judgment, §42):

Both HS2 and BBVS would have had matching rights and interests in contesting such a remedy. There would therefore have been no “separate issue” under the first part of the principles I have listed at [25(2)] above. BBVS could, potentially, have argued that it had “an interest which required separate representation” to justify further involvement, but I am not persuaded that such an application would have succeeded, and I am not persuaded that such “an interest” would in any way be different from the interests of HS2.

The TCC went on to discount BBVS’ argument that it could have applied to make submissions on the grounds for not making a declaration of ineffectiveness set out at Regulation 115 of the UCR. Fraser J found that “*proceedings had simply not reached the stage of liability being established,*

or of BBVS either applying for, or being made, an interested party in respect of the declaration of ineffectiveness" (judgment, §44).

In sum, Fraser J considered that "[t]here is no doubt that it was entirely sensible for BBVS to have taken its own advice in respect of this remedy being sought by Bechtel", but that those costs were part of "the costs of doing business generally" (judgment, §45).

Commentary

Fraser J's judgment provides important guidance on the circumstances in which interested parties will be able to recover their costs in public procurement proceedings, whether commenced in the TCC or Administrative Court; the circumstances in which an interested party will be able to participate in public procurement proceedings; and, more generally, a useful example of the application of the *Bolton* principles.

The following points would appear to be of particular importance going forward:

- **Terms of the order granting interested party status.** The judgment makes clear that the terms of such an order will be key to any costs application. As per principle (4) at §25 of the judgment: "*[s]imply because an interested party is involved at one stage of the proceedings does not entitle that party to participate in later stages of the same proceedings.*" The TCC stated that, if the terms of the order do not cover a specific activity – for example, in this instance, costs arising from the declaration of ineffectiveness plea – then costs incurred in respect of those activities will be irrecoverable.

- **Separate issue or separate interest.** As per principle (2), an interested party "must be able to show that": (a) "there is a separate issue on which he was entitled to be heard, that is to say an issue not covered by the contracting authority"; or that (b) it "has an interest which requires separate representation". As per principle (3), "[t]he mere fact that a party has won the bid does not automatically entitle him" to either become a party to proceedings or to recover costs. In this regard, the TCC indicated that costs are unlikely to be granted for simple damages actions, as these will not affect the winning bidder's rights (judgment, §21).

- **Specific and unusual features.** In awarding BBVS' confidentiality costs, the TCC placed significant weight on four "specific and unusual features ... which will not be present in most procurement challenges" (judgment, §31) – namely the size of the contract, the reputational impact

of the claim succeeding, that the nature of the claim required detailed consideration of BBVS' confidential information, and that this information could be used in future procurements. It is important to note here that the judgment does not provide for a general rule or presumption that interested parties will be able to recover costs incurred to protect commercially confidential information.

- **Joinder applications.** The judgment makes clear that principle (2) also applies to applications to be joined as an interested party.