Procurement review bodies: taking stock

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Session 3: Remedies – the United Kingdom

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Remedies for what?

- A high proportion of challenges are brought by unsuccessful bidders in relation to the evaluation of bids (or applications to be invited to tender), including issues around –

  - Alleged unfairness, bias or manifest error
  - Interpretation of criteria (RWIND test)
  - Use and abuse of “clarifications”
  - Abnormally low tenders
  - Failure to verify bidders’ assertions
  - Accepting late or technically non-compliant tenders
  - Alleged improper post-tender negotiations

  etc etc

Remedies for what?

- There are examples of challenges not of the "I lost and it's not fair" variety, though less numerous (and it is striking that many of these have arisen from judicial review or breach of statutory duty claims), often not brought by economic operators
- They include cases of –
  - Alleged improper contract modification e.g. *R (Gottlieb) v Winchester CC* [2015] EWHC 231 (Admin), *R (Wylde) v Waverley BC* [2017] PTSR 1245
  - Allegations that agreements concerning land should have been procured as works contracts e.g. *Faraday Development Ltd v West Berkshire Council* [2019] PTSR 1346, *Ocean Outdoor UK Ltd v Hammersmith & Fulham LBC* [2019] PTSR 1714
  - Disputes about whether in-house or inter-public arrangements should have been subjected to open procurement e.g. *Risk Management Partners Ltd v Brent LBC* [2011] 2 AC 34; or about use of frameworks e.g. *R (Unison) v NHS Wiltshire PCT* [2012] EWHC 624 (Admin)
  - Occasional in-time challenges to the choice of criteria e.g. *AbbVie Ltd v NHS England* [2019] EWHC 61 (TCC)

Remedies at trial (1 – contract not yet awarded)

- In “pre-award” cases, offending (features) of process would no doubt normally be quashed/eliminated
- In “post-evaluation/award” cases, court has discretion to confine claimant to damages remedy *(Mears Ltd v Leeds CC (no 2)* [2011] EWHC 2694 (TCC)) – but will probably be relatively unusual unless claimant’s lost chance of winning contract seems to exist but to be relatively small (see discussion in *MLS (Overseas) Ltd v Secretary of State for Defence* [2017] EWHC 3389 (TCC); also *McLaughlin & Harvey Ltd v DFP* [2009] EuLR 82) – at this stage, defendant itself may not be keen on a damages remedy
- For approach to required remarking, see *Natural World Products Ltd v Arc21* [2008] NLGR 49; cf. *Resource (NI) Ltd v NICTS* [2011] NIQB 121 re evaluation process as “indivisible whole”
- Courts appear very (excessively?) reluctant to direct the award of the contract to a claimant – see *Resource NI*; *Woods Building Services v Milton Keynes Council (no 2)* [2015] EWHC 2172 (TCC)

Remedies at trial (2 – contract already awarded)

- Normal and natural remedy is award of damages (see further below)
- Declaration of ineffectiveness –
  - Has not often arisen – reflecting both increased use of VEAT notices and fact that most challenges are by competition losers – arguments that departures from contract notices attract ineffectiveness have failed (*Alstom Transport v Eurostar International Ltd* [2011] EWHC 1828 (Ch), *AAEW Europe LLP v Basingstoke & Deane BC* [2019] EWHC 2050 (TCC))
  - But first English declaration granted in *Faraday* on basis of inadequate VEAT notice – remarkably generous £1 civil financial penalty may not be reliable precedent (cf. brief discussion in *Ocean Outdoor*) – no caselaw yet on discharge terms (or public interest exception)
- What happens if the illegality consists of a contract modification without a fresh procurement? – can contract revert back to unmodified form? – note also the reg 73 termination "remedy"
- Judicial review discretionary remedies likely to mirror what would be granted in a claim under the Regulations

Award of damages (1 – “sufficiently serious”)

- Is it necessary to pass the *Factortame/Francovich* “sufficiently serious” test, and what does that imply?
  - Supreme Court in *Energy Solutions EU Ltd v NDA* [2017] 1 WLR 1373 said “yes”, in reliance on CJEU in C-568/08 *Combinatie Spijker*
  - EFTA Court later said “no” in E-16/16 *Fosen-Linjen (no 1)* – but see now E-7/18 *Fosen-Linjen (no 2)*
  - Fraser J in *Energy Solutions* had (hypothetically) taken broad approach to what breaches would be sufficiently serious – not very clear what is being said (obiter) in *Ocean Outdoor* at [160]
  - For potential impact on suspension decisions, see *Lancashire Care NHS Foundation Trust v Lancashire CC* [2018] EWHC 200 (TCC) and also *DHL Supply Chain Ltd v Secretary of State for Health and Social Care* [2018] EWHC 2213 (TCC)

Award of damages (2 – other issues)

- Awarded in e.g. *Harmon CFEM Facades* (67) Con LR 1
- Causation of loss will have to be demonstrated in any event – very hard to quantify in "no procurement" cases (see e.g. *Nationwide Gritting v Scottish Ministers* [2014] CSOH 151, *FP McCann Ltd v DRD* [2016] NICh 12) - difficult issues about approach in cases where criteria fail the RWND test – but may be full loss of profit where claimant would have clearly won but for breach
- *Energy Solutions* rejected arguments based upon deliberate non-triggering of suspension as matter breaking chain of causation

Award of damages (3 – other issues)

- Court of Appeal currently considering issues around extent to which claims survive abandonment of procurement – *Amey Highways Ltd v West Sussex CC* [2019] EWHC 1291 (TCC)
- Bid costs not recoverable as such, but might formulate as claim for reliance loss in cases where expectation loss cannot be demonstrated?
- Do principles of "least burdensome performance" apply to e.g. whether should be assumed that defendant would have exercised contractual rights of termination? – *Willmott Dixon* (*obiter*) suggests not