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The Procurement Act 2022: the nature and intensity of review by the court

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The status quo - caselaw

Usefully discussed and summarised in for example:

***QMAC Construction Ltd v NIHE* [2021] NIQB 41 at [23-33]**

***Braceurself Ltd v NHS England* [2022] EWHC 1532 (TCC) at [35-41], [56], [143-148]**

See also:

***Abbvie Ltd v NHS England* [2019] EWHC 61 (TCC) at [59-67]**

***Bechtel Ltd v High Speed Two (HS2) Ltd* (2021) 195 Con LR 123 at [18-28]**

***Ryhurst Ltd v Whittington Health NHS Trust* (2019) 189 Con LR 83 at [27-63]**

The status quo – basic principles

- **In dealing with matters of judgment, discretion or evaluation, the authority has a “margin of appreciation” – the court will intervene only for “manifest error”, said to be broadly equivalent to *Wednesbury* unreasonableness in domestic law**
- **By contrast, there is no margin of appreciation for compliance with “fundamental procurement principles” – in particular transparency and equality**
- **The interpretation of procurement documents is a matter for the court, applying the RWIND tenderer test; similarly, no margin of appreciation if the authority misunderstands an unambiguous bid**

The status quo - nuances

- **Manifest error is an objective question, but the court will recognise “institutional competence” where appropriate**
- **Breadth of the margin of appreciation depends on the nature of the issue in question, and how the authority approached it**
- **Transparency and equality may involve judgments and thus a margin of appreciation e.g. whether two cases are in fact “alike”, and whether a difference in treatment is a proportionate response to such differences as exist between those cases**
- **Although authorities must comply strictly with their competition rules, those rules may themselves be formulated in terms of judgment or discretion; but any such discretion must be exercised proportionately**
- **May be some margin for the authority in how it understands an ambiguous tender**

Procurement Act 2023 (when in force)

What should the general approach to interpretation be?

- **This is domestic primary legislation, not retained EU law, and there is no longer any scope to invoke general overarching principles of EU law**
- **There is a presumption of intended compliance with international treaty obligations (including GPA – note in particular Articles IV, XV, XVIII), but that is normally only relevant in case of ambiguity (cf. *Western Sahara Campaign UK* [2022] EWHC 3108 (Admin))**
- **Some concepts in the Act (e.g. who is a contracting authority) may be recognised as intended to replicate existing procurement law concepts, and be interpreted accordingly – but the respective roles of contracting authority and court are likely to be seen as having been re-cast**

General principles under the Procurement Act?

- **Basic requirement to “carry out a covered procurement . . . In accordance with this Act”:** s 11(1)
- **No equivalent of overarching PCR reg 18 requirement to treat equally and without discrimination, act transparently and proportionately (and non-avoidance principles). Instead, more specific provisions:**
 - **Treat suppliers the same unless a difference between them justifies different treatment:** s 12(2)
 - **Nationality-based discrimination against treaty state suppliers prohibited:** s 90
 - **References to proportionality in particular contexts e.g. s 20(3) obligation to ensure tendering procedure is proportionate means of awarding contract**

General public law principles

- **Likely that normal public law principles will apply – Act provides statutory underpinning (cf. *Menai Collect Ltd* [2006] EWHC 724 (Admin)), and its scheme does not suggest merely commercial decisions of a private nature; odd if authority not constrained by such principles in many instances where test is what it “considers” under the Act**
- **So discretionary powers must be exercised for proper purposes (*Padfield*), and decisions taken with regard to legally relevant considerations, rationally, and after rational enquiry (*Tameside*); and existence of discretion may imply duty to consider exercising it**
- **But no general principle of proportionality in English law (*Keyu* [2016] AC 1355), though it may inform application of other rules – certainly no scope to build a superstructure on the express legislation as CJEU used the transparency and equality principles to do**
- **Express transparency requirements make it difficult to imply further obligations to give reasons**

General principles: enforcement

- **Are general public law principles part of the Part 9 (s 99(1)) duty to comply with the Act, enforceable by “suppliers”? – probably yes, but debateable**
- **Are “suppliers” the same as PCR “economic operators” as identified in *International Game Technology* [2023] EWHC 1961 (TCC)?**
- **Judicial review by non-suppliers – probably similar issues of standing to those at present (and s 107 investigations as alternative remedy?)**
- **Note that s 99(5) provides that “have regard” duties under ss 12(4), 13(9), 14(8) are not enforceable in Part 9 proceedings – that must be matter for judicial review**

Review under the Procurement Act

- **On a challenge, is the court second-guessing the authority's conclusion, or merely reviewing for error, and against what standard? As at present, there is no single answer to this question – close attention to the wording of the statutory provision under which the issue arises will be required.**
- **The powers and duties of a contracting authority under the Act fall into a number of broad categories:**
 - **Objectively expressed definitions and situations**
 - **Situations identified in subjective terms e.g. what the authority “considers”**
 - **Situations identified without subjective language, but in terms calling for judgment e.g. “justified”, “reasonable steps”**
 - **Simple discretions (the authority “may”), as opposed to “must” in other cases**
 - **“Have regard” obligations**

Objective versus subjective (1)

- **Examples of (generally) objective formulations:**
 - **Definition of contracting authority (s 2)**
 - **Definitions of public, utilities, defence/security, concession contracts (ss 3, 6, 7, 8) including Sched 2 exemptions and Sched 4 utility activities**
 - **Sched 5 direct award justifications – though see para 17(b), and also elements of s 43 (switch to direct award)**
 - **Test for substantial and below-threshold modifications (s 74), and Sched 8 permitted modifications – though see para 5 on new “materialisation of known risks” gateway**
- **Even objective words can sometimes denote judgment by body with relevant function, as opposed to “precedent fact” whose existence the court must determine itself – but unlikely here, given the many instances of apparent deliberate choice to use subjective wording (cf. *A v Croydon LBC* [2009] 1 WLR 2557)**

Objective versus subjective (2)

- **Examples of subjective test of what authority “considers”:**
 - **Severability test for mixed procurements (ss 5,10, 74(7))**
 - **Whether pre-market engagement has led to unavoidable unfair advantage (s 16(4))**
 - **Whether use of lots appropriate (s 18(2))**
 - **Which is the most advantageous tender (s 19(2)), and whether tender is abnormally low (s 19(3)(c))**
 - **What selection process or other preliminary steps appropriate prior to direct award (ss 41(3), 43(5))**
 - **Whether framework needs to be longer than normal maximum (s 47(3))**
 - **Whether supplier is excluded/excludable (s 57)**
 - **Whether there has been unlawful modification triggering termination power (s 78(2)(a))**

Objective versus subjective (3)

Other subjective formulations:

- **Estimation of contract value (s 4 – though must follow Sched 3)**
- **Whether “satisfied” that abnormally low tender can be performed (s 19(5))**
- **Whether satisfied tender documents, participation conditions, award criteria meet statutory requirements (ss 21-23)**
- **Duty under s 30 to exclude for improper behaviour if authority “determines” that it has occurred and creates unavoidable unfair advantage**
- **Whether satisfied information is “sensitive commercial information” with overriding interest in non-publication (s 94)**

Objective versus subjective (4)

Mixed or less obvious examples:

- **Duty under s 12(2) to treat suppliers the same unless different treatment is justified is objectively expressed – although s 12(3) consequential duty to take all reasonable steps to avoid unfair (dis)advantage applies where authority “considers” that differential treatment is justified**
- **Whether tender satisfies conditions of participation or breaches a procedural requirement under s 19 is objectively expressed, but the relevant requirements might themselves be formulated in partly subjective terms**
- **What is nature and scope of s 20(3) duty to ensure that procedure is proportionate?**
- **Is it a purely objective test under s 56(2) whether procurement documents could “appropriately” refer to performance or functional requirements, so that technical specification has to be framed in that way?**

Why it matters

- **Where the issue arises from a subjectively formulated provision, then any challenge to the authority's actions will have to show that the authority's conclusion is flawed on public law grounds such as irrationality – for example, did a supplier fail to perform a contract to a public authority's satisfaction and fail to improve its performance despite a proper opportunity to do so?**
- **Similarly, challenges to the exercise of discretion will have to be based on conventional public law grounds, or upon the express statutory requirement of treating suppliers the same unless differentiating between them is justified, or upon a failure to have regard to matters specified by the Act**
- **By contrast, objectively formulated provisions will require the court itself to come to a view – so, for example, was a direct award lawful because the required supplies were “strictly necessary for reasons of extreme and unavoidable urgency”?**

“Have regard” obligations in the Act

- **Under s 12(1), “the importance of”:** delivering value for money; maximising public benefit; sharing information to aid understanding re procurement; acting and being seen to act with integrity
- **Under s 12(4), participation barriers faced by SMEs, and consider whether they can be removed or reduced**
- **Under ss 13 and 14, national procurement policy statement (and Welsh equivalent)**
- **Under s 22(5), nature, complexity and cost of contract when setting supplier requirements**
- **Under s 54(1), specified matters in setting time limits in procurements**
- **Also various obligations to “consider” or “determine” particular matters: s 18(1) re separate contracts and lots; ss 26 and 28 re exclusion; s 31(4) re time limits if procurement modified**

Legal content of “have regard” obligation

- A requirement to have regard to particular matters is a familiar concept in public law – discussed in e.g. *R (Khatun) v Newham LBC* [2005] QB 37; *R (London Oratory) v Schools Adjudicator* [2015] ELR 335
- Where the matter to which regard must be had is guidance, there is no duty to *comply* with that guidance – but any departure must be recognised, and reasoned – departure from NPPS unlikely to have to meet a “good” or “cogent” threshold beyond ordinary rationality – though mere disagreement with it may not suffice
- The s 12(1) duty is more reminiscent of the public sector equality duty under s 149 of the Equality Act 2010 – much caselaw (see e.g. recent summary in *Sheakh v Lambeth LBC* [2022] PTSR 1315), but key point is that this is an obligation of process, not result
- Note as above that s 99(5) leaves some but not all of the Act’s have regard duties to be enforced through judicial review

Remedies for breach of process obligations

- **Where an authority has breached its absolute or objective obligations, little reason to think that remedies will raise fundamentally different issues to those familiar under the PCR – also where the problem is that the authority has reached an irrational conclusion (the equivalent of manifest error)**
- **Failure to consider matters or exercise discretions lawfully, now a greater focus of attention under the Act, may call for some further thought – in principle, it is not for the court to usurp the role of decision-maker – that is why quashing and remission is by far the most common judicial review remedy**
- **That is easily catered for as a pre-contractual remedy under s 102 of the Act (court can set aside and require reconsideration), but is less happy in a s 103 post-contractual damages claim – does court have to assess what authority would have decided? Should this be a factor in s 101 decisions on whether to lift suspension?**