

Procurement law

Have the lessons from Lancashire Care NHS Foundation Trust & Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council been learnt?

It's over a year since the case of Lancashire Care NHS Foundation Trust and Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council was determined. Hempsons advised the two foundation trusts in successfully challenging the Council's process, which had been run under the Light Touch Regime. See Lancashire Care NHS Foundation Trust & Blackpool Teaching Hospitals NHS Foundation Trust v Lancashire County Council [2018] EWHC 1589 (TCC).

If you are unsuccessful in a tender process then a speedy consideration of any issues during the standstill period is critical. There are very tight timescales that apply to procurement law challenges, and the remedies available are impacted by whether the contract has been signed with the successful bidder.

It is now easier to request, and receive, the contemporaneous records of the evaluation with clearly defined and robust requests for information (a "fishing expedition" is not permitted). If an aggrieved supplier requests information in relation to an award decision, usually during the standstill period, it is now usually the case that contemporaneous records of the evaluation and moderation will need to be disclosed at an early stage (see Technology and Construction Court Guidance Note on Public Procurement). Contracting authorities need to be able to demonstrate a robust and defensible audit trail as, without this, the process will be at serious risk of successful challenge.

The Trusts challenged the Council's decision to award a contract for Public Health and Nursing Services for children and young people (0 – 19) to Virgin Care Services Limited. The Judge upheld the challenge and concluded that the procurement decision should be set aside. The Trusts demonstrated that the reasons given by the Council for the scores awarded to the Trusts and the winning bidder for the quality evaluation questions were insufficient in law and as a result the decision of the Council to award the contract to Virgin must be set aside.

Nearly a year on, having advised on a number of other procurement projects since, both for contracting authorities and bidders, it appears to us that the key learning points from this case have not been consistently implemented by authorities.

In any public procurement process governed by the procurement regulations (Public Contracts Regulations 2015), it is imperative that the bids are scored and that a final rationale is documented for the score(s) awarded. If there is a staged evaluation process, then this scoring and documentation exercise should be carried out at each stage. In the Lancashire case the Judge was critical of the lack of reasons that could be demonstrated for the decisions taken at moderation. The Judge stated that "although the panel reached consensus on scores, there was not necessarily or even probably congruity of reasoning that led each evaluator to subscribe to the consensus score for the question." It is imperative that a

contracting authority is able to justify the scores it has given and the decision that it has made. If it can't, then the process is open to challenge.

While it may not be mandatory (depending on the process followed) that all the moderators agree on all of the reasons for awarding a particular score, it should be possible from the evaluation notes to understand the basis on which the moderators arrived at a particular score. In this case, the Judge was 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.”

Over the last year it has become clear to us from our national experience of procurements in the health and social care sectors (and more widely across the public sector) that procurement processes are sometimes falling short in terms of the level of audit trail that would be required by the Court in the event of a legal challenge. Hempsons' specialist, integrated procurement and litigation teams can utilise our significant first-hand experience to guide you through these thorny issues, working with our clients to challenge defective processes.

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