

## Failing the most basic standard of transparency: *Lancashire Care NHS Foundation Trust and another v Lancashire County Council* [2018] EWHC 1589 (TCC)

*Lancashire Care NHS Foundation Trust and another v Lancashire County Council* [2018] EWHC 1589 (TCC) provides a highly instructive judgment to bidders and contracting authorities alike. It also presents a rare opportunity to clarify the standards to be applied when conducting a moderation exercise in the context of a regulated procurement process.

The case involved the procurement of a public contract relating to the provision of public health nursing services in Lancashire under the Public Contracts Regulations 2015 (the “PCRs”). The tender process was conducted by Lancashire County Council (“LCC”) using the so-called ‘light touch procedure’ under the PCRs. The claimant trusts (the “Claimants”) were the incumbent providers of the services. Only the Claimants and another bidder, Virgin Care Services Ltd (“Virgin”), participated in the tender.

The Claimants challenged the award of the contract by LCC to Virgin. Broadly-speaking, the challenge revolved around whether LCC’s procedures for evaluating the bids – including the moderation process used to determine the bidders’ final scores – complied with the relevant procurement rules on equal treatment and transparency.

The key points from the judgment were as follows:

1. There is no general obligation for an authority to disclose the notes of its moderation exercise. However, where the authority seeks to rely on those notes as the written reasons for its decision, the contracting authority’s moderation process and the notes relied upon must adhere to well-known procurement standards of equal treatment and transparency.
2. The notes must be recorded in a consistent and clear manner, and provide a full and transparent record of the contracting authority’s reasons and *reasoning* behind the conclusions reached, which is not the same as providing a list of factors taken into account.
3. Contracting authorities retain the freedom to decide how to structure their examination and analyses of bids, provided that such does not have the effect of amending the contract award criteria (e.g. by affording unequal weightings to criteria where none is specified).
4. The judgment also reaffirmed the now familiar position that the Court will not generally interfere with the margin of appreciation afforded to contracting authorities by re-marking the tender bids itself.

Having examined the facts of the case, the Court identified several deficiencies and inconsistencies in the actual moderation process used to arrive at the final ‘consensus’ scores for each of the bidders. This meant that the evaluators’ score sheets (original and moderated) and accompanying notes did not constitute a “*full, transparent or fair summary*” as to why the LCC moderation panel awarded the scores that they did.

Accordingly, the Court found LCC’s reasons for the scores awarded to the Claimants and Virgin respectively as insufficient in law, and ordered the award of the contract to be set aside on this ground.

The judgment comes as perhaps a welcome surprise to bidders who may feel that the tide of procurement judgments has been somewhat against them in recent years, given the number of unsuccessful challenges to contract award decisions.<sup>1</sup>

Unsuccessful bidders should take confidence that contracting authorities will be held to the same familiar standards of transparency and equal treatment during the moderation stage as for the rest of the tender process. In particular, it is notable that the Court highlighted its agreement with the Claimants' submission 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*".

Regrettably for LCC, the case sets out a laundry list as to what not to do when conducting a moderation exercise as part of the tender process. As such, the judgment certainly provides greater leverage for unsuccessful bidders to challenge future procurement decisions of contracting authorities.

If you have any questions or comments in relation to the above, please contact Warsha Kalé or James Harrison, or your usual Mayer Brown contact.

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<sup>1</sup> See, for example, *Nuclear Decommissioning Authority (Appellant) v Energy Solutions EU Ltd (now called ATK Energy EU Ltd) (Respondent)* [2017] UKSC 34.