

No evaluation notes? No contract award¹

The High Court in England has ruled that a procurement by Lancashire County Council (the **Council**) was conducted in breach of its own evaluation process and procurement law and ordered that the award of the contract be set aside.

The award decision was made in favour of Virgin Care Services Limited (**Virgin**). The claim was brought by incumbent providers and unsuccessful consortium, Lancashire Care NHS Foundation Trust and Blackpool Teaching Hospitals NHS Foundation Trust (the **Trusts**). The scores achieved by the two tenderers were very similar and the Trusts had concerns regarding the Council's approach to scoring the submissions.

The court, focusing primarily on the moderation meeting, criticised the manner in which the Council conducted the evaluation process. In particular, the court criticised the inability of the Council to explain how the procurement team had come to their conclusion to award the contract to Virgin. Stuart-Smith J held 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.*" The main reason for this was the Council's poor system of record keeping whereby the notes failed to demonstrate how a consensus score was reached for each question.

Some of the record keeping issues raised include:

- evaluating the companies comparatively instead of independently;
- failure to discuss key points;
- recording contradictory points;
- evaluating the companies using reasons not found in the notes;
- failure to organise information in a clear and consistent manner;
- failure to send the notes to panel members for review and sign-off after the meeting.

As a result, the court could not find enough information to disprove that a manifest error in evaluation had occurred.

Comment

This case is the most recent in a number of cases highlighting the need to maintain transparency at every stage of the procurement process. The court's finding in this case sets a very low bar for setting aside the award of a contract i.e. *where the evaluation panel's notes are not sufficient to explain the reasons for the decision (even if the decision is the right one) a challenge to the award could be successful.* Whilst generally an authority has no obligation to reveal the full extent of the comments made during the moderation exercise, the courts have increasingly looked to scrutinise the moderation aspect of the procurement process to understand the reasoning of decisions in cases like this, particularly where these notes are relied on by the authority as the reasons for the decisions taken in the evaluation process, as was the case here.

In this case, the court decided that, as the lack of record keeping failed to prove that there had been no manifest error, it was possible that material damage had been caused. This sets potentially a very low bar for challenge.

¹ *Lancashire Care NHS Foundation Trust & Another v Lancashire County Council* [2018] EWHC 1589 (TCC)