

Procurement Surgery

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Record keeping, moderation and transparency



Regulation 84 - *Documentation of progress and decisions*



(7) CAs shall document the progress of all procurement decisions, whether or not they are conducted by electronic means

(8) CAs shall ensure that they **keep sufficient documentation to justify decisions** taken at all stages of the procurement procedure, such as documentation on

- (a) **Communications with EOs and internal deliberations**
- (b) Preparation of the procurement documents
- (c) Dialogue or negotiation if any
- (d) **Selection and award of the contract**



“...under the current statutory and jurisprudential regime, meetings of contract procurement evaluation panels are something considerably greater than merely formal events. **They are solemn exercises of critical importance to economic operators and the public and must be designed, constructed and transacted in such a manner to ensure that full effect is given to the overarching procurement rules and principles.**”

The Law – Lancashire Care v Lancashire County Council [2018]



“I look for the reasons why the Council awarded the scores that it did; and I accept the 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.”**”

“an Authority is not generally under an obligation to disclose the notes of the moderation. Where, however, the authority relies upon those notes as setting out the written reasons for the evaluators’ decisions, it is to those notes that the Court must look for the reasons and reasoning adopted by the Authority.

“...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. First, there is evidence, which I accept, that other reasons (including some agreed reasons) were in play and are not reflected in the notes. Second, pervasively there is no or no sufficient account of the reasoning and reasons that led panel members to resolve their differences (if they did) so as to arrive at consensus scores.”

Wordperfect Translation v Minister for Public expenditure [2018] IECA (1)



“In the High Court Barrett J. rejected the argument that the evaluators were required to explain the progression of marks as between the various evaluation meetings. I think that he was perfectly correct in so holding. As he put it, the test of “manifest error is a ground of objection targeted ultimately at an impugned decision, not at the notes of the meetings which precede the making of such decision.”

Wordperfect Translation v Minister for Public expenditure [2018] IECA (2)



- “Just as importantly, evaluators should have the freedom to explore, consider and reflect on the strengths and weaknesses of the various tenders.”
- The evaluators must be prepared to stand or fall by a review of the final published evaluation for manifest error. But short of that they cannot be expected to have to defend what are, at best, tentative or provisional views expressed during the course of evaluation process. I would accordingly reject Word Perfect's appeal under this heading.

Hypothetical facts (1)



- Individual evaluators evaluate bids, assign scores and provide written reasons
- A moderation meeting is held for less than 2 hours
- Moderated scores are awarded which result in changes to about 50% of the scores, some up, some down
- No minutes are taken of the meeting, save for m/s notes which the procurement lead took but subsequently destroyed

Hypothetical facts (2)



- The procurement lead then takes 10 days to draft reasons for the scores awarded to the winning bidder and 21 days to draft reasons for the scores awarded to the challenger
- The other evaluators are asked to review those drafts but are not permitted to make track changed comments, only m/s comments which are subsequently destroyed
- The CA denies that there are any flaws in the record keeping or integrity of the moderation process

Is the Court likely to uphold the lawfulness of the moderation process and/or the record keeping?

- Yes
- No

- On the basis of ***Lancashire***, I think that a Court is likely to find that what the CA produced was not a sufficient account of the reasoning and reasons that led panel members to resolve their differences so as to arrive at consensus scores, because it was one evaluator's account of what transpired many days after the meeting itself
- On the basis of ***Wordperfect***, it might do, depending on how the evidence came out

- Many cases still where procurement decisions are either not documented at all or very poorly
- the English Courts are very suspicious of an absence of records – Energy Solutions, Lancashire, Geodesign
- Whatever the future for procurement law, under domestic law, discretion must be exercised rationally, according to principle and on a proportionate basis and records of score changes should demonstrate that; in their absence, the CA is taking a risk

Green Procurement



The Question



- What can we do as lawyers to assist in procuring construction projects in a manner that is as sustainable and “green” as possible?
- Should we be looking at drafting contract clauses for this, or should we be leaving this up to the designers and other construction professionals to sort out?
- From a purely legal perspective, what sorts of clauses should we, as a profession, be thinking about advising clients to add to contracts and how can we build green drafting into procurement?

Concordia Bus - Case C-513/99



- Procurement of public bus services for Helsinki
- The ITT awarded points for the use of buses with nitrogen oxide emissions and noise levels below specified values. Only the CA's own transport undertaking could meet those criteria
- Held – lawful for a CA to take environmental criteria into consideration, provided linked to the subject matter of the contract, it did not confer an unrestricted freedom of choice on CA, expressly mentioned in tender documents and not discriminatory

Environmental issues and the procurement process



- The Client needs to decide what it wants and how much it is prepared to pay for it
- The tender documents need to specify those requirements and to evaluate them (technical and price) in an objective and non-discriminatory way
- The draft contract (published with the ITT) needs to reflect those requirements as far as possible
- The winning bidder's promises need to be included in the contract that is awarded (schedules)
- Performance must be monitored



- <https://ec.europa.eu/environment/gpp/pdf/Buying-Green-Handbook-3rd-Edition.pdf>
- Chapter 5 – Life Cycle Costing 5.3
- PCR 2015 – Contract Award Criteria may include life cycle costing (Reg 67) as described in Reg 68 – expressly includes greenhouse gases
- Chapter 6 – Contract Clauses
 - Publish in procurement documents
 - Evaluate fairly
 - Monitor compliance – beware material change

- BREEAM – objective external standard for assessment of sustainability for buildings (and more)
<https://www.breeam.com/>
- WRAP- Guidance for low-carbon building projects and estates management
<https://www.wrap.org.uk/sites/files/wrap/Procurement%20Requirements%20for%20carbon%20efficiency%20FINAL.pdf>
- Government Buying Standards (rather scant)
<https://www.gov.uk/government/publications/sustainable-procurement-gbs-for-construction-projects>

Thank you for listening

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