CHALLENGE TO HS2'S £1 BILLION PROCUREMENT DEFEATED ON MULTIPLE FRONTS

By Sarah Hannaford QC, Simon Taylor and Ben Graff

Bechtel Limited v High Speed Two (HS2) Limited [2021] EHWC 458 (TCC)

Judgment was handed down on 4 March 2021 by Fraser J in the claim arising out of the HS2 procurement for the construction partner contract for Old Oak Common Station (one of the two Southern Stations on the HS2 network), a project with an 'incentive target' cost of over £1bn. The contract was awarded to BBVS, a consortium of bidders including Balfour Beatty Group Ltd, Vinci Construction (UK) Ltd, Vinci Construction Grands Projets and Systra Ltd. An unsuccessful bidder, Bechtel Ltd, challenged the outcome of the procurement.

Bechtel scored 73.76% compared to BBVS' score of 75.38% and was ranked 2nd but had a substantial bid qualification. The Judge noted that Bechtel scored 5.76% on the 'Lump Sum Fee' bid (overheads and margin) as compared to the maximum 10% awarded to BBVS. In effect, this accounted for the ranking. Bechtel scored higher on quality but lost overall due to its price.

The Issues

Bechtel alleged that there were manifest errors in scoring and inadequate records of the assessment and moderation process in breach of the transparency principle. The focus of its case was that the BBVS' bid ought to have received a score of 'Major Concerns' for a question relating to organisation (E001), rather than the score of 'Concerns' awarded, because the proposed level of resources was too low. Had BBVS been scored as Major Concerns for E001, this could (and Bechtel said should) have led to its disqualification under the tender rules. Bechtel argued that the relatively high scores for the other technical questions were inconsistent with the Concerns over BBVS' resourcing.

Bechtel also alleged unequal treatment in the evaluation of certain questions and that there was 'downward pressure' exerted by moderators and legal advisers (by way of a moderation assurance process) on certain Bechtel scores. It claimed that the winning bid was abnormally low due to a lack of resources and ought to have been disqualified.

Finally, Bechtel alleged that the winning bid and the contract entered into with the winning bidder had been unlawfully modified and that reassurances as to resource levels provided by BBVS at a post tender meeting were impermissible. Bechtel argued that changes made to the project programme due to the passage of time between the anticipated contract start date and the actual start date (about 1 year) and overall HS2 project changes ought to have led HS2 to invite revised bids.

HS2 denied all allegations and argued that the claim did not cause any loss because Bechtel would, if it had come first, have been disqualified from the competition anyway by HS2 for failing to remove a fundamental qualification from its bid.

The trial on liability and causation took place in person in October to November 2020 before the 2nd Covid lockdown. 18 witness were called over a 3 week period.

The Court's Role

Fraser J commented on the nature of judicial oversight in procurement cases, noting that it is exercised with restraint. Proceedings are not an appeal against the tender outcome of the decision and the Court will only interfere with evaluation if there is manifest error. This is a high threshold and another way of expressing irrationality. The Court will give *"suitable recognition to the institutional competence of decision-makers"* and recognise the competence of the Subject Matter Experts (SMEs) charged with the evaluation of bids. Procurement law does not impose a counsel of perfection on contracting authorities.

The judge also commented on confidentiality and redactions in particular, noting the importance of transparency and the need to minimise and explain (in a schedule) any redactions made to documents and witness statements. While he considered that some documents relied on at trial had been over-redacted (certain redactions were removed during the trial), he did not consider that this interfered with the fair disposal of the issues.

On the Bechtel evidence, Fraser J referred to *Healthcare at Home v Common Service Agency* [2014] UKSC 49, noting that the evidence of a particular tenderer's understanding of the tender documents is irrelevant. What matters is how the reasonably well informed and normally diligent (RWIND) tenderer would interpret them. Equally the views of a Claimant witness on how its bid or another bid should have been evaluated will not be of relevance to the Court's determination of the issues.

The Judgment

Fraser J rejected substantially all of Bechtel's arguments and its case failed completely.

Evaluation, moderation and scoring

The issue of whether there was manifest error in the scoring of E001 came down to the difference in the scoring guidance between a finding of 'significant risk' (Concerns) and 'substantial risk' (Major Concerns). This was held to be a subjective judgment of the HS2 evaluators based on their expertise and experience and it was not the role of the Court to interfere with judgment calls reached after hours of discussion at a consensus meeting.

Bechtel sought to elevate the importance of the draft initial scores reached by the evaluators and objected to its scores on those questions where the draft score of one or other evaluator was higher than the moderated score. Fraser J found that this was how moderation was designed to work – assessors discussed their views of the response and arrived at a consensus score. The fact that it might be different to their draft score did not matter and certainly did not establish manifest error. The process was set out in the Invitation to Tender ("ITT").

On the evidence and documents, Fraser J held not only that HS2 made no manifest errors in the evaluation of bids, but also that it made no errors at all and there were no instances of breach of equal treatment or transparency in the evaluation of bids. The alleged errors were no more than subjective disagreements from Bechtel and there is *"no judicial remedy for subjective dissatisfaction at losing a procurement competition"*. He rejected Bechtel's argument that evaluators ought to have considered the 'practical achievability' of BBVS' response to the various technical questions in light of the scoring of E001 as this would change the entire scoring methodology.

Record-Keeping, Moderation Assurance and the Clarification Meeting

On record-keeping and transparency generally, Fraser J considered the standstill letter issued by HS2 to be *"extraordinarily comprehensive"*, the evaluator training to have been very thorough and the records of the evaluation process to be sufficient. The moderation records did not for example need to be verbatim accounts. He found that there was no duty of 'good administration' on HS2 and that the procedural burden on authorities is balanced and limited by the EU principle of proportionality.

HS2's record keeping was held to fall below the required standard in only one respect, in that it failed to keep a proper written record of a post tender clarification meeting with BBVS. This was a technical breach of the transparency principle but had no causative effect and did not assist Bechtel's claim. It was markedly different to the widespread failure of record keeping on the evaluation of bids in *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] WHC 1589 (TCC). There was no basis here to set aside the award decision based on this 'de minimis' breach. To do so would be disproportionate.

Fraser J rejected the argument that the 'moderation assurance' checks carried out interfered with or applied downward pressure on the scores as there was no evidential basis for this allegation either in the emails or the cross examination of HS2's witnesses.

As to the clarification meeting, he concluded that this was provided for in the ITT and permissible. Given the score of Concerns for E001 it was sensible for HS2 to seek clarifications on resource levels, but the score was not conditional upon those clarifications as the scores were already finalised.

Abnormally Low Tender

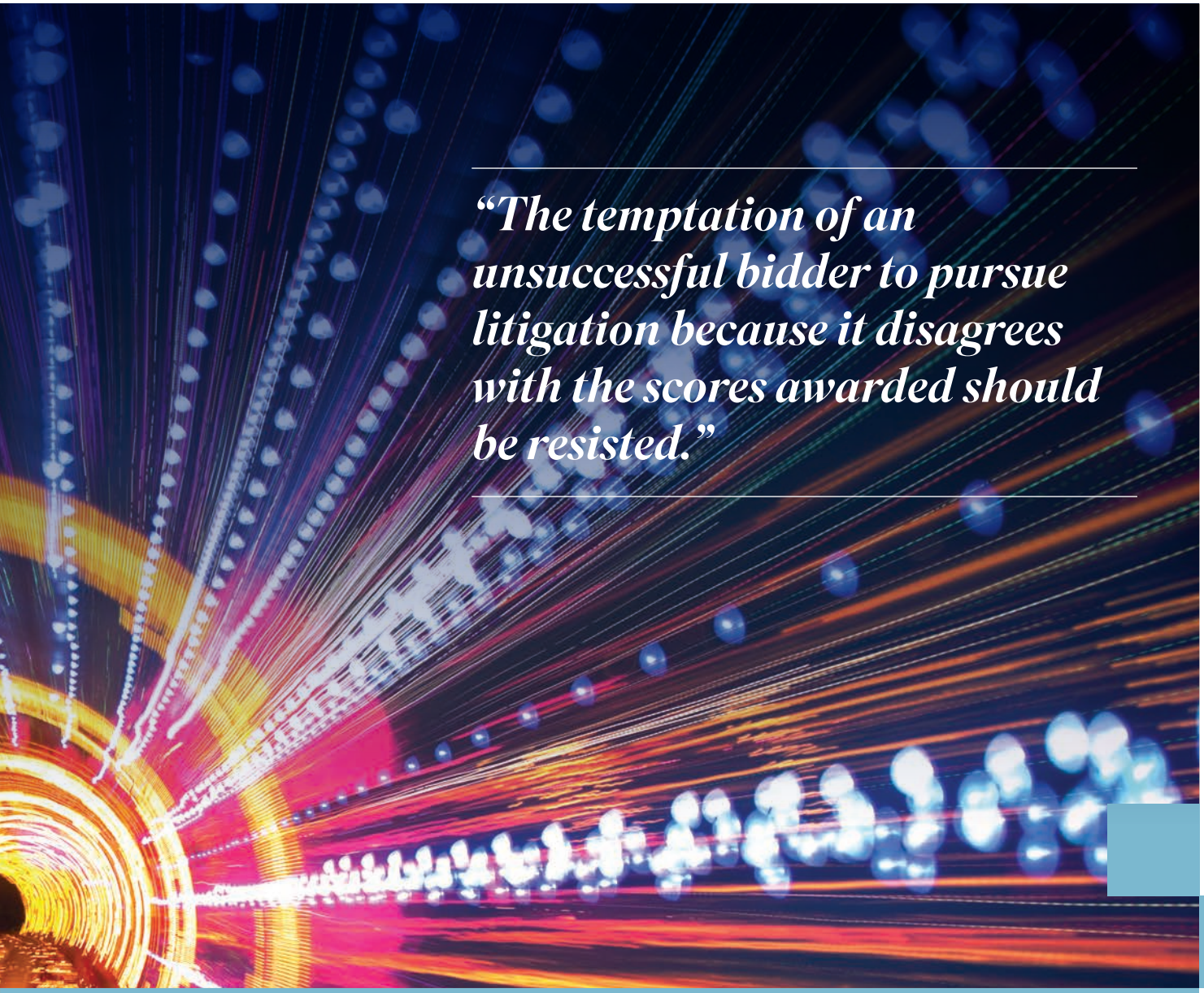
There was no basis for any finding that the bid was abnormally low. The concept of an abnormally low tender has to be considered by reference to the particular contract to be awarded, the work involved and the way that costs and prices are calculated. While resources were an element of the tender they did not feed into the price bid. Furthermore, HS2 had set a 'fee collar' or lower limit on the lump sum fee in the ITT and the BBVS' fee was above that limit. HS2 had also performed a review of the staff rates bid. There was no discernible error in HS2's finding that the BBVS' tender was not abnormally low.

Material Change

On the alleged material changes, Fraser J agreed with HS2 that the ITT permitted changes to project dates and noted that it would be extraordinary if it did not, given the nature of the project. The judge accepted HS2's submission that the Utilities Contracts Regulations 2016 ("UCRs") allowed flexibility in the conduct of negotiations with the preferred bidder. While the project was slightly different to that tendered for in terms of programme dates, this was entirely to be expected. The fact that tenderers might have submitted different bids had they bid against different project dates was hypothetical and irrelevant.

Qualification

Fraser J also found that in the event that Bechtel had been ranked as the winning bidder, it would have been disqualified from the competition by HS2 for failing to remove a fundamental qualification from its bid, despite repeated requests to do so. That qualification would have shifted the financial risk profile of the Contract substantially to the detriment of HS2 by giving Bechtel the right to terminate the contract after the station design had been completed if it then felt unable to deliver the contract to the incentive target. Bechtel's case therefore also failed because it could not show that any loss had been caused by the alleged breaches given that it would have been disqualified in any event.



"The temptation of an unsuccessful bidder to pursue litigation because it disagrees with the scores awarded should be resisted."

Commentary

Every case is decided on its facts and this procurement was, as Fraser J concluded, a competition working fairly. However, there are a number of points that can be taken from this judgment. These include:

First, the temptation of an unsuccessful bidder to pursue litigation because it disagrees with the scores awarded should be resisted. A claimant has to show manifest error (ie irrationality) in the scoring or some other breach which caused it loss. The court will recognise the expertise of the evaluators but the views of the claimant's witnesses on the correct scores will not be of assistance.

Second, moderation is just that. It is a process by which the initial views and draft scores of evaluators are then considered in often lengthy discussion with other SMEs. Those views are moderated and a consensus is reached. What generally matters is the consensus rationale and scores and the record of those, not the initial views or draft scores of the evaluators.

Third, the principle of proportionality imposes sensible limits on the procedural burdens imposed, and lengths to which contracting authorities must go, in recording its evaluation process. Comprehensive reasons were provided to Bechtel (a 104 page standstill letter) setting out the rationale for its scores and those of BBVS. No contracting authority is required to take verbatim notes of evaluation or moderation sessions. Isolated lapses (such as the failure to minute a meeting) may breach the transparency principle but do not assist the claim if they have no effect on the tender outcome.

Fourth, there is some flexibility under the UCRs to negotiate, clarify and finalise terms at preferred bidder stage and more so than under the Public Contracts Regulations 2015. However, it is certainly helpful to ensure that the tender documents provide for foreseeable post tender steps, such as clarifications and negotiations, as HS2's ITT did.

Fifth, if an authority sets an 'anomaly threshold' (here a 'fee collar') in its tender documents it will be difficult to argue that a bid which exceeds that threshold is abnormally low. Clearly, if the claim is that the threshold is irrational, the claimant has to challenge the tender documents within the relevant limitation period.

Finally, a claimant who caveats its bid with a commercially unacceptable qualification may struggle to convince a court that its alleged breaches have caused any loss.

Sarah Hannaford QC, Simon Taylor and Ben Graff acted for HS2, instructed by Addleshaw Goddard LLP.

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