Tilting at Windmills: Siemens v HS2

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Judgment was handed down on 6 November 2023 by O'Farrell J in *Siemens Mobility Limited v High Speed Two (HS2) Limited & Bombardier Transportation UK Limited, Hitachi Rail Limited* [2023] EWHC 2768 (TCC). This case was heard at a 5 week trial in late 2022, with further dates in January and March 2023. Siemens brought 17 claims in total and the court heard from 18 witnesses. The claims were brought primarily on the basis of the Utilities Contract Regulations 2016 ("UCR") but public law principles were also invoked and the claims included 8 judicial reviews. All claims were dismissed.

Each claim contained multiple allegations that the court methodically considered and rejected. In relation to one of the later claims concerning an allegedly intended modification, the judge observed at paragraph 689 that Siemens was *"tilting at windmills".* It might be said that this literary metaphor characterises much of Siemens' approach to the litigation.

As in 2021 in *Bechtel Limited v High Speed 2 (HS2) Limited* [2021] EWHC 458 (TCC), HS2's procurement processes were vindicated by the court following a lengthy and wide-ranging trial.

This is a brief overview of the notable aspects of the case.

The scoring challenge

There was a challenge to the assessment by HS2 of more than 20 questions in its technical evaluation (Stages 2 to 4). A recurrent theme of the challenge was that HS2 made manifest errors by failing to reflect an alleged lack of evidence that the successful tenderer ("**the JV**" – comprising Bombardier Transportation UK Limited and Hitachi Rail Limited)'s proposals demonstrated compliance with the various specifications. The court found that that line of attack frequently involved misconstruing the questions, which asked tenderers to demonstrate either assurance that such compliance was feasible or the validity of their modelling or otherwise describe their approach to contract mobilisation and delivery. As the court pointed out at paragraph 381, it was not intended that HS2 should approve the proposals at tender stage as the design and delivery plans were incomplete.

HS2's role was to assess the tender responses against the specific questions asked and the award criteria without discrimination or manifest error. The court's role, in turn, is supervisory and the significant margin of appreciation enjoyed by the assessors was recognised. O'Farrell J cited with approval Fraser J's comment from *Bechtel* that "*There is… no judicial remedy for subjective dissatisfaction at losing a procurement competition*" (paragraph 145) and noted at paragraph 383 that "*It is not sufficient for Siemens simply to rely on deficiencies in the JV bid that were noted, discussed and taken into account by the assessors in reaching their consensus scores.*"

In the 250 paragraphs of the judgment on scoring allegations, the court found that Siemens had identified not a single manifest error.

Exercise of discretion over 'shortfall tender'

HS2 exercised a discretion in the Invitation to Tender ("**the ITT**") to allow a tenderer which failed to meet one of the technical evaluation thresholds (a shortfall tender) to progress in the competition to the assessment of price at 'Stage 5'. The ITT set out relevant factors in the exercise of the discretion (paragraph 401). The court noted that while the discretion was expressed to be absolute it must not be exercised on an unlimited, capricious or arbitrary basis and must be exercised rationally and in accordance with the policy on which it was based.

The JV was a shortfall tenderer due to failing one sub-plan in one delivery plan, but did well on all other parts of the tender, unlike the other shortfall tenderers, and the discretion was exercised allowing it to progress in the competition. Siemens made a number of allegations that HS2 failed to recognise or take into account issues relating to deliverability risk and wrongly dismissed others. The court found that the complaints were either wrong, unjustified or failed to appreciate the process being followed by HS2.

The court also rejected the criticism of the roles played by the various HS2 review panels which ensured scrutiny and oversight of key procurement decisions. The court found that the decision taken by HS2 was careful, rational, based on relevant evidence and not contrary to the UCR.

Change of control consent

There was an unusual challenge to the timing and operation of provisions in the ITT which required tenderers to seek HS2's consent for a change of control and obliged tenderers to choose which tender would remain in the competition if that change resulted in two tenderers being part of the same corporate group (section 15.7.2). These provisions had been the subject of clarification questions in the same procurement in 2018 when a merger between Alstom and Siemens was mooted. That merger did not go ahead but a merger between Alstom and Bombardier did reach completion in late January 2021. The outcome of the technical evaluation, which was also finalised and notified to tenderers in January 2021, was that Alstom was disqualified and the JV's tender progressed to Stage 5, but neither tenderer knew the outcome of the other's tender as HS2 wished, for reasons of competitive tension in the procurement to keep the identity of the Stage 5 tenderers confidential until contract award.

HS2 therefore then agreed with the parties to the merger that it would tell each the Stages 2-4 outcome of the other's tender, so that they could make an informed choice under section 15.7.2. For obvious reasons, both Alstom (by now owner of Bombardier) and the JV chose the JV's bid.

Siemens' case was that HS2 had permitted Alstom and the JV to delay making the section 15.7.2 notification until after completion to ensure that they would not back the wrong bid. It also challenged the process of communicating the outcomes to the tenderers, alleging among other things that HS2 failed to comply with the undertakings provided by the merging parties to the European Commission by not appointing an independent expert to select which bid would remain.

The court pointed out at paragraph 499 that section 15.7.2 was not in fact engaged at all because Alstom's tender was disqualified at the date of completion and thus prior to HS2's consent being given for the change of circumstances. There was also nothing left for the independent expert to determine as there was by then only one tender in play and, in any event, HS2 had no obligation to appoint an independent expert as this was not provided for in the tender rules, HS2 was not subject to the merger undertakings and it was up to the tenderers to decide which of the tenders they wished to withdraw. The allegation that HS2 delayed the process was rejected as the obligation to notify HS2 of the change of circumstances under the terms of the ITT did not arise until there was a definite proposal to make a change and notification was duly made by the JV on 29 January 2021, the date of closure of the merger. Notification of the joint proposal under section 15.7.2 was made 5 weeks later, which was within the anticipated timescale. Moreover, there was no evidence that any delay gave Alstom or the JV an unfair advantage as Alstom knew by 24 September 2020 (the date of European Commission approval when Siemens said the section 15.7.2 obligation was triggered) that it was likely to be disqualified. The court also pointed to the responses to Siemens' own clarification questions from 2018 to show that HS2 did what it said it would do in the tender rules.

There was one failing on HS2's part, which was that it communicated with the merging tenderers by telephone rather than via the portal. This was the only breach that the court found in the 183-page judgment and was a technical breach of the tender rules with no causative effect.

Stage 5 and abnormally low

Siemens also made multiple allegations regarding the Stage 5 process, which was the comparison of the 'Assessed Prices' of Siemens and the JV to determine which was the most economically advantageous tenderer. The Assessed Price aggregated the contract price tendered for capital, maintenance and other costs and certain monetised benefits (or deductions) representing notional value to HS2 as a result of design features (such as number of seats and noise levels). The commercial assessors carried out checks on the consistency of the various documents and models used to compile the Assessed prices. This led to certain clarifications on the JV's tender which were challenged by Siemens.

Applying the principles set out in *Hersi v Lord Chancellor* [2017] EWHC 2667 (TCC), Regulation 76(4) of the UCR and the tender rules, the court held that the various clarifications sought arose due to inconsistencies or obvious errors that made no difference to the evaluation outcome and that it was permissible to correct these.

Somewhat bizarrely, Siemens challenged HS2's use of the alias 'Dr No' for Siemens to which HS2's response was that the JV's alias 'Le Chiffre' was an equally if not more evil Bond villain. The court agreed that there was no merit in this or other Stage 5 allegations.

On the abnormally low allegation, the court adopted at paragraph 559 the formulation of the law set out by Fraser J *in Bechtel* and held that it was a matter for HS2 whether to carry out an abnormally low review and how to do it. The court found that the significant difference in the Assessed Prices of the two tenderers was expressly considered by HS2, including Siemens' greater allowance for risk, contingencies and margin. HS2 did not find the JV's bid to be abnormally low and, in the absence of that finding, there was no obligation on HS2 to require the JV to explain its prices. Siemens failed to establish that there was irrationality or manifest error in the finding that the JV's bid was not abnormally low.

Verification and pre contract checks

Siemens argued that Case C-448/01 *EVN AG and Wienstrohm GmbH v Austria* [2003]

ECRI-14527 gives rise to a general duty to verify tenders after evaluation but before negotiation or award under the equal treatment principle. The court rejected this interpretation of *EVN*, finding that unlike in *EVN*, HS2's tender documents, including at pre-qualification (PQP) stage, contained assessment criteria and requirements which permitted the responses to be effectively verified as part of assessment. While the tender documents enabled HS2 to review or verify information submitted by tenderers up to contract award there was no obligation to do so.

Nevertheless, HS2 did conduct certain pre contract checks on the JV's financial standing and technical issues relating to the JV partners which had arisen subsequent to the assessment of capability at PQP stage. The court accepted the submission that having decided to do so, HS2's checks must be carried out and its discretion (as to whether or not to exclude tenderers) exercised rationally and without manifest error (paragraph 619). Siemens made multiple allegations regarding the pre contract checks carried out, all of which were rejected by the court.

On the financial checks, the court decided that Siemens' criticisms were misplaced and their disagreement with HS2's conclusions on the JV's financial resilience was not sufficient to establish manifest error.

On the technical side, the court found that Siemens' *"challenge amounts to no more than an assertion that [the individual reviewing the checks] should have found that the issues raised were so serious as to oblige HS2 to disqualify the JV. That fails to grapple with the exercise he was undertaking ..."* (paragraph 641).

HS2 was not reassessing the tender responses and any such fresh assessment would breach principles of equal treatment and transparency as it was not provided for in the tender rules. It was undertaking a review to assess whether new issues, such as delay and cracking on other trains gave rise to grounds for reconsidering the earlier evaluations. They did not because they related to different designs, materials and suppliers. HS2 considered these matters and the court found no errors in HS2's analysis and report.

Modifications

Siemens argued that the award decision was made by HS2 on the basis that it would later change the train design substantially, in particular to add more doors, without factoring in the impact of such a change on the assessment process. It claimed that this was inevitable on the basis that the JV's design did not meet the Department for Transport ("the **DfT**")'s dwell time (ie the time spent between doors opening and closing) and journey time requirements and should have been disqualified for a failure to meet certain mandatory requirements (TTS-94 and TTS-161).

The court found there to be no evidence that the JV failed to meet these mandatory requirements. Concerns were raised by the West Coast Partner (the franchisee) over whether the static dwell time model ("**SDTM**") used by HS2 to assess the dwell time performance of the proposed design was an accurate reflection of the likely mix of travellers, but this was the model used in the tender rules and the court accepted the evidence that there were no irregularities in the SDTM or the data used (paragraph 677).

The court noted the considerable latitude afforded to a utility using the negotiated procedure to make changes, as recognised in *Bechtel* and found there to be no unfairness in principle to Siemens in HS2 considering such changes and no decision made to make the changes. The court also rejected the argument relating to DfT requirements as these did not form part of the tender rules and HS2's evidence that the DfT requirements could be met in a variety of ways was accepted. The decision to enter into the contract with the JV was not outside the range of reasonable decisions open to HS2 (paragraph 680).

Finally, Siemens argued that the claim relating to the alleged substantial modifications, though brought after the contract had been entered into with the JV, triggered an automatic suspension. This prompted the court to find that *"Siemens is tilting at windmills"* (paragraph 689). There was no contractual change or notional contract to which a suspension could attach. The court also rejected the request for an order preventing HS2 from entering into the alleged modification, not least because no design changes had been instructed and any

future change would be different from those which had been rejected, so any declaratory order would be obsolete (paragraph 691).

Conflicts

In claims brought in the months before trial in 2022, Siemens alleged that two HS2 employees involved in the procurement had conflict of interest by virtue of the fact that they had defined benefit pensions from their previous long employment at Bombardier. It was not alleged that the prior employment itself was a conflict. That would have been time-barred as Siemens knew of their involvement and prior employment as early as October 2021. It was the pensions issue that only came to light in correspondence in August 2022.

HS2 argued that the pensions conflict was time barred, partly on the basis of Siemens' own evidence from their head of pensions at trial that it was "almost inevitable" that the individuals would have defined benefit pensions given the time of their prior employment in the early 2000s. The court rejected the limitation point on the basis that the individuals could equally have cashed in their pensions, Siemens did not know for a fact that they still had them until August 2022 and it was not incumbent on Siemens to have asked the questions about pensions in October 2021 that it later asked in July 2022.

However, the court rejected the pensions conflict claims (paragraph 755) because it considered that the pensions did not give rise to a conflict, applying the test in Regulation 42 and the common law doctrine of apparent bias (*Porter v Magill* [2002] A.C. 357). The court noted that, in deciding whether the fair minded and informed observer would consider that the interest might be perceived to compromise the impartiality of the individuals, it should have regard to admissible evidence about what actually happened in the course of decision making and all relevant factual circumstances. The ultimate question was whether the proceedings were and were seen to be fair (*Virdi v Law Society* [2010] 1 WLR 2840). The material circumstances included that the pension was held in a separate Fund, administered by trustees to meet long-term pension liabilities, acting in the best interests of the Fund's beneficiaries, rather than Bombardier's. The sequence of events necessary before there would be any impact on the value of the pensions (including Bombardier's insolvency, no rescue of the Fund by another employer, a deficit in assets in the Fund which could not be recovered) and the fact that the Pension Protection Fund would then provide compensation of 90% (and a cap on increases for inflation) was such that the interest of the two employees was so remote as to be immaterial.

The court added that the various steps taken by HS2 to manage potential conflicts and avoid distortions of competition, including training, having 3 assessors for each question, anonymisation of tenders and three levels of review of decision making by HS2 panels, ensured that there was no unfairness or appearance of unfairness. Finally, and in any event, the individuals involved were not decision makers and Siemens had failed to establish that any of the impugned decisions would have been any different had they not participated.

A further, very late claim was issued on 29 December 2022 and served on 5 January 2023, after the close of evidence, arising out of evidence given in cross examination on 30 November 2022. This claim was the subject of an application to strike out and reverse summary judgment by HS2, which was heard on 14 March 2023 (closing submission in the main trial having been made on 23 January 2023). The alleged conflict of interest was that one of the individuals with the pension interest had also maintained contact with former colleagues at Bombardier and HS2 had failed to prevent this.

The court considered the case law on abuse of process (*Henderson v Henderson* (1843) Hare 100) and the guidance in cases on very late amendments (*CIP Properties v Galliford Try* [2015] EWHC 1345 (TCC) and *Quah Su-Ling v Goldman Sachs* [2015] EWHC 759). The court criticised Siemens for failing to provide an adequate explanation for the delay in issuing the claim between 30 November 2022 and 29 December 2022 (paragraphs 802-803). The court cited Lewison LJ in FAGE UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; *"The trial is not a dress rehearsal. It is the first and last night of the show."* The court went on to find, against this background, that the late claim had no real prospect of success. The court found that the fair minded and informed observer would not perceive that his impartiality and independence was compromised and concluded that *"it would be oppressive and unjust to HS2 for it to be vexed with another trial … on the chance that, on a further trail of inquiry something might turn up"* (paragraphs 811 - 813).

Judicial Review Claims

Finally, permission was refused for the 8 parallel judicial review claims brought which relied on the same allegations as the Part 7 claims, with reference to public law duties, on the basis that (a) Siemens was not entitled to invoke public law duties in support of its UCR claims (see paragraph 129), (b) the challenges raised concern a commercial competition and did not contain any public law element and (c) there was a suitable alternative remedy in the UCR as demonstrated by the (multiple) Part 7 claims.

Commentary

The case is notable for at least the following important points.

First, the judgment reinforces that a claimant cannot win if it is unable to show that there were manifest errors in the assessment conducted or decisions taken or other material breaches of duty. Those might be a failure to follow the published tender rules, deficiencies in a tender response not considered by assessors or an irrational exercise of discretion. But there is no remedy for subjective disagreement by unsuccessful bidders.

Second, the court firmly rejected the proposition that parallel judicial reviews could or should be issued, relying on the same allegations and claiming identical relief. It is now clear that claimants should not invoke public law principles such as legitimate expectation in procurement disputes, given the scope of the principles of equal treatment and transparency (paragraph 131).

Third, the formulation of the law on abnormally low tenders as set out by Fraser J in *SRCL v NHS Commissioning* [2018] EWHC 1985 (TCC) and *Bechtel* has again been endorsed. If an authority does not consider a bid to be abnormally low, it does not need to require a tenderer to explain its prices and to succeed a claimant would need to show at least manifest error or irrationality in the authority's consideration of the issue.

Fourth, the court made clear its position on the meaning of *EVN* and that there is no general duty of verification of tenders or qualification status prior to contract award.

Fifth, the judgment makes clear that, if matters arise in the course of cross examination that the claimant wishes to deploy in fresh allegations, it should act before the curtain closes on evidence.

In addition, it is submitted that the case raises important questions about multiplicity of claims and allegations.

First, the court was obviously concerned about the large number of claims, stating at paragraph 797 that *"In most cases, the issue of 17 different claims by a claimant against the same defendant, in respect of the same dispute, arising out of the same procurement, would be considered to be an abuse of process"*. Whilst the court acknowledged that the bringing of new claims to avoid limitation issues was a well-established practice in procurement cases, it is submitted that this established practice is only justified if the claims raise new causes of action and, even then, the claimant should seek the defendant's approval for amendments before issuing a new claim.

Second, whilst wide-ranging allegations are often pleaded at an early stage (sometimes due to limitation concerns), it is submitted that it is sensible to weed out weaker allegations well before trial to avoid unnecessarily long and costly litigation.

Finally, this case provides a good example of a utility with a sophisticated set of tender rules and processes, including the use of tiers of review panels to ensure proper oversight of decisions and good governance. HS2's procurement processes for high value procurements have again been examined thoroughly and given a clean bill of health.