

Avoiding Risks in Procurement: Abandonment



Procurement processes are full of risks, both for the tenderers, when spending valuable resources preparing tenders, and even more so for contracting authorities, when it becomes apparent that a tenderer is going to present a challenge.

Earlier this year, in *Amey Highways Ltd v West Sussex County Council [2019] EWHC 1291*, it was decided by the High Court in London that abandoning a procurement process will not necessarily defeat a tenderer's claim for damages under the Public Contract Regulations 2015 (*"the Regulations"*).

This case gives us an excellent insight into the dilemmas faced by contracting authorities when a tenderer threatens or brings a challenge, and how they should consider going forward, especially in light of this decision on abandonment.

Amey Highways Ltd ("Amey") v West Sussex County Council ("the Council")

The case arose from a procurement process to award a contract for a highways maintenance term service contract. Amey lost out by a *"wafer-thin margin"* of 0.03. Amey promptly commenced proceedings, arguing that the Council had breached the Regulations and made a manifest error in scoring. Amey's position was that its score should have been higher and, accordingly, it should have been awarded the contract. Amey claimed

£28 million for its projected loss of profits and £1 million in wasted costs for preparing the tender.

The Council's Options

The Council was left to navigate a minefield in deciding how to respond to Amey's challenge. Its first reaction was a failed attempt to strike out Amey's claim. Then, it considered its remaining four options:

1. Sign the contract with the winning tenderer and continue the litigation with Amey subject to settlement. This would allow the contract to proceed but run the risk of losing the litigation with the only remedy awardable by the court being damages;
2. Abandon the procurement;
3. Rewind the procurement to an uncontroversial point and re-run it from then; or
4. Award the contract to Amey, dispensing with the litigation but potentially inviting claims from other dissatisfied tenderers not least the then incumbent winning tenderer.

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Ultimately, the Council chose Option 2.

By abandoning the process, the Council considered it likely that Amey's claim would be extinguished whilst avoiding the greater risk of uncertainty and challenges from rewinding the procurement.

The tradeoff the Council was taking was the further delay in award of the contract, paying Balfour Beatty, the existing contractor, to continue to provide highway maintenance, and the cost of rerunning the process.

However, Amey, described as a "*determined protagonist*" by Mr Justice Stuart-Smith, opted to commence a second action challenging the lawfulness of the abandonment, and alleging that it did not extinguish Amey's first action.

In relation to the lawfulness of the abandonment it was decided that it was not irrational. Case law afforded the Council a broad discretion in assessing the factors to take account of when making its decision. Whilst the key factor was Amey's challenge, the Council had also considered the following items:

1. How to avoid the "*double bind*" of contracting with winning tenderer and resisting Amey's claim;
2. The cost savings if Amey's claim could be extinguished;
3. The additional risks of not contracting with the winning tenderer;
4. Securing critical services over the coming winter; and
5. The possibility of developing and adapting the tender and receiving more economically advantageous solutions on re-procurement.

The effect of abandonment

It was decided that the abandonment did not extinguish Amey's claim. Abandonment may be used to avoid claims coming into existence, e.g. abandonment where continuing would result in acting in breach of the Regulations. However, abandonment does not operate to extinguish an accrued cause of action and there is nothing

in the Regulations to that effect. A procurement challenge is not like a judicial review where a cause of action may fall away.

Whilst tenderers accept the risk that the contracting authority may decide not to award the contract, they do not necessarily accept that they will be deprived accrued causes of action as a result.

This decision is likely welcome for procurers. Notably though, this decision dealt only with preliminary issues of the lawfulness and effect of the abandonment decision. It will be interesting to see what effect, if any, the abandonment decision has on the amount of damages awarded to Amey, if the case is not settled before trial.

Conclusion

For contracting authorities, this case provides guidance when deciding whether to abandon a procurement process but also makes it clear that all decisions come with inherent risks. It is recommended that contracting authorities take a broad view and do not necessarily decide to abandon solely to seek to defeat a challenge. Taking a broad approach may allow the contracting authority to argue that the abandonment would have taken place in any event and thus there is no causation between the breach and non-award of the contract to the claimant.

Furthermore, this case may also prompt contracting authorities to seek to settle claims, as abandonment could prove unlikely to provide relief by itself.

The safest approach remains for contracting authorities to ensure that they are properly advised and that the procurement process is run compliantly. Doing so will place the contracting authority in the strongest position to resist or settle potential claims. It will allow them to anticipate potential breaches and potentially abandon the process before any claims can crystallise.

If you require any advice on your procurement process or procurement challenge, contact Stefan Berry at Stefan.Berry@QuiggGolden.com

