

## Case update: abandoning a public procurement process

In the case of *Amey Highways Ltd v West Sussex County Council*, the High Court considered whether it was lawful for a contracting authority to abandon a procurement process and whether that decision extinguished a bidder's accrued causes of action.

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### Facts of the case

Amey Highways Ltd (Amey) submitted a bid to West Sussex County Council (the Council) to carry out highways maintenance for a Highways Term Service Contract 2018 – 2028 (the Procurement). It was informed that it was not the preferred bidder scoring 0.03 less than a competitor.

Upon notification, it brought proceedings against the Council alleging failures in the Procurement including that its score should have been higher resulting in the contract being awarded to it. It was claiming loss of profits close to £28 million (covering the projected life of the contract) and close to £1 million for wasted costs of preparing its bid. The Council applied to strike out Amey's claim, with Amey requesting summary judgment. Both applications were refused. Following its unsuccessful attempt to dismiss the case brought by Amey and upon consideration of a number of issues, the Council decided to abandon the Procurement and start again (the Abandonment Decision). Amey responded by challenging the lawfulness and effect of the Procurement being abandoned.

### Issues considered by the court

The court identified a number of issues for consideration. However, the two key issues were whether it was lawful for the Council as a contracting authority to abandon the Procurement process and whether that decision extinguished accrued causes of action from a bidder such as Amey.

### Lawfulness of the Abandonment Decision

The court examined a number of cases, which outline some of the key principles applicable to a procurement process and the rights of a contracting authority in carrying out that process. These included:

- A contracting authority having broad discretion in assessing the factors it takes into account when deciding to award a contract following an invitation to tender, which includes any decision not to award a contract and abandon a procurement (***Embassy Limousines & Services v European Parliament* T-203/96 [1999] 1 C.M.L.R 667**);
- The exercise of discretion is not limited to exceptional cases or necessarily be based on serious grounds. Further, there is no implied obligation under the Public Contracts Directive (the Directive) or the Public Contracts Regulations 2015 (the Regulations) to carry an

award procedure to a conclusion (**Metalmecanica Fracasso SpA v Amt de Salzburger Landesregierung ECR I-5697 [2000] 2 CMLR 1150**);

- Neither the Directive or Regulations contain specific provisions regarding “*the substantive or formal conditions*” for the decision not to award a contract or to abandon a procurement. However, the decision is “*subject to the fundamental rules of Community law, and in particular to the principles laid down in the EC Treaty on the right of establishment and the freedom to provide services*” (**Hospital Ingenieure (HI) v Stadt Wien [2004] 3 CMLR 16**);
- The duty to notify reasons in the Directive and the Regulations is dictated by a concern to ensure a minimum level of transparency in the contract-awarding procedure and compliance with the principle of equal treatment (HI);
- Courts of member states must be able to determine the lawfulness of a decision to abandon a procurement and it is contrary to the Remedies Directive to limit the review of legality of a decision to “*mere examination of whether it was arbitrary*” (HI);
- A contracting authority has the power to abandon a procurement without a contract award when it discovers after assessment of tenders that, because of errors it has made, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender. However, any such decision that it adopts is subject to compliance with fundamental rules of Community law on public procurement such as the principle of equal treatment (**Kauppatalo Hansel v Imatran Kaupunk [2003] ECR I-12139**); and
- EU law permits member states to provide in their legislation for the possibility to withdraw an invitation to tender on grounds which may be based on reasons such as whether it is expedient to carry an award procedure to conclusion due to changes in the economic context or factual circumstances or the needs of the contracting authority. The grounds for a withdrawal decision may also relate to an insufficient degree of competition (**Croce Amica One Italia Srl v AREU [2015] PTSR 600**).

The court found that the driver for the Abandonment Decision was Amey’s legal challenge. However, the Council also considered other factors including attempting to balance the risks inherent in the litigation, terminating the procurement would enable it to take into account lessons learned, the need to secure critical services over the winter period and the loss of savings and benefits it had anticipated with awarding the contract in this procurement.

Importantly, the court was not persuaded that the decision to abandon was irrational. On the contrary, the court found that the Council’s actions were a rational attempt to preserve public funds by taking into account a number of factors including:

- avoiding a double bind of contracting with the preferred bidder whilst litigating a claim with another;
- the potential costs that would be saved if the procurement challenge could be disposed;
- the additional costs that would be incurred if a contract was not entered into with the preferred bidder;
- the need to secure provision of critical services;
- the possibility of developing a more advantageous solution on a re-procurement.

In addition, the court found that even if the Council was unsuccessful in terminating the procurement challenge, Amey as the claimant in this case was not able to show that there was any better approach the Council could adopt, other than abandonment of the process, or that the decision it did take was not expedient in the public interest.

The court also addressed arguments made in respect of the compliance with Treaty principles of equal treatment and transparency. In respect of equal treatment, the court found that the Abandonment Decision does not infringe that principle since all bidders were equally placed with no binding commitment made to any of them and who accepted the risk of a rational decision being made resulting in abandonment of the procurement. In relation to transparency, the court found that it may have been possible for the Council to explain its reasons more fully but overall there was no lack of transparency, which would result in the Council’s decision being unlawful.

## Effect of the Abandonment Decision on accrued causes of action

The Council argued that bidders participate in procurements regulated by the Regulations in the knowledge that they have no right or legitimate expectations to be awarded a public contract or to be compensated for the costs of their bid if they are unsuccessful.

In addition, they have knowledge of a contracting authority’s wide discretion to abandon a procurement process at any stage but are willing to participate because of the prospect of making substantial profits if they are successful.

The Council also argued that decisions by contracting authorities under the Regulations are public law decisions challengeable by judicial review and should be viewed as having the same attributes as other public law decisions. The Regulations provide a remedy in damages, which is a private law remedy but is not one which is to be viewed as an equivalent standard tort claim for breach of statutory duty. The cause of action created by the Regulations retains its legal status and effect and is capable of being set aside. On that basis when the lawful decision to abandon the procurement was taken, this did not result in cancellation of an accrued cause of action but the cause of action claimed no longer existed.

Firstly, the court was not persuaded by the Council's arguments on the basis that claims for damages under the Regulations being private law claims could not be equated to a claim for a public law remedy such as judicial review. The court found that decisions by a contracting authority in the context of procurement may be a public law act and engage public law remedies and be a breach of a private law duty giving rise to a private law remedy. Regulation 98(2) makes specific provision for an award of damages for breach of statutory duty even where a challenged decision to enter into a contract may no longer be set aside. Therefore, the private law remedy for damages may subsist whether or not the public law remedy is available. Further, the court found that there is nothing in the Regulations expressly or interpreted by implication to impose a limitation on the availability of an award for damages where the court is satisfied that the statutory criteria for an award are met.

Secondly, the court found that there was a distinction between claims that were unenforceable before the abandonment of procurement and claims that have crystallised into an accrued cause of action. The court accepted that lawfully withdrawing a procurement process may prevent private law claims from coming into existence. Some of the circumstances where this could arise would be where pursuing the procurement would not result in the contract being awarded to the most economically advantageous or where it would not be expedient from the point of view of public interest.

However, an accrued cause of action is fundamentally different from a claim that has not yet crystallised and may become enforceable in the future. The court described an accrued cause of action as being regarded as property, an asset and capable of having value. The court considered the claim in the present case as 'cancellation' of an existing accrued cause of action. Where the Abandonment Decision has the effect of depriving an economic operator of a cause of action in existence and which it is entitled to enforce before a decision is taken, this is neither mandated by the Regulations or public law principles. Further, the principle of equal treatment does not require cancellation of an existing accrued cause of action.

In the court's view *"the inherent nature of an accrued cause of action means that the power to cancel"* it by terminating a procurement process requires clear statutory sanction or policy justification or binding prior authority. In this case, none of these were present. On the basis the Abandonment Decision had no effect on the accrued cause of action by Amey to the extent that it is able to prove that it had such an accrued cause of action before the Abandonment Decision.

## Implications of the decision

This case is an important reminder to contracting authorities of the principles applicable when determining whether to abandon a procurement process and the implications of such decisions. Whilst contracting authorities enjoy wide discretion when determining whether to abort a process, they must carefully consider a range of factors to inform their decision and in particular ensuring that the decision reached is lawful.

Following this decision, a contracting authority must also carefully consider the distinction between causes of action that may accrue in the future and accrued causes of action. A lawful decision to abort a process may well extinguish causes of action that may accrue in the future but would not lead to cancellation of those already in existence. Considering this distinction is important as failure to do so may result in an abandonment decision being challenged resulting in additional cost being incurred.

Contracting authorities must also document all relevant considerations in order to be able to justify their decision should they be challenged. In this case, the court carefully examined a wide range of communications between the officers involved in the decision making, in-house legal advisers, members, as well as reports prepared, notes of meetings and entries in the Council's risk register.

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