Moving the stalls

Jeremy Glover examines the use of expert evidence in procurement disputes

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'In most judicial review cases, expert evidence will not be admissible, particularly where the public body making the decision under review is itself composed of experts or has been advised by an expert assessor.'

The case of *BY Development Ltd v Covent Garden Market Authority* [2012], heard before Coulson J raised important issues about the extent to which, if at all, expert evidence can be admissible or relevant in a procurement dispute under the Public Contracts Regulations 2006 (as amended).

The facts

The defendant (CMGA), a statutory corporation that owns a large site next to Vauxhall Cross in South London where, for almost 40 years, the New Covent Garden Market has operated, wished to redevelop the site. It began a tender process in March 2010 using the competitive dialogue procedure that, following pre-qualification, involved three stages:

- initial dialogue and submission of outline solutions;
- the detailed dialogue; and
- the submission of final tenders.

The claimants reached stage 3 of the process. However, on 27 March 2012, CMGA issued a notice under reg 32, notifying the claimants that their tender had not been successful and that it intended to award the development contract to a rival bidder.

The claimants sought to challenge that decision arguing that CMGA's evaluation of the respective bids contained a number of manifest errors, particularly in relation to planning matters. Alternatively, they said that the decision was unfair and/or arose as a result of the unequal treatment of their bid. As part of this challenge to the procurement process, the claimants sought leave to rely on expert evidence in relation to both planning and finance matters.

The question for Coulson J was whether the expert evidence was either admissible or relevant. Under the 2006 Regulations as amended, the principal way in which an unsuccessful bidder can challenge the proposed award of a contract to another bidder is to show that the public body's evaluation of the rival bids either involved a manifest error, or was in some way unfair, or arose out of unequal treatment. The judge said that this means that the court's role is a limited one. Importantly, he stressed that the court will not be tasked with undertaking a comprehensive review of the tender evaluation process nor is it to substitute its own view as to the merits or otherwise of the rival bids for that already reached by the public body.

Wednesbury

The Judge noted that the test of 'manifest error' applied in the European procurement cases was very similar to, if indeed not the same as, the *Wednesbury* test of unreasonableness or irrationality in domestic judicial review proceedings (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948]: adopting the *Wednesbury* approach, a court will consider whether the decision was so perverse that no reasonable tribunal, properly directing itself as to the law to be applied, could have come to the same conclusion). He further noted that in domestic judicial review proceedings, it is very rare for expert evidence to be either relevant or admissible. He referred, by way of example, to the decision of Collins J

in *R (on the application of Lynch) v General Dental Council* [2003] who concluded that in most judicial review cases, expert evidence will not be admissible, particularly where the public body making the decision under review is itself composed of experts or has been advised by an expert assessor. Collins J said:

> ... it will be virtually impossible to justify the submission of expert evidence which goes beyond explanation of technical terms since it will almost inevitably involve an attempt to challenge the factual conclusions and judgment of an expert.

The one exception might be a report from an expert, which, again in the words of Collins J, 'seeks to explain what is involved in a particular process and how complicated that process is'. In rare circumstances such a report might be admissible to explain the technical terms and concepts.

Coulson J considered that the correct approach to the test of 'manifest error' in public procurement cases is that the court must carry out its review with an appropriate degree of scrutiny to ensure that the basic principles for public procurement have been complied with, that the facts relied upon by the contracting authority are correct and that there is no manifest error of assessment or misuse of power. If the contracting authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for it to have a 'margin of appreciation' as to the extent to which it did, or did not, comply with its obligations. For example, this will mean that the court will not carry out a re-marking exercise in order to substitute its own view for that of the local authority. The task for the court is to ascertain if there is a manifest error, something that is not established merely because a different mark might have been awarded.

The judge referred to the decision in the case of *Letting International Ltd v London Borough of Newham* [2008], where Silber J had to consider allegations of manifest errors in the Contracting Authority's tender evaluation process. Silber J considered each of the alleged errors in the evaluation. However, the judge emphasised that, in so doing, he was not carrying out a re-marking exercise, in order to substitute his own view for that of the local authority:

> ... but to ascertain if there is a manifest error, which is not established merely because on mature reflection a different mark might have been awarded.

As many will recall, Silber J found that there had been a manifest error in relation to the authority's marking on size and that there was also 'probably' another manifest error relating to disability discrimination. The first error was accepted by the Newham's principal witness of fact. The same witness was not able to provide a rational explanation for the second error. No other manifest errors were found. However, it is equally important to remember that, the Judge in the *Letting* case decided that the manifest errors were not causative because, even making allowances for them, the tender would still have been unsuccessful. The point that was relevant to Coulson J was that exercise undertaken by the judge was a straightforward factual investigation. There was no expert evidence.

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Exception not the rule

Indeed, one thing to emerge from *BY* was the fact that procurement disputes of this type do not generally involve expert evidence. Only three were referred to in the judgment:

- *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons* [1999], where HHJ Lloyd QC found that the tender procedure for the fenestration package at Portcullis House was operated in breach of the relevant Regulations. Here, the judge had to consider expert evidence from an engineer and a quantity surveyor. The evidence here was not about the tender process but went to particular issues of causation (namely whether or not, but for the errors, the claimant's tender would have been successful) and quantum.

- *Henry Brothers (Magherafelt) Ltd v Department of Education for Northern Ireland* [2011], where at first instance there was expert evidence about applicability of one of the relevant criteria, against which the bids were considered, rather than any wider issues concerning the tender process as a whole.

- *Newcastle Upon Tyne Hospital NHS Foundation v Newcastle Primary Care Trust* [2012], where expert evidence was put forward before Tugendhat J who was dealing with an application under reg 47H. The judge was critical of the evidence in question.

This lead Coulson J to conclude that (para 20):

> ... where the issues are concerned with manifest error or unfairness, expert evidence will not generally be admissible or relevant in judicial review or procurement cases. That is in part because the court is carrying out a limited review of the decision reached by the relevant public body and is not substituting its own view for that previously reached; in part because the public body is likely either to be made up of experts or will have taken expert advice itself in reaching the decision; and in part because such evidence may usurp the court's function.

This does not mean that expert evidence can never be admissible in public procurement cases concerned with manifest error. Sometimes technical explanatory evidence is required. Is the claim one where the technical background is so complex that explanatory expert evidence is required, and/or the claim an unusual case where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the court to reach a proper view on the issues of manifest error or unfairness? For example, Coulson J acknowledged the appropriateness of the use of expert evidence in *Henry Bros* where the particular issue was specific and discrete, such as a debate about one of the criteria used in the evaluation.

In *Henry Bros*, the issue in question related to the amount of defined costs as required under the NEC 3 form of contract. The underlying assumption made by the contracting authority was that defined costs would be the same for each contractor. It was demonstrated at the hearing at first instance, through expert evidence called by the claimant and cross-examination of the defendant's witness that that assumption was incorrect and amounted to a manifest error. In addition, the evidence showed that fee percentages could give misleading results in terms of competitiveness depending on the manner in which a contractor allocated his management staff. As an indicator of price competitiveness they were unreliable on that account also.

The court will not carry out a re-marking exercise in order to substitute its own view for that of the local authority.

Tender evaluation

In *BY*, all the matters at issue went to elements of the tender evaluation itself. In these circumstances, unlike in *Henry*, the need for such evidence to explain background technical matters was not made out. Indeed, the judge went further to suggest that there did not seem to be any substantive disputes between the parties as to the technical background to the evaluation. The judge gave an example. One of the questions for the proposed planning expert was whether or not the London Borough of Wandsworth would have accepted an outline application for planning permission for a 175m tower. The judge was of the view that the opinion evidence of a planning expert, reached some time after the event, as to what a third party local authority might have done

had it received a hypothetical planning application, was not going to be of any meaningful assistance to a judge who had to decide whether or not there was a manifest error in the assessment of planning risk.

Saying this, the judge recognised that, in these cases, claimants who are almost invariably the party whose bid has been unsuccessful can often be at something of a disadvantage in mounting a challenge to the decision. That claimant has had no involvement in the detailed evaluation, so does not know precisely why its bid was unsuccessful. In the first instance, it is entirely dependent on the information that it is given by the defendant. Even once the proceedings have commenced, and further information has been provided (usually with a greater or lesser degree of reluctance) the claimant often remains unclear as to precisely what happened during the evaluation exercise.

However, while against that background the judge could see that the possibility of being able to rely on a detailed expert's report, dealing with all aspects of the evaluation and out of which a case as to manifest error or unfairness might emerge, would be at least superficially attractive to a claimant. He reconfirmed that:

> I consider that such an approach is wrong. Given the limited nature of the court's review function, such expert evidence will not generally be admissible unless there are particular reasons why, on the facts of the case in question, the costs, time and effort required to present such opinion evidence could be justified.

Here the judge was concerned that the instruction of the expert would lead to a complete re-run of the evaluation process, with the experts commenting on each element of the tenders and their evaluation, and seeking to substitute their views for those held and the decisions taken at the time. That is not the role of the judge.

To do this would be to ignore the limited review task for the court at trial. You should not assume that a complete replay of the whole evaluation process will be allowed. Further, there was a danger that the experts were also being asked to usurp the function of the court. The experts were being asked not only whether it was their view that, for example, the claimant's bid did not represent an unreasonable planning risk but also whether, in reaching the contrary conclusion, they were of the opinion that the authority's evaluation was manifestly wrong.

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Conclusion

The *BY* judgment makes it clear that the need for explanatory expert evidence will need to be very carefully assessed by the courts in cases where a challenge is being made to the tender process. It is only where there is a complex technical field where explanation is required in order for the court to reach a conclusion that such evidence will be permitted. The judge was careful to keep an open mind. For example, he acknowledged that if there is a genuine need for explanatory expert evidence that will usually emerge much closer to the trial, perhaps following the exchange of witness statements. Here the judge noted that if there were very specific areas of debate then these types of cases may well be suited to the use of a joint expert to deal with those specific matters. The joint expert could give evidence writing and with little or no cross-examination.

That said, given the very clear comments made by Coulson J in *BY*, it must be anticipated that it will only be on very rare occasions that such expert evidence will be allowed. The task of the court when considering challenges to the procurement process is a limited one and the court will not allow a complete replay of the whole evaluation process. Here the judge felt that the desire to appoint an expert was designed to permit such a complete re-run of the evaluation process, with the experts commenting on each element of the tenders and their evaluation. Inevitably, the experts would seek to substitute their views for those held, and the decisions taken, at the time.

When deciding whether or not to allow expert evidence the question the court will ask itself is this:

> Is this a claim where the technical background is so complex that explanatory expert evidence is required, and/or is this an unusual case where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the court to reach a proper view on the issues of manifest error or unfairness?

The likely answer in most cases will be: no. ■

Associated Provincial Picture Houses Ltd v Wednesbury Corporation
(1948) 1 KB 223

BY Development Ltd & ors v Covent Garden Market Authority
[2012] EWHC 2546 (TCC)

CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons
[1999] 67 Con LR 1

Henry Brothers (Magherafelt) Ltd & ors v Department of Education for Northern Ireland
[2011] NICA 59

Letting International Limited v London Borough of Newham
[2008] EWHC 1583 (QB)

Newcastle Upon Tyne Hospital NHS Foundation v Newcastle Primary Care Trust & ors
[2012] EWHC 2093 (QB)