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# Abandoning a procurement: not always the end of the story

By Jonathan Lewis

In *Amey Highways Ltd v West Sussex Highways* [2019] EWHC 1291 (TCC), Stuart-Smith J held that a contracting authority's decision to abandon a procurement following a challenge brought by a disappointed tenderer does not automatically extinguish that tenderer's claim for damages.

## INTRODUCTION

1. West Sussex County Council (the "**Council**") put out for a tender a contract for the maintenance of certain highways. The procurement was governed by the Public Contract Regulations 2015 ("**PCR**"). Amey Highways Limited ("**Amey**") lost out by a "wafer-thin" margin of just 0.03% to Ringway Infrastructure Services Limited ("**Ringway**"). It issued proceedings challenging the award on the basis that the Council acted contrary to the principle of transparency and had made manifest errors in underscoring its bid. The primary relief that Amey sought was to have the Council's decision to award the contract to Ringway set aside. However, it also claimed damages for loss of profits (of around £28m) and wasted tender costs (of around £1m).
2. The Council applied to strike out critical parts of Amey's case and Amey applied for summary judgment on its claim. Stuart-Smith J dismissed both applications.<sup>1</sup> The Council then decided to terminate the procurement and start again (the "**Decision**").

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<sup>1</sup> [2018] EWHC 1976 (TCC).

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It was its hope and intention that withdrawing the procurement would defeat any claim that Amey might otherwise have had (at [2]). However, Amey issued a second set of proceedings challenging the Decision.

3. Whilst there were at least seven issues before him, Stuart-Smith J characterised the critical issue as being whether the Council was right in its hope and intention that withdrawing the procurement as and when it did would bring Amey's first claim to an end (at [4]). As explained below, he found that it did not.
4. The judge carried out a forensic analysis of the evidence to establish the precise reason why the Council decided to abandon the procurement ([19]-[43]). The Council had never publicly accepted that it made any mistakes in the course of the procurement ([20]). Its preferred option was to award to Ringway (and, to that end, it had secured the lifting of the automatic suspension).
5. One of course has sympathy with the (not unfamiliar) position that this contracting authority found itself in. On the one hand, it was concerned that a failure to put the new contract in place would be seen as a failure of one of its core functions and duties. Further, it needed to make provision for the annual winter maintenance service of highways and wanted to achieve the significant savings that the new contract was expected to achieve (at [20]). On the other hand, it faced the real and substantial risk of "*lengthy, expensive and labour intensive litigation*" (at [22]). Defending Amey's claim would "*impose a heavy burden on the Council's limited resources, both human and financial*".
6. The Council ultimately reached the view that abandonment would be its best option – a decision which the judge found to be rational (at [42]). Whilst the Council hoped that abandonment would remove Amey's claim, it did not believe that it was *bound* to do so (at [25]). The judge found that the driver behind the Decision was Amey's claim

and there was no other rationale behind it (at [34]). He rejected Amey’s contention that the Council proceeded on the basis that abandoning the procurement would certainly bring the litigation to an end quickly (at [41 (iii)]).

## PRINCIPLES RELATING TO ABANDONMENT

7. Stuart-Smith J usefully distilled the following principles in relation to the abandonment of a procurement:
  - a. A contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and therefore in respect of any decision not to award a contract and abandon a procurement.<sup>2</sup>
  - b. The exercise of that discretion is not limited to exceptional cases or has necessarily to be based on serious grounds.<sup>3</sup>
  - c. There is no implied obligation under the Public Contracts Directive or the PCR to carry the award procedure to its conclusion.<sup>4</sup>
  - d. Neither the Public Contracts Directive nor the PCR contain any specific provision concerning “*the substantive or formal conditions*” for the decision not to award a contract / to abandon a procurement. But, the decision is “*subject to the fundamental rules of Community law, and in particular to the principles laid down by the EC Treaty on the right of establishment and the freedom to provide services*”.<sup>5</sup>
  - e. The courts of member states must be able to determine the lawfulness of a decision to abandon a procurement, and it is contrary to the provision of the Remedies

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<sup>2</sup> See *Embassy Limousines & Services v European Parliament* T-203/96 [1999] 1 CMLR 667 at [56].

<sup>3</sup> See *Metalmeccanica Fracasso SpA v Amt de Salzburger Landesregierung* [1999] ECR I-5697; [2000] 2 CMLR 1150 at [23].

<sup>4</sup> See *Metalmeccanica supra.* at [24] and [33].

<sup>5</sup> See *Hospital Ingenieure v Stadt Wien* [2004] 3 CMLR 16 at [42] and [47].

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Directive<sup>6</sup> to limit the review of the legality of the decision to “*mere examination of whether it was arbitrary*”.<sup>7</sup>

- f. A contracting authority has power to abandon a procurement without contract award “*when it discovers after examining and comparing the tenders that, because of the errors committed in its preliminary assessment, the content of the invitation to tender makes it impossible for it to accept the most economically advantageous tender, provided that, when it adopts such a decision, it complies with the fundamental rules of Community law on public procurement such as the principle of equal treatment*”.<sup>8</sup>
- g. 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 which reflect inter alia the assessment as to whether it is expedient, from the point of view of the public interest, to carry an award procedure to its conclusion, having regard, amongst other things, to any change that may arise in the economic context or factual circumstances, or indeed the needs of the contracting authority concerned...*”.<sup>9</sup>

## THE ORIGINAL CLAIM IS NOT SUPERSEDED BY THE ABANDONMENT

- 8. Amey challenged the Decision on the basis that it had been taken on the basis that the original claim had been “*superseded*”, taking into account the potential costs, uncertainty, delay and disruption to highway services and in a deliberate attempt to deprive it of its cause of action, none of which were proper and rational reasons (at [43]). There was no evidence that the Council would have abandoned the procurement on a lawful basis in any event (at [48]).

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<sup>6</sup> Directive 89/665.

<sup>7</sup> See *Hospital Ingenieure* at [61]-[64].

<sup>8</sup> See *Kaupatalo Hansel v Imatran Kaupunck* [2003] ECR I-12139 at [36].

<sup>9</sup> See *Croce Amica One Italia Srl v AREU* [2015] PTSR 600 at [35].

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9. The essence of the Council’s case was that decisions taken by contracting authorities under the PCR are public law decisions which are in principle challengeable by judicial review and should be regarded as having the same attributes as other public law decisions (at [53]). Whilst damages could be sought under the PCR, that remedy was not equivalent to a “*standard*” tort claim for breach of statutory duty. On this basis, there has to be an extant procurement to challenge and if the procurement has been abandoned there is none, hence the claim must fall away.
10. Stuart-Smith J rejected the Council’s analysis primarily on the basis that it is wrong to assert that decisions taken in the course of a procurement *only* engage public law principles and remedies. Rather, the Supreme Court in *Energy Solutions v Nuclear Decommissioning Authority*<sup>10</sup> established that breach of the PCR is best regarded as a breach of statutory duties but subject to *Francovich* principles (at [56]). He made good this point by highlighting that regulation 98(2) PCR provides for damages for breach of duty even where a challenged decision may no longer be set aside; hence, the private law remedy of an award of damages may subsist whether or not public law remedies are still available (at [57]). The judge saw “*no basis in public law principles, public policy more generally or the purposes underlying and embodied in the PCR*” that supported the Council’s position that the original claim had somehow been extinguished (at [61]).
11. The judge stressed that an accrued cause of action is fundamentally different from an inchoate claim that might become enforceable at some future date; an accrued cause of action may be regarded as property, an asset, capable of having present value (at [61]). Whilst abandoning a procurement does not have any impact upon an accrued cause of action, it may prevent private law claims from coming into existence thereafter (at [59]).

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<sup>10</sup> [2017] UKSC 34; [2017] 1 WLR 1373; [2017] 3 CMLR 388.

## CONCLUSION

12. The decision in *Amey* took some somewhat by surprise. However, Stuart-Smith J was very careful to make clear that his decision did not depart from the general principles in relation to the abandonment of a procurement established in domestic and European authorities (see [63]-[77]). Rather, he considered that the particular issue as to the status of an existing cause of action after abandonment had not previously been expressly addressed.
13. Certainly this decision will give contracting authorities further pause for thought before deciding to abandon a procurement (especially where they do not consider themselves to have been at fault). Contracting authorities should be astute to document carefully all of their reasons justifying a decision to abandon a procurement. It is now clear that whilst abandoning a procurement might serve the valuable purpose of extinguishing causes of action that may accrue in the future, it would not lead to extinguishment of those already in existence.
14. It might well be that if a disappointed tenderer won the contract when a procurement was re-run it would ultimately be prepared to settle its claim in respect of the first procurement. However, this is not to say that its original claim would be without value (for example, the tenderer might still seek to recover its original wasted tender costs or might seek to amend the relief sought in light of the abandonment). Ultimately, it might be prepared to settle simply because it wishes to preserve cordial relations with the authority it is about to contract with.

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