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Public Procurement & Contract Exclusions - 1. Working on Wellbeing Ltd t/a Optima Health v Secretary of State for Work and Pensions & Anor [2025] EWCA Civ 127 (14 February 2025) 2. EE Ltd v Virgin Mo

1. *Working on Wellbeing Ltd t/a Optima Health v Secretary of State for Work and Pensions & Anor* [2025] EWCA Civ 127

Date: 14 February 2025

Key Words:

Public procurement dispute, Invitation to Tender (ItT), Mandatory exclusion provision, Framework Maximum Prices, Duty to seek clarification, Equal treatment, Transparency, Proportionality, Reasonably well-informed and normally diligent tenderer (RWIND tenderer), Discretion, Obvious error or ambiguity, Materiality, New bid, Irrationality, Call-off contract, Occupational health and employee assistance programmes (OHEAP)

Summary

This appeal concerned a public procurement dispute over a call-off contract for occupational health and employee assistance programmes ("OHEAP") [1-6]. Optima appealed its exclusion from tender consideration, arguing the Department for Work and Pensions ("DWP") misapplied the Invitation to Tender ("ItT") terms, failed to seek clarification of errors, and exceeded permissible clarification limits [1]. The Court of Appeal allowed the appeal, ruling that DWP misdirected itself in law and failed to exercise discretion properly [162].

***Key Themes*:**

The key themes in this case are:

1. Mandatory Exclusion vs. Discretion: The dispute centred on whether the ItT mandated exclusion for exceeding Framework Maximum Prices or allowed DWP discretion [1, 16].
2. Duty to Seek Clarification: The judgment examined whether DWP was obliged to clarify errors or ambiguities in Optima's bid [1, 2, 16, 17, 24].
3. Equal Treatment & Transparency: The case highlighted tensions between equal treatment and transparency, particularly regarding clarifications [1, 2, 16, 17.2a-d].
4. Proportionality: The court considered whether excluding Optima's high-quality bid was a proportionate response to errors [2, 21, 28, 53].

5. Interpretation of ItT: The judgment analysed whether a "reasonably well-informed and normally diligent tenderer" (RWIND) would have understood paragraph 2.2 of Attachment 1 as requiring exclusion [17-19, 29].

Background

- Optima was a party to the RM6182 Framework Agreement with DWP [4, 5].
- Six framework participants were invited to tender for an OHEAP contract [6].
- Bidders submitted 133 line-item prices, totalling 190 prices [7].
- Evaluation was weighted 70% quality, 30% price [7].
- Optima's quadruple-checked tender exceeded Framework Maximum Prices in three of 133 service lines [10, 11].
- DWP excluded Optima's bid and awarded the contract to People Asset Management Limited ("PAM") [15].
- Optima argued the ItT lacked a clear exclusion warning and that DWP failed to exercise discretion properly [15, 16].

Legal Issues and Analysis

1. **Issue 1/Ground 1: Mandatory Exclusion Clause:** The court found paragraph 2.2 of Attachment 1 did not mandate exclusion [35-37]. The term "discounted" was ambiguous and could mean "reduced" rather than "excluded" [38]. Other ItT sections explicitly warned of exclusion, reinforcing the lack of a mandatory clause
[37].
2. **Issue 2/Ground 6: Failure to Exercise Discretion:** DWP misdirected itself in law and failed to properly exercise their discretion when considering whether to seek clarification from Optima [92, 93, 108]. DWP's decision was tainted by the erroneous belief that there was a mandatory exclusion provision and that DWP did not properly consider the options available to it [94, 95].
3. **Issue 3/Grounds 2, 3, and 4:** Obvious Mistake or Ambiguity and Seeking Clarification: Optima's tender contained obvious errors and/or ambiguities [126]. DWP was obliged to seek clarification from Optima and could have done so without breaching the duty of equal treatment [162b-c]. Seeking clarification was necessary for a proper evaluation of the tenders and that the principle of equal treatment should not be applied in a way that prevents a contracting authority from addressing obvious errors or ambiguities [132-133].

Conclusion

The Court of Appeal allowed Optima's appeal, finding that DWP had acted unlawfully by excluding Optima's bid. The ItT did not contain a mandatory exclusion provision, that DWP had failed to properly exercise their discretion, and that DWP was obliged to seek clarification from Optima regarding the errors in its bid [45, 96, 97e, 106, 108,
135, 162].

Key Takeaway:

The judgment underscores the importance of clarity in procurement. Contracting authorities must exercise discretion proportionately and apply equal treatment flexibly to allow clarification of obvious errors. It also clarifies when authorities must seek clarification and the limits of bid changes.

Parting Thoughts

Clarity and transparency are crucial in procurement [108]. Equal treatment should not rigidly prevent addressing obvious errors [132, 136, 137]. Discretion should be exercised in the interest of fair competition and thorough evaluation [104]. Overly rigid interpretations should not override the public interest in achieving the best procurement outcome [105, 106, 122, 123].
I'm eager to review fascinating recent cases from around the globe. If you have one to share, please send it my way and I'll credit you with the reference.

#PublicProcurement #ProcurementLaw #InvitationToTender #MandatoryExclusion #DutyToClarify #EqualTreatment #Transparency #Proportionality #RWINDTenderer #Discretion #ObviousError #FrameworkAgreement #CallOffContract #OptimaHealth #PublicLaw #GoodAdministration #Materiality #NewBid #Optima

2. *EE Ltd v Virgin Mobile Telecoms Ltd* [2025] EWCA Civ 70

Date: 4 February 2025

Key Words:

Exclusion clause, Anticipated profits, Telecommunications Supply Agreement (TSA), Freedom of contract, Commercial context, Loss of profits, Diminution in price, Expectation loss, Breach of contract, Damages, Minimum Revenue Commitment, Injunctive relief, Wasted expenditure

Summary

The Court of Appeal upheld the High Court's decision that EE Limited's claim against Virgin Mobile Telecoms Limited was excluded under clause 34.5(a) of their contract as it concerned "anticipated profits" [1, 2]. The court ruled that EE's claim for revenue lost due to VM diverting customers was indeed a claim for anticipated profits, which the contract excluded [19, 20, 81, 82].

Key Themes:

The key themes in this case are:

1. ***Interpretation of Exclusion Clauses:*** *The case focused on interpreting a commercial contract's exclusion clause regarding "anticipated profits" [12].*
2. ***Freedom of Contract:*** *The court reaffirmed that commercial parties are free to allocate risks, including through exclusion clauses [16]. The court reaffirmed that commercial parties are free to allocate risks, including through exclusion clauses [16].*
3. ***Commercial Context:*** *Contracts must be interpreted in their documentary, factual, and commercial context [15].*
4. ***Nature of Damages:*** *The case distinguished between "loss of profits" and "diminution in price" and their relation to expectation loss [31-33, 40, 41].*

Background

- EE, a Mobile Network Operator (MNO), and VM, a Mobile Virtual Network Operator, entered into a Telecommunications Supply Agreement (TSA) in 2013 [1-6].
- EE provided VM with access to its mobile network for VM's customers to use 2G, 3G, and 4G services [7].
- VM agreed to use EE's network exclusively until December 31, 2021, later amended to 2026 if the TSA term extended [7].

- A 2016 amendment allowed VM to provide 5G services to its customers through another MNO if no agreement was made with EE regarding 5G services, and also allowed VM to source 2G, 3G and 4G services from the alternative MNO [7-9].
- EE launched its 5G service in May 2019, but VM entered an agreement with Vodafone for 5G services and began migrating customers in January 2021 [9-10].
- EE claimed VM breached the exclusivity obligation by migrating customers to Vodafone outside the parameters of clause 5B.2 and/or adding new non-5G customers to the Vodafone network, even though those customers were only provided with 2G-4G mobile services [11].
- EE's claim for loss and damage was for the revenue EE would have received had VM's customers remained on the EE network for 2G-4G services, estimated at around £24,635,684 [11]. VM denied breach and argued the claim was for "anticipated profits," excluded under clause 34.5(a) of the TSA [12].

Legal Issues and Analysis

1. **Central Issue:** Whether EE's claim was excluded by clause 34.5(a) of the TSA as "anticipated profits" [1].
2. **The High Court's Analysis:** The High Court found EE's claim fell within the exclusion clause [1, 13-16]. EE appealed.
3. **Court of Appeal's Analysis:** The Court of Appeal upheld the High Court's decision, noting that "anticipated profits" should be interpreted as any loss of profits, including expectation loss [19, 72, 73].
    1. The court rejected EE's argument that its claim was for "diminution in price" rather than "loss of profits," deeming the distinction "arid" [40].
    2. The court considered previous cases cited by EE, such as The Herdentor and Ease Faith, but found them unhelpful as the clauses and contexts differed materially [16(27d), 36, 37]. These cases did not establish any principle that an exclusion of "loss of profits" cannot cover a claim for "diminution in price"[39, 40].
    3. The court also addressed the argument that the exclusion clause would render the exclusivity clause meaningless, referring to Kudos Catering, but distinguished the case, noting that EE retained other contractual rights and remedies [24, 26, 27].
    4. The commercial context confirmed the exclusion clause was a negotiated risk allocation applying to both parties [21, 99].
    5. The court also considered the argument that EE was left without an effective remedy, but it stated that EE could still pursue claims for wasted expenditure and injunctive relief [68, 69, 90, 94-96].
4. **Dissenting Opinion:** Phillips LJ dissented, arguing the exclusion clause undermined the commercial bargain [105]. He suggested "anticipated profits" should exclude only uncertain profits, not sums payable under the contract [108].

Conclusion

The Court of Appeal dismissed EE's appeal, affirming that its claim was excluded under clause 34.5(a) of the TSA [81-83, 102-103].

***Key Takeaway*:**

The ruling highlights the significance of carefully drafting exclusion clauses in commercial contracts [99]. Exclusions of "anticipated profits" can encompass claims for lost revenue or expectation loss,

depending on the contract's wording and context [81-82]. Parties must ensure their contractual intentions are clearly reflected [15(26), 16(27)].

Parting Thoughts

Exclusion clauses, especially regarding "anticipated profits," can significantly impact risk allocation [12, 81, 82]. Their interpretation depends on specific wording and commercial context, with courts presuming parties do not intend to abandon all remedies for breach [81, 82, 16(27a-b), 107, 108]. A broad exclusion can cover direct revenue loss, altering risk allocation in unintended ways [81, 82, 99]. Clear drafting is essential to prevent unexpected consequences [81, 82].

#ContractLaw #ExclusionClause #CommercialLaw #LossOfProfits #Telecommunications #BreachOfContract #Damages #LegalInterpretation #MinimumRevenueCommitment #InjunctiveRelief #WastedExpenditure #FreedomOfContract #ExpectationLoss #TSA #EE #VirginMobileTelecoms

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