Procurement Law Matters

The Duty to Provide Reasons in Public Procurement

Jurisdictions: EU | Ireland | UK

v.2 (updated to 29 January 2025)

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The Duty to Provide Reasons and Transparency in Public Procurement

I. Introduction

1. The duty on public authorities to provide reasons for the procurement decisions they take is a legal obligation of considerable importance in the area of public procurement. A failure to provide sufficient reasons potentially leaves an authority open to legal challenge and the failure to provide such reasons may be a ground for the annulment of a procurement decision.

2. From a legal perspective, the provision of reasons to losing tenderers is required (i) to enable the tenderer to assert its right to bring a challenge to the decision and (ii) if such a challenge is brought, to enable the Court or other reviewing body to exercise its functions of reviewing the decision that has been taken. If reasons are not given, then a losing tenderer will not know whether it has grounds to initiate a challenge. Similarly, without the benefit of an expression of reasons, it is difficult for a court to review the legality of the decision.

3. At a more general level, the provision of feedback to losing bidders ought, in any event, to form part of good procurement practice. If losing tenderers are informed of the reasons as to why their bid was unsuccessful, they may be able to use this feedback to formulate better tenders in the future.

4. With reference to the laws applicable in the European Union, Ireland and the United Kingdom, this paper will focus on the legal obligation to provide reasons in the field of public procurement[1] and proceeds to consider the following three issues in turn:

    - The duty to provide reasons as a matter of public law generally;
    - The specific rules relating to the provision of reasons in public procurement; and
    - The lessons that might be learned from judicial consideration of the duty to give reasons in procurement cases.

[1] This paper focuses on the obligation to provide reasons for award decisions. The question of the obligation to provide reasons for other decisions made in the procurement process is not considered here.

II. The duty to provide reasons as a matter of public law generally

5. The historical position as a matter of English common law has been that there was no general duty on public authorities to provide reasons for their decisions. If such a general rule does still exist, it has, however, become rather meaningless as the situations in which a duty to provide reasons has been found have expanded. The position has recently been summarised as follows:

> "*The increasing number of so-called "exceptional" circumstances, in which fairness or procedural fairness does now require that reasons be afforded to an affected individual means that the proposition that there is no general duty is meaningless apart from demonstrating that the mere fact that a decision-making process is held to be subject to the requirements of fairness does not automatically lead to further conclusions that reasons must be given. However, it is certainly now the case that a decision-maker subject to the requirements of fairness should consider carefully whether, in the particular circumstances of the case, reasons should be given. Indeed, fairness or procedural fairness usually will require a decision-maker to give reasons for its decision. Overall, "the trend of the law has been towards an increased recognition of the duty to give reasons" and there has been a strong momentum in favour of greater openness and transparency in decision-making."* [2]

6. The question of a general duty on public authorities to provide reasons was the subject of consideration by the Irish Supreme Court in the important case of *Mallak v Minister for Justice, Equality and Law Reform*.[3] This case concerned a Syrian national, Mr. Mallak, who had applied to the Minister for a certificate of naturalization. The application was refused, the Minister declining to provide any reason for his decision to refuse to issue the certificate. In support of his contention that he was not obliged to furnish reasons, the Minister relied on the wording of the relevant statute, which provided that the Minister may "in his absolute discretion, grant an application for a certificate of naturalization". At first instance, Cooke J agreed that the Minister was not obliged to provide reasons, interpreting the statute to mean "quite literally that the Minister does not need to have or to give any reason for refusing an application for a certificate".[4]

7. An appeal by Mr. Mallak was allowed by the Supreme Court. Giving the judgment of the five-member court, Fennelly J described the general principles in issue as follows:

> "*It cannot be correct to say that the "absolute discretion" conferred on the Minister necessarily implies or implies at all that he is not obliged to have a reason. That would be the very definition of an arbitrary power. Leaving aside entirely the question of the*

[2] De Smith's Judicial Review, 9th ed (2023) para 9-122.
[3] [2012] IESC 59, [2012] 3 IR 297.
[4] *Mallak v Minister for Justice, Equality and Law Reform* [2011] IEHC 306, para 12.

disclosure of reasons to an affected person, it seems to me axiomatic that the rule of law requires all decision-makers to act fairly and rationally, meaning that they must not make decisions without reasons.

The general principles of natural and constitutional justice comprise a number of individual aspects of the protection of due process. The obligation to give fair notice and, possibly, to provide access to information or, in some cases, to have a hearing are intimately interrelated and the obligation to give reasons is sometimes merely one part of the process. The overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek the protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed."[5]

8. Fennelly J went on to discuss how it would be unusual for an administrative decision-maker to be free not to provide reasons for a decision, highlighting the importance of the provision of reasons in securing fairness:

"*In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.*

…

The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision-maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for the applicant to make a judgment as to whether he has a ground for applying for a judicial review of the substance of the decision and, for the same reason, for the court to exercise its power. At the very least, the decision maker must be able to justify the refusal. No attempt has been made to do so in the present case and I believe it would be wrong to speculate about cases in which the courts might be persuaded to accept such justification."[6]

9. The importance of the *Mallak* judgment can be seen in its application in subsequent cases and it is regularly cited and applied in decisions of the Superior Courts.[7] For example, in *Wicklow*

[5] [2012] IESC 59, paras 43-44.

[6] [2012] IESC 59, paras 64, 74.

[7] See also, in particular, *Murphy v Ireland* [2014] IESC 19, [2014] 1 ILRM 457 (concerning the duty on the Director of Public Prosecutions to provide reasons for a decision to certify that a trial ought to take place in the Special Criminal Court, without a jury; see especially the comments of O'Donnell J at paras 39-43; for commentary, see Keniry, 'Judicial Review of the Decisions of the Director of Public Prosecutions' (2016) 19 *Trinity College Law Review* 196); *Oates v Browne* [2016] IESC 7; *Connelly v An Bord Pleanala* [2018] IESC 31, [2021] 2 IR 752. See also a decision that came shortly before *Mallak*, *Rawson v Minister for Defence* [2012] IESC 26. For a review of case law, see Biehler, 'The Rationale for the Obligation to Provide Reasons for Administrative Decisions' (2019) 61 *The Irish Jurist* 148.

County Council v Fortune (No 3),[8] Hogan J, held that the respondent Council had failed to provide sufficient reasons for its refusal to grant a certificate exempting a building from planning permission. Although the decision to refuse to grant the certificate had not itself been challenged, Hogan J considered that "*yet one cannot help thinking that the reasons given for the decision are not altogether satisfactory*".[9] Recognising the burden placed on public authorities, Hogan J noted that "*[it] is, perhaps, all too easy to be critical of hard-pressed decision makers, but, unfortunately, in the present case the basis for the s 5 decision to refuse to grant exempted status cannot readily be followed or understood by reason of its resort to vague generalities of language*."[10]

10. As can be seen from *Mallak* itself, the requirements of procedural fairness and the intensity of the obligation to provide reasons will depend on the particular circumstances, a point emphasised by Clarke CJ in *Connelly v An Bord Pleanála*.[11] In that case, Clarke CJ emphasised at [30] that the requirement to give reasons "cannot be met by a form of box-ticking" and that a decision of a public body should identify the factors taken into account (so that a court can assess if all relevant factors were considered and if irrelevant factors were excluded). Clarke CJ went on:

> "*But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons.*"

11. While the formal public procurement rules, contained in EU directives and national implementing legislation, include their own specific requirements with respect to the provision of reasons, the above discussion provides some context for consideration of the reasons question in procurement and illustrates that the duty to provide reasons is an issue being canvassed in the courts with greater frequency. It should also be noted that where a public authority takes a procurement decision that falls outside of the formal rules (for

[8] [2013] IEHC 397. See also, *EMI Records (Ireland) Ltd v Data Protection Commissioner* [2013] IESC 34 (the Supreme Court holding that the High Court had been correct to find that an enforcement notice issued by the Data Protection Commissioner did not provide any reasons; an argument that reasons could be inferred from the decision was rejected).
[9] [2013] IEHC 397, para 15.
[10] [2013] IEHC 397, para 17.
[11] [2018] IESC 31, [2021] 2 IR 752.

example, because the value of the contract at issue is below the relevant financial thresholds), there might still be a duty to provide reasons on the basis of general public law.

III. Rules applicable in public procurement

A. EU Directives

12. The obligation to provide reasons for a decision to award a public contract is intertwined with the requirement for a standstill period. This is the period after the award decision is made, during which the authority is prevented from concluding the contract. The purpose of the standstill period is to give tenderers sufficient time to examine the contract award decision and to assess whether it is appropriate to initiate a review procedure.[12]

13. From the perspective of a losing tenderer, it will know whether it has grounds to seek review of the award decision only if it has been provided with the reasons for the decision. So, "[when] the award decision is notified to them, the tenderers concerned should be given the relevant information which is essential for them to seek effective review."[13]

14. Article 2a of the Remedies Directive goes on to provide as follows:

> "Standstill period
>
> 1. The Member States shall ensure that the persons referred to in Article 1(3) have sufficient time for effective review of the contract award decisions taken by contracting authorities, by adopting the necessary provisions respecting the minimum conditions set out in paragraph 2 of this Article and in Article 2c.
>
> 2. A contract may not be concluded following the decision to award a contract falling within the scope of Directive 2014/24/EU or Directive 2014/23/EU before the expiry of a period of at least 10 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned if fax or electronic means are used or, if other means of communication are used, before the expiry of a period of either at least 15 calendar days with effect from the day following the date on which the contract award decision is sent to the tenderers and candidates concerned or at least 10 calendar days with effect from the day following the date of the receipt of the contract award decision.
>
> Tenderers shall be deemed to be concerned if they have not yet been definitively excluded. An exclusion is definitive if it has been notified to the tenderers concerned and has either been considered lawful by an independent review body or can no longer be subject to a review procedure.

[12] Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, Recital 6.
[13] Directive 2007/66/EC, Recital 6.

Candidates shall be deemed to be concerned if the contracting authority has not made available information about the rejection of their application before the notification of the contract award decision to the tenderers concerned.

The communication of the award decision to each tenderer and candidate concerned shall be accompanied by the following:

- a summary of the relevant reasons as set out in Article 55(2) of Directive 2014/24/EU, subject to Article 55(3) of that Directive, or in the second subparagraph of Article 40(1) of Directive 2014/23/EU, subject to Article 40(2) of that Directive, and,

- a precise statement of the exact standstill period applicable pursuant to the provisions of national law transposing this paragraph."

15. Article 55(2)(c) of Directive 2014/24 provides that in the case of a tenderer who has submitted an admissible tenderer, the information to be provided is to include "**the characteristics and relative advantages of the tender selected**" (emphasis added).

16. So, a losing bidder must be given sufficient time for effective review of the award decision and, according to Article 2a of the Remedies Directive, the standstill notice must contain a summary of the relevant reasons for the decision, to include the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement.

B. Irish Regulations

17. These obligations on contracting authorities find expression in Regulation 6 of the Irish Remedies Regulations[14], which requires a summary of reasons for the rejection of the tender to be provided to a losing tenderer.[15] The summary shall comprise the characteristics and relative advantages of the tender selected[16] as well as the name of the winning tenderer.[17] The standstill notice must also state the exact standstill period applicable.[18] Regulation 6(5) then provides as follows:

"In the case of an unsuccessful tenderer, the information to be provided under paragraph (2)(c)(ii) and subparagraphs (a) and (b) of paragraph (3) **may be provided** by setting out—

[14] S.I. No. 130 of 2010 European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010.
[15] Regulation 2(c)(ii).
[16] Regulation 6(3)(a).
[17] Regulation 6(3)(b).
[18] Regulation 6(2)(b).

(a) the score obtained by the unsuccessful tenderer concerned, and

(b) the score obtained by the successful tenderer in respect of each criterion assessed by the contracting authority."

18. Regulation 6(5) appears to be saying (on one reading at least) that to comply with its reason-giving obligations, it is sufficient for a contracting authority to provide scores. However the better view is that all it is saying is that in certain circumstances, it might be the case that scores are sufficient: note the word "*may*" in the "*may be provided*" language. In the High Court decision of *RPS Consulting Engineers Limited v Kildare County Council* [2016] IEHC 113, Humphreys J, in discussing Regulation 6(5) took the view that "the provision of scores alone could only constitute sufficient reason if the tenderer criteria revolved around price or other purely quantitative measurements" (at paragraph 71).

19. There are certain exceptions to the duty to provide reasons contained in the Regulations. Regulation 6(7) of the Remedies Regulations provides that a contracting authority may withhold information, if the release of such information "*would impede law enforcement*", "would otherwise be contrary to the public interest", "*would prejudice the legitimate commercial interests of economic operators*" or "*might prejudice fair competition between economic operators*".[19]

20. In *RPS Consulting Engineers Limited v Kildare County Council* [2016] IEHC 113, Humphreys J set out a summary of the purpose of a right to reasons which can be found at paragraphs 52 to 66 of that judgment and which is worth noting.[20] That case is also worth noting for a number of other points, including (i) highlighting that where the losing bidder had a lower priced offering, there is a particular need for it to be clearly demonstrated that valid objective reasoning was applied in the selection process (para 74); (ii) a list at paragraph 89 of standards which the Court extracts from the directives and previous case law; (iii) the suggestion that a tenderer has a right to require further reasons of the contracting authority, regardless of the content of the initial letter providing reasons (paras 48-51).[21]

21. In *Sanofi Aventis Ireland Limited v Health Service Executive* [2018] IEHC 566, McDonald J repeated a number of the principles set out in RPS and drew also on the Supreme Court

[19] SI 130/2010, Reg 6(7).
[20] A useful note of the case is provided by McGovern at [2016] PPLR NA107.
[21] A further Irish case which concerns reasons in public procurement is *Forum Connemara Limited v Galway County Local Community Development Committee* [2016] IEHC 493, where Hedigan J found that the reasons provided were more than adequate.

decision in *Connelly v An Bord Pleanala* [2018] IESC 31, [2021] 2 IR 752 and a number of the EU cases. McDonald J endorsed the principle that information on the characteristics and relative advantages of the successful tender "*will be all the more necessary when the price offered by the unsuccessful tenderer is lower than that offered by the successful tenderer"* (para 47(c); a point also discussed below in the context of the EU case law). McDonald J also emphasised that "*[the] adequacy of reasons can only be assessed on the basis of the reasons provided prior to the commencement of proceedings*."

22. McDonald J also noted that, as found by the Court of Appeal in *Word Perfect Translation Services Limited v. Minister for Public Expenditure and Reform (No. 3)* [2018] IECA 156, there is no obligation to provide reasons to the losing tenderer in respect of criteria where it has scored higher than the winner. McDonald J also took the view that no reasons were required when equal marks had been given, noting at paras 74-75:

> *"It is important to note that there is, in fact, no obligation on a contracting authority to provide reasons to a disappointed tenderer in respect of any criterion where the tenderer scored a higher mark than the successful candidate. This is clear from the decision of the Court of Appeal in Word Perfect Translation Services Limited v. Minister for Public Expenditure and Reform (No. 3) [2018] IECA 156 … Although not expressly so decided in the Word Perfect case, it would seem to follow, as a matter of logic, that the same principle should apply where both the unsuccessful tenderer and the successful candidate scored the same marks."*

23. This issue raises interesting questions as it does appear that an applicant can legitimately raise complaints about a mark awarded to the successful tenderer in a criterion where the successful tenderer has scored lower than the applicant, and obtain discovery of documentation in order to advance such a claim (see *Word Perfect Translation Services Limited v The Minister for Public Expenditure and Reform (No.2)*).

24. McDonald J held in *Sanofi* that there was a failure on the part of the HSE to provide reasons in respect of two sub-sub-criteria. However, this breach was not sufficient to annul the decision and the Court held it would be disproportionate to do so, holding at paras 144-145:

> *"In my view, it would be disproportionate to set aside the decision of the HSE to award the contract to Glaxo by reason of its failure to provide reasons in relation to these two sub-sub-criteria … the difference in marks between Glaxo and Sanofi in relation to these two sub-sub-criteria would not justify the court taking such a course. As noted above, the divergence in marks as between Sanofi and Glaxo would not be sufficient to make a difference to the award of the contract. The difference in marks was 1.5 in relation to regularity of batch supply and expiry date management. The difference in relation to*

packaging and labelling was four. That could not have made a difference to the award given that the much larger gap of 41 marks between the final score for Sanofi and the final score for Glaxo … The only way in which the scoring could conceivably have made a difference is in the event that Glaxo was awarded a score of zero or close to zero and Sanofi was awarded full marks or close to full marks. However, it is fanciful to suggest that there was any such possibility. In the circumstances, it seems to me that it would plainly be disproportionate to annul the award of the contract on the basis of the failure to provide reasons in respect of these two sub-sub-criteria … It seems to me that the appropriate relief to be granted is, first, a declaration that Sanofi's rights have been infringed and, secondly, an order pursuant to Regulation 9(1)(c) of the Remedies Regulations directing the HSE to provide full reasons (including the characteristics and relative advantages of the Glaxo tender) to Sanofi within a period of time which I will fix after hearing from the parties. I am of the view that such relief will provide an appropriate, adequate and proportionate remedy…"

25. In *Newbridge Tyre and Battery Co Limited v Commissioner of An Garda Síochána* [2018] IEHC 365 the High Court held that time for bringing a challenge under the Remedies Regulations might not begin to run until such time as sufficient information has been provided to a potential applicant to allow it to evaluate whether it would be justified in bringing proceedings or determining if they are "*reasonably likely to succeed*" (para 44).[22]

26. In *O'Dubhgain v Minister for Culture, Heritage and the Gaeltacht* [2023] IEHC 396, O'Regan J quashed a decision to award a contract for a fast ferry service between the mainland and Tory Island. The Court, following RPS, criticised the reasons which had been provided. One example was the following reasons provided in relation to the Risk Management criterion, where the winning bidder had scored 15 points more than the applicant:

"The SMT response was considered to be excellent. The WJD was very good but some areas of risk which are considered quite important were not covered in the submission."

Of this, O'Regan J said:

"In respect of risk management, the only detail given about the winning tender was that it was considered to be excellent. This is just such a detail as was deprecated by Humphreys J in RPS. Furthermore, in relation to the applicant it was recorded that some areas of risk which are considered quite important were not covered. However, there is no identification of such quite important risks and accordingly is entirely uninformative."

[22] See also *Baxter Healthcare Limited v Health Service Executive* [2013] IEHC 413, paras 74-76.

27. Given that the overall difference in scores was 20 points, and the various criteria where reasons had been deficient represented more than this, the appropriate relief was to quash the decision.

28. In *Killaree Lighting Services Limited v Mayo County Council* [2025] IECA 7, the Court of Appeal upheld the finding of the High Court that the applicant had been given sufficient reasons for its exclusion, on the basis that its tender was abnormally low. Having sought an explanation for the pricing of the Applicant's tender, as it appeared abnormally low, the Applicant provided a detailed response and the contracting authority subsequently wrote to it, rejecting the tender. The contracting authority's letter included the following statements:

> "*66% of the tendered rates submitted in the Pricing Document were priced at €0.01 values;*
>
> *The rates priced at €0.01 do not cover the full inclusive value of the relevant works, supplies and services;*
>
> *The clarifications and explanations provided by Killaree do not provide sufficient evidence that the tendered rates and prices submitted in its Pricing Document are not abnormally low or that they reflect a balanced allocation of the Notional Tender Total; and*
>
> *In light of the works, supplies and services required under the Contract, the Contract is not capable of being performed on the basis of the tendered rates*."

29. Hyland J rejected the contention that sufficient reasons had not been given, emphasising that Killaree must have been taken to know that explanations which it provided for negligible pricing of certain items (it said these were included in other prices or that the items with negligible prices were unnecessary) were unacceptable and breached the express provisions of the RFT, which imposed an obligation to price each item on a fully inclusive basis and as well as on an individual basis, something about which Killaree had already been reminded in correspondence. Hyland stated at [89]:

> "*There cannot be an obligation on the authority to explain over and over something that the tenderer well knows. In the circumstances, the Council was entitled to reject a justification that was non-compliant with the RFT and treat the abnormally low tender as not having been satisfactorily explained without further recourse to Killaree. This*

necessarily means the Council was entitled to provide reasons in a summary format because of the knowledge that was correctly assumed on the part of the tenderer."

30. The *Killaree* case is also notable as it raised the question of the consequence of the contracting authority having failed to send a valid standstill letter. In this case, the regret letter did not indicate the decision reached concerning the award of the contract and did not specify the exact standstill period. As it happened, by the time the Applicant brought its proceedings, the contract was concluded and therefore the Applicant was denied the opportunity of obtaining pre-contractual remedies. While the Court of Appeal rejected the claim that this merited a mandatory order of ineffectiveness (there was no substantive infringement of the Regulations) and that an order of discretionary ineffectiveness was not merited, it held that there was a mandatory obligation on the High Court to impose an alternative penalty under Regulation 13(1) of the Remedies Regulations and remitted the case to the High Court on that basis.

C. UK

31. The reason-giving obligation has also been discussed in English procurement cases.[23] For example, in *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC), Stuart Smith J accepted the submission that "*a procurement in which the contracting authority cannot explain why it awarded the scores which it did fails the most basic standard of transparency*" (para 54). On the topic of record-keeping, Stuart Smith J noted at para 59:

> *"I am not suggesting that it was necessary to keep a complete record of what was said or a comprehensive note of every point that was made … In summary, the negative and positive points are not, without more, themselves reasons or reasoning and the written reasons do not adequately set out the panel's reasons or reasoning. While the notes record lists of positive and negative points, they do not do so "as comprehensively as possible" or in a way that enables either the Trusts to defend their rights or the Court to exercise its supervisory jurisdiction. The bullet points may provide material that was relevant to the Panel's reasons and reasoning, but they do not themselves provide the rationale for the consensus scores."*

32. On the question of remedy, the Court held at para 82:

[23] For a Scottish case, see *Healthcare at Home v Common Services Agency* [2012] CSOH 75 (and [2013] CSIH 22) (framework agreement for a compounding, dispensing and delivery service of Herceptin and a nursing administration and support service; detailed consideration of whether adequate reasons in respect of a number of sub-criteria had been given, at paras 89-103).

"The Council submits that any breach of Issue 1(a) is not causative since the Trusts have received far more information and documentation by virtue of disclosure than it was entitled to under the 2015 Regulations and this information would have had no bearing on the scoring of the tender. I do not accept the implied submission that the information that the Trusts have received is a substitute for the provision of proper reasons that fulfil the statutory functions of transparency and equal treatment of economic operators. The Council relies upon the notes of the moderation as providing the requisite reasons, and they do not. Furthermore, this is not a case where evidence provided later has plugged the gap, for the reasons already given about the deficiencies of the Council's witness evidence. The failure to provide transparent and comprehensible reasons prevents the Court from making a reliable assessment of material error in circumstances where only a very modest adjustment in scores (for either Tenderer) would be decisive. That is sufficient to demonstrate the materiality of the breach under Issue 1(a), in which case it is common ground that the decision of the Defendant to award the tender to Virgin must be set aside."

33. The UK's Procurement Act 2023, which came into force on 24 February 2025, contains rules on reason-giving whereby tenderers are to be provided with so-called "Assessment Summaries" (see section 50 of the Procurement Act 2023 and Regulation 31 of the Procurement Regulations 2024 (SI No. 692 of 2024)). Tenderers are to be told "*how the tender was assessed against the award criteria by reference to scores including … the score … and an explanation for that score by reference to relevant information in the tender*". Losing tenders are entitled to this information both in respect of their own tender and that of the successful tenderer.

D. Duty to give reasons in cases outside of the Regulations

34. Even if a public contract falls outside the scope of the formal rules contained in Directive 2014/24 and the relevant national implementing regulations, the procedure for awarding the contract may be subject to the general principles of EU law where the contract has a potential cross-border interest, *i.e.* is potentially of interest to a tenderer located in another EU Member State.[24] Of particular importance in procurement cases are the principles of transparency, equal treatment, non-discrimination on the grounds of nationality and proportionality.[25] The

[24] See, e.g., Case C-226/09 *Commission v Ireland*, Advocate General Mengozzi stating at para 22 of his opinion that "if a public contract involves a cross-border interest, even if merely a potential cross-border interest, the rules that arise from the Treaty must apply."

[25] For an overview, see Brown, 'EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives' (2010) 19 *Public Procurement Law Review* 169. See also Commission Communication on the Community Law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directive [2006] OJ C179/02. The Commission Communication was endorsed by the General Court in Case T-258/06 *Germany v Commission* [2010] ECR II-2027, as properly reflecting the EU law obligations that apply to contracts of cross-border interest that fall wholly or partly outside

principle of transparency, in particular, suggests an obligation to provide reasons for the award decision.[26]

35. Additionally, the principle of effective judicial protection of EU law rights suggests that contracting authorities are required to state the grounds of their award decisions so as to allow for the effective exercise of the right to judicial review.[27] This means that sufficient reasons must be provided even for contracts falling outside the formal procurement rules. The principle of effective judicial protection is enshrined in Article 47 of the EU Charter of Fundamental Rights.

IV. EU Court decisions on the duty to give reasons

36. The duty to state reasons has been examined by the General Court of the European Union in many cases involving tenders carried out by EU institutions.[28] Many of these cases contain similar analyses of the duty to provide reasons.

37. Most cases before the General Court have involved the public procurement regime applicable to institutions of the European Union (such as the Commission and the EU Parliament). While the source of the applicable rules is different to those applying to procurement by public authorities in the Member States, the substance of the rules is very similar[29] (one additional obligation on the EU institutions is the explicit requirement for give reasons as stated in Article

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the formal procurement rules, the General Court stating at paragraph 162 that the Communication "*does not contain new rules for the award of public contracts which go beyond the obligations under Community law as it currently stands*". Despite the guidance in the Commission Communication, one cannot say that there is certainty as to the scope of the requirements that flow from the Treaty principles and the features of a procurement that will, if included or excluded, result in a breach of EU law.

[26] See, e.g., Case T-457/10 *Evropaïki Dynamiki v Commission*.

[27] See, e.g., Case 222/86 *Unectef v Heylens* [1987] ECR 4097, para 15.

[28] Among the cases where the issue of sufficient reasons has been raised are Cases T-183/00 *Strabag Benelux v Council*; T-89/07 *VIP Car Solutions SARL v European Parliament*; T-300/07 *Evropaïki Dynamiki v Commission*; T-465/04 *Evropaïki Dynamiki v Commission*; T-63/06 *Evropaïki Dynamiki v EMCDDA*; T-387/08 *Evropaïki Dynamiki v Commission* (and C-561/10P); T-406/06 *Evropaïki Dynamiki v Commission*; T-476/07 *Evropaïki Dynamiki v Frontex*; T-461/08 *Evropaïki Dynamiki v European Investment Bank*; T-17/09 *Evropaïki Dynamiki v Commission*; T-57/09 *Alfastar Benelux SA v Council*; T-298/09 *Evropaïki Dynamiki v Commission* (C-629/11P); T-32/08 *Evropaïki Dynamiki v Commission*; T-9/10 *Proigmena Systimata v Commission*; T-457/10 *Evropaïki Dynamiki v Commission;* T-183/10 *Sviluppo Globale v Commission*; C-235/11P *Evropaïki Dynamiki v Commission (affirming* T-589/08 *Evropaïki Dynamiki v Commission*).; Case T-447/10 *Evropaïki Dynamiki v Court of Justice*; Case T-165/12 *European Dynamics Luxembourg SA v Commission*; Case T-297/09 *Evropaïki Dynamiki v European Aviation Safety* Agency (same duty of reasons where tender not technically rejected, but rather ranked second on a framework where work would be allocated by way of a cascade, *i.e.* the first ranked tenderer would be given the opportunity to provide the services first); Case T-477/15 *European Dynamics Luxembourg SA v European Chemicals Agency*; Case T-481/14 *European Dynamics Luxembourg SA v European Institute of Innovation and Technology*.

[29] In particular, the obligation to provide the details of the characteristics and relative advantages of the winning tender are set out in Article 100(2) of the Financial Regulation and Article 149(3) of the Implementing Rules.

296 Treaty on the Functioning of the European Union) so that guidance can be taken from these cases in considering the scope of the duty to provide reasons at the national level. It should also be borne in mind that the duty to state reasons has itself been said by the CJEU to stem from the general EU law principle of good administration.[30]

38. By way of broad summary, these cases have found that (i) the scope of the obligation to provide reasons depends on the circumstances, (ii) the provision of only scores of the successful and losing tenderer will not usually be sufficient, (iii) more detailed reasons may be required where the losing tenderer had submitted a lower price to the winning tenderer and (iv) the obligation to provide reasons must be met in the first letter to the losing tenderer explaining the grounds for rejection of its bid, with further communications limited to supplementing the initial response.

39. That the extent of the reasons required will depend on the circumstances can be seen, for example, from Case T-300/07 *Evropaïki Dynamiki v Commission*. This involved a tender run by the European Commission for a number of lots for the supply of IT portals. Evropaïki Dynamiki was unsuccessful in its bids. In challenging the Commission's decisions, one of the grounds argued was that the Commission had failed in its obligation to provide reasons. The General Court made the following statement of general principle at paragraph 46:

> "*It should also be borne in mind that* ***the requirements to be satisfied by the statement of reasons depend on the circumstances of each case****, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations*" (emphasis added).

40. The application of the obligation to state reasons to the particular facts highlights how the level of information required will depend on the circumstances. In respect of its rejection from Lot 1, the applicant had failed to achieve a minimum number of points for technical evaluation, without any comparison needing to be made with other tenders. In those circumstances, the provision of fairly limited information, which included a table of scores of the applicant and the winning bidder, was sufficient to satisfy the obligation to provide reasons. In respect of Lot 2, the Commission informed the applicant that its tender was rejected because it did not present the best value for money on a price/quality ratio. In its letter of explanation, the Commission provided a table setting out the scores of the applicant

[30] See, e.g., Case C-54/21 *Antea Polska S.A. v Państwowe Gospodarstwo Wodne Wody Polskie* ECLI:EU:C:2022:888, para 50.

and the winning tenderer and this was the only method of comparison between the two bids that was disclosed to the applicant. The General Court found that the Commission's letter did not contain even a brief comment on the successful tenderer's bid and that this was unsatisfactory. The winning bidder had in fact submitted a higher price and so the quality of its offering was the decisive factor in the evaluation. In those circumstances, the Court held, "*the information concerning the award criteria was all the more necessary as the price offered by the applicant was lower than that offered by the successful tenderer*".[31] However, in other cases where the applicant had provided a lower price, the courts have not found any additional or more rigorous reason-giving obligation.[32]

41. From this, it appears that the provision of scores will not necessarily be sufficient to comply with the obligation to provide reasons for award decisions. Whether scores are sufficient in a particular case may depend on the circumstances. As already noted above, to the extent then that Regulation 6(5) of the Irish Remedies Regulations is read to mean that the reason-giving obligation can always be met by merely providing scores, this provision is arguably incompatible with EU law and in *RPS Consulting Engineers Limited v Kildare County Council* [2016] IEHC 113 Humphreys J found that scores alone could only provide sufficient reasons with respect to quantitative criteria (e.g. price).

42. The General Court has also made reference to the Charter of Fundamental Rights in the context of the obligation to give reasons for procurement decisions, noting in *Sviluppo Globale v Commission* that there is "*a close relationship between the obligation to state reasons and the fundamental right to effective judicial protection and the right to an effective remedy under Article 47 of the Charter of Fundamental Rights*."[33]

43. It can also be noted from the case law of the General Court that reasons must be provided before proceedings are brought by a disappointed tenderer and in certain cases, the Court has said that communications subsequent to the first one issued by the public authority can only be supplemental. Consequently, some of the cases seem to suggest that a contracting authority is required to set out its reasons for rejection of the bid in its first communication to the losing tenderer. A better way to put it may be to say that a contracting authority cannot set out new reasons in subsequent communications or after proceedings have been initiated,

[31] Case T-300/07 *Evropaïki Dynamiki v Commission*, para 72 (appeal dismissed, Case C-560/10P *Evropaïki Dynamiki v Commission*, Order of 20 September 2011).
[32] See, e.g. Case T-477/15 *European Dynamics Luxembourg SA v European Chemicals Agency*, ECLI:EU:T:2018:52.
[33] Case T-183/10 *Sviluppo Globale v Commission*, judgment of 10 October 2012, para 40.

although merely supplementing, in a new communication, reasons already given, will usually be permissible.[34]

44. This question was also addressed by the General Court in Case T-89/07 *VIP Car Solutions SARL v European Parliament*. The applicant challenged a decision of the European Parliament in respect of a tender for chauffeur-driven cars and mini-buses for MEPs, in which the applicant came second. The initial explanation provided by the Parliament failed to include, as was required by the Financial Regulation and its Implementing Rules, details of the characteristics and relative advantages of the winning bid and a further communication similarly failed to meet this obligation. On the legitimacy of providing reasons in subsequent communications, the General Court made the general point that:

> "*[If] the institution concerned sends a letter in response to a request from the applicant seeking additional explanations about a decision before instituting proceedings but after the date laid down in Article 149(3) of the Implementing Rules, that letter may also be taken into account when examining whether the statement of reasons in the case in question is adequate. The requirement to state reasons must be assessed in the light of the information which the applicant possessed at the time of instituting proceedings, it being understood, however, that the institution is not permitted to replace the original statement of reasons by an entirely new statement*".[35]

45. While the Parliament provided reasons for its decision in the course of the proceedings that had been brought by the disappointed tenderer, this was too late:

> "*However, the fact that the Parliament provided the reasons for that decision in the course of the proceedings does not compensate for the inadequacy of the initial statement of reasons for the contested decision. It is settled case-law that the reasons for a decision cannot be explained for the first time ex post facto before the Court, save in exceptional circumstances which, in the absence of urgency, are not present in this case*".[36]

46. The General Court has indicated that a subsequent letter, sent after the letter issued in response to an applicant's request for the characteristics and relative advantages of the tender selected, could be taken into account

[34] See Case T-387/08 *Evropaïki Dynamiki v Commission*, paras 47-58. But see, e.g., Case T-297/09 *Evropaïki Dynamiki v EASA*, for example, the General Court emphasised at paragraphs 79 and 84 that the reasons were to be assessed at the time the application for review was brought and so included a second letter issued by the respondent, which appeared to provide much more detailed information than had been issued in the first communication.

[35] Case T-387/08 *Evropaïki Dynamiki v Commission*, para 73.

[36] Case T-387/08 *Evropaïki Dynamiki v Commission*, para 76.

> *"when such a letter confirms the initial statement of reasons and is restricted to providing more detail on the grounds justifying rejection of the bid of the unsuccessful tenderer and award of the contract to the tenderer whose bid was ranked in first position. However, the grounds set out in such a letter must not undermine the statement of reasons provided in the first two letters."*[37]

47. The case of T-457/10 *Evropaïki Dynamiki v Commission*, judgment of the General Court of 15 October 2013, offers a useful review of the law on the duty to provide reasons.[38] This case concerned a call for tenders issued by the Commission's Directorate-General for Informatics (DIGIT) for "External service provision for development, studies and support for information systems." The applicant, which was a losing tenderer, maintained that DIGIT failed to notify it of the relative advantages of the winning consortium by, among others, not providing a full copy of the evaluation report and of the successful tenderer's bid, thus failing to fulfil its obligation to state reasons. The applicant requested the Court to order production of the full evaluation report, including the comments relating to the successful tenderers and a copy of their tenders, as well as details of the names of the people on the evaluation committee. The General Court dismissed the action in its entirety, holding that there was no obligation on the Commission to disclose these various items.

48. Other notable statements in the EU cases include the statement of the General Court in Case T-165/12 *European Dynamics Luxembourg SA v Commission* that "*the contracting authority's comments must be sufficiently precise to enable the applicants to ascertain the matters of fact and law on the basis of which the contracting authority rejected their offer and accepted that of another tenderer*".

49. The limitations of the right to reasons can also be seen in some of the cases concerning the EU institutions, for example, in Case C-629/11P *Evropaïki Dynamiki v Commission*, where the CJEU noted at paragraph 21:

> *"[The] Commission cannot be required to communicate to an unsuccessful tenderer, first, in addition to the reasons for rejecting its tender, a detailed summary of how each detail of its tender was taken into account when the tender was evaluated and, second, in the context of notification of the characteristics and relative advantages of the successful tender, a detailed comparative analysis of the successful tender and of the unsuccessful tender."*

[37] Case T-477/15 *European Dynamics Luxembourg SA v European Chemicals Agency*, ECLI:EU:T:2018:52, para 35.
[38] See, in particular, paras 83-103 of the judgment.

50. This formulation is often repeated in the case law.[39]

V. Transparency more generally

51. As can be seen from the above discussion, the duty to provide reasons can be seen as a specific requirement of the broader obligation of transparency, although it has also been said to stem from the general principle of good administration.[40]

52. Useful general guidance on the purpose of the principle of transparency is found in the decision of the English Court of Appeal in *R (Law Society) v Legal Services Commission* [2008] QB 737 in which the central issue related to a provision in a contract, devised by the Legal Services Commission, empowering the Commission to amend any of the contractual terms in certain circumstances. The Law Society brought proceedings, contending that this was incompatible with the obligation on the Commission to act in accordance with the requirements of equal treatment and transparency. Finding that an open-ended amendment clause violated the principle of transparency, Lord Philips set out the objectives achieved by the principle of transparency as follows:

> "*The rationale of the principle has been expressed in a number of different ways.*
>
> *(1) First, it enables the contracting authority to satisfy itself that the principles of equal treatment and of non-discrimination on the grounds of nationality have been complied with: Telaustria Verlags GmbH v Telekom Austria AG (Case C-324/98) [2000] ECR I-10745 , para 61; SIAC Construction Limited v Mayo County Council (Case C-19/00) [2001] ECR I-7725, para 41 and Commission of the European Communities v French Republic (Case C-340/02) [2004] ECR I-9845, para 34.*
>
> *(2) Second, it facilitates competition: Telaustria Verlags GmbH v Telekom Austria AG (Case C-324/98) [2000] ECR I-10745 , para 62; Parking Brixen GmbH v Gemeinde Brixen (Case C-458/03) [2005] ECR I-8585 , paras 50, 52 and Impresa Portuale di Cagliari Srl v Tirrenia di*

[39] See, recently, e.g., Case T-717/20 *Lenovo Global Technology Belgium BV v European High-Performance Computing Joint Undertaking (EuroHPC)* at para 162. In that case, the General Court upheld the following reasons as being sufficient: "*[The] evaluation committee took the view that, although, in the applicant's technical proposal, 'the mitigation strategies for most components [were] well defined and aligned to provide the agreed performance', the fact remained that, 'for critical components like the CPU and the GPU the proposed alternatives [were] not convincing as the tenderer heavily [relied] on the release timescale of the suppliers [and that] alternative solutions proposed [might] alter significantly the final performance and power consumption numbers*'."

[40] See, e.g., Case C-927/19 *Klaipėdos regiono atliekų tvarkymo centras UAB v Ecoservice Klaipėda UAB*, para 122.

Navigazione SpA (Case C-174/03) (unreported) 21 April 2005 , para 75, per Advocate General Jacobs.

(3) Third, it enables the impartiality of procurement procedures to be reviewed: Telaustria Verlags GmbH v Telekom Austria AG (Case C-324/98) [2000] ECR I-10745, para 62 and Impresa Portuale di Cagliari Srl v Tirrenia di Navigazione SpA (Case C-174/03), para 75, per Advocate General Jacobs.

(4) Fourth, it precludes any risk of favouritism or arbitrariness on the part of the contracting authority: Commission of the European Communities v CAS Succhi di Frutta SpA (Case C-496/99 P) [2004] ECR I-3801, para 111.

(5) Fifth, it promotes a level playing field by enabling all tenderers to know in advance on what criteria their tenders will be judged and those criteria are assessed objectively; SIAC Construction Limited v Mayo County Council (Case C-19/00) [2001] ECR I-7725, para 38, per Advocate General Jacobs."

VI. Conclusion

53. As can be seen from the above discussion, the obligation to provide reasons in respect of public procurement decisions imposes significant burdens on contracting authorities. There appears to be an increasing tendency for disappointed tenderers, when challenging the results of a public tender, to argue that insufficient reasons for the decision have been provided. While the formal procurement rules contain provisions as to the scope of the reason-giving obligation, the rules must be adapted for each particular situation. This means that the precise level of detail that must be provided to a losing tenderer will depend on the circumstances. The overriding concern is that the reasons given should be adequate for their purpose of enabling persons concerned to assert their rights and for the Court to exercise its function of review.