

Computer says no—challenge to public procurement exclusion dismissed (Inhealth Intelligence Ltd v NHS England)

Public Law analysis: Inhealth Intelligence Ltd (IIL) challenged a decision by NHS England (NHSE) to exclude it from a Child Health Information Services procurement, on the basis that IIL had failed to submit a compliant tender on NHSE's designated e-tendering portal (InTend) before the tender submission deadline. Adam Constable KC, sitting as a deputy High Court Judge, dismissed the claim, finding that the errors rendering IIL's tender non-compliant were 'squarely' IIL's fault, and that NHSE's strict application of its clearly stated rules was appropriate and lawful in the circumstances. Written by Andrew Dean, director of Public Law and Oliver Carroll, senior associate at Clifford Chance LLP.

Inhealth Intelligence Ltd v NHS England [\[2023\] EWHC 352 \(TCC\)](#)

This analysis was first published on Lexis®PSL on 13 March 2023 and can be found [here](#) (subscription required).

What are the practical implications of this case?

This case serves as a cautionary tale for bid teams, and highlights the perils of leaving the electronic submission of tenders to the last moment (particularly on procurements with complex submission needs such as the requirement to upload a range of individual documents).

Bidders should be aware of the sacrosanctity of the contracting authority's submission rules and deadlines, and that it will 'generally be necessary' for contracting authorities to exclude bidders that fail to properly submit a completed bid on time when the fault for the error lies with the bidder.

For contracting authorities, the case highlights the importance of investigating events and alleged failings, before reaching a final decision to exclude a bidder.

What was the background?

The challenge arose from a procurement of Child Health Information Services carried out by the North of England Commissioning Support (NECS) on NHSE's behalf.

On 9 June 2022, NECS published a contract notice in respect of the procurement, which was divided into four regional lots. The ITT clearly stated that:

- tenders must be submitted via InTend by noon on 12 July 2022
- parts of the tender must be uploaded to the correct location or 'placeholder' and all mandatory attachments must be 'uploaded' before the tender can be 'submitted' via InTend
- inTend 'did not accept files with the same name'

IIL prepared a submission for each of the four lots. At 11:40am on the day of submission (20 minutes before the deadline), IIL uploaded what it thought was the 'last' attachment required to have been uploaded prior to submission. However, IIL had mistakenly uploaded documents with the same name in respect of its Lot 4 submission, and was met with 'error' messages each time it pressed the 'submit' button on the InTend system, preventing IIL from submitting a tender for any of the Lots. Despite frantic attempts to correct the problem in the final minutes, IIL failed to submit a single document on InTend on time for any of the four Lots.

IIL complained to NECS that it had been prevented from submitting a tender due to problems with InTend.

NECS, along with NHSE and the InTend provider, conducted an investigation into the events before concluding that there were no issues with the portal, and IIL's failure to submit a tender was simply due to IIL's non-compliance with the stated rules. On this basis, NECS and NHSE proceeded to exclude IIL.

IIL brought legal proceedings on the basis that NHSE's decision to exclude IIL breached the Public Contracts Regulations 2015 ('PCR 2015') and was unlawful.

What are the practical implications of this case?

The court decided that NHSE's decision to exclude IIL's bid was not manifestly flawed, or irrational. IIL had failed to comply with the clearly stated deadline for reasons which were its fault. Neither the system used to process the procurement, nor NHSE, were to blame for the failure to submit a compliant bid by the deadline, and the consequences for failure to submit a compliant bid by the deadline were clearly spelt out and understood by IIL.

Relying on established case law and academic guidance from Professor Sue Arrowsmith KC (Hon), the Court held that the ability for contracting authorities to waive non-compliance under PCR 2015 is limited in circumstances in which the bidder fails to submit a compliant bid on time:

'...generally it will not be within the bounds of discretion to waive non-compliance with a stated deadline; instead, excluding late tenders will generally be necessary.'

Contracting authorities will still need to determine whether excluding a late bid is appropriate on the facts (eg by carrying out an investigation into the events or alleged failing) in case exceptional circumstances do exist that might dictate that the only reasonable (and possibly lawful) decision would be to waive non-compliance with submission requirements and evaluate a late bid. For instance, if the tenderer's failure was the fault of the contracting authority, which prejudiced more than one tenderer, fairness may dictate that the only reasonable (and possibly lawful) decision would be to waive the relevant requirement. However, the residual discretion will only arise in exceptional circumstances.

In dismissing IIL's challenge, Mr Constable KC noted that there was nothing exceptional about IIL's inability to submit the bid in accordance with the requirements of the invitation to tender, and nothing had happened to justify waiving the rules. Further, if NHSE had decided to waive the rules in IIL's favour, NHSE would have failed to comply with the requirements of equal treatment under Regulation 18 of the PCR 2015. Accordingly, NHS's decision to exclude IIL from the procurement did not breach the PCR 2015, retained EU law or any enforceable obligation including with respect to proportionality, equal treatment, and discrimination.

Case details:

- Court: King's Bench Division (Technology and Construction Court)
- Judge: Adam Constable KC (sitting as a deputy judge of the High Court)
- Date of judgment: 20 February 2023

Andrew Dean, director of Public Law and Oliver Carroll, senior associate at Clifford Chance LLP. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk

Want to read more? Sign up for a free trial below.

FREE TRIAL

The Future of Law. Since 1818.



RELX (UK) Limited, trading as LexisNexis®. Registered office 1-3 Strand London WC2N 5JR. Registered in England number 2746621. VAT Registered No. GB 730 8595 20. LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. © 2018 LexisNexis SA -0120-048. Reproduction, copying or extracting by any means of the whole or part of this publication must not be undertaken without the written permission of the publishers. This publication is current as of the publish date above and it is intended to be a general guide and cannot be a substitute for professional advice. Neither the authors nor the publishers accept any responsibility for loss occasioned to any person acting or refraining from acting as a result of material contained in this publication.