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2025 Procurement Case Law Year to Date in Review

This article highlights several key Irish, European and UK procurement decisions to date this year. The cases cover an array of legal issues, from contract modifications and abnormally low tenders, to lifting automatic suspensions and the use of restrictive technical specifications by public bodies.

Obligation to seek clarifications - Working on Wellbeing Ltd t/a Optima Health v Secretary of State for Work and Pensions & Anor [2025] EWCA Civ 127

The claimant, Optima Health ("**Optima**"), was invited to tender for an Occupational Health and Employee Assistance Programme for the UK's Department for Work and Pensions ("**DWP**"). The Invitation to Tender ("**ITT**") stated that no unit price should exceed the maximum specified prices within the ITT. Optima exceeded these maximum prices in relation to 3 out of the 133 delivery service lines. Critically, Optima's bid was the highest scoring on quality and would have won the contract had DWP not determined that Optima's bid was non-compliant for exceeding these maximum prices.

Optima challenged the disqualification on the basis the ITT was insufficiently clear that an entire tender would be excluded if prices of any specified item exceeded the ITT's maximum specified prices. Optima further argued that the errors were minor in nature – in some instances "cut and paste" errors - and the DWP had an obligation to seek clarification from Optima in relation to obvious and material errors within a tender.

At first instance, the UK's High Court confirmed that DWP was justified in its decision to exclude Optima as a non-compliant tender and held that the reasonably well informed and normally diligent ("**RWIND**") tenderer – the standard by which the court will seek to interpret provisions as part of procurement challenges - would understand that the failure to submit prices that did not exceed the ITT's maximum specified prices would result in exclusion.

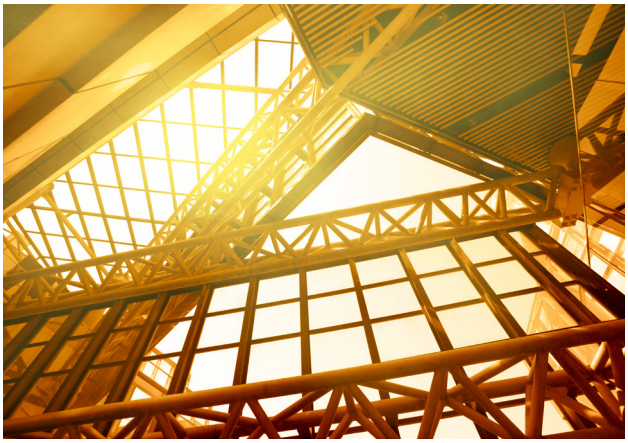
Optima appealed the UK High Court's decision. The UK Court of Appeal subsequently found in favour of Optima, it held there was no doubt that the tender document did not include a mandatory exclusion provision (as it stated that tenders would be "*discounted*" rather than "*excluded*"), and that no RWIND tenderer would have come to such conclusion. The UK Court of Appeal applied a three-stage test to determine when a contracting authority was **obliged** to seek clarification of obvious and material errors and suggested that a contracting authority was required in most instances to take the "least onerous option" to a tenderer and seek clarification rather than exclude the tender. The Court of Appeal confirmed that this would not violate the principle of equal treatment provided that the clarifications did not constitute a new bid or a substantial change. It held that the failure to clarify and decision to exclude Optima was irrational and was disproportionate.

Why is this important: This case provides a detailed analysis of the relevant principles applicable when considering the exclusion of tenders. In particular, it recognises that contracting authorities may be obliged in some instances to seek clarifications (rather than simply having a discretion to do so under public procurement legislation) and acknowledges a need for a "common sense" approach to dealing with clarifications.

Abnormally Low Tenders - Killaree Lighting Services Limited v. Mayo County Council and Electric Skyline Limited [2025] IECA 7

This case concerns an appeal from the High Court and upholds the finding that the respondent, Mayo County Council, "*did not err in its decision to exclude*" Killaree's tender on the basis that it was abnormally low. This case is the subject of a separate article which you can find here.

The Council raised concerns that Killaree's tender included abnormally low prices. Following an exchange of correspondence, the Council eliminated Killaree from the process on the basis that its tender included abnormally low prices. The letter stated that, following identification of the successful tenderer and observance of the standstill period, the name of the winner would be published in a contract award notice.



At first instance, the High Court rejected Killaree's submissions that it had been unlawfully excluded from the competition and had not received adequate reasons for exclusion. However, the High Court found that the letter issued was not a standstill letter and therefore was in breach of Regulation 5(1) of the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010 (the "**Remedies Regulations**"). The High Court, however, did not declare the contract ineffective (i.e. void), as it was clear from the letter Killaree was out of the competition and previous correspondence outlined the Council's concerns and stated Killaree would be excluded from the process. As a consequence, the High Court found that Killaree was not deprived of its pre-contractual remedies under the Remedies Regulations and there was no requirement to make a declaration of ineffectiveness.

On appeal, the Court of Appeal agreed with the High Court's findings regarding the exclusion of Killaree's tender as abnormally low. However, the Court of Appeal concluded that the Council's failure to provide a standstill letter (specifying the standstill period) **had** deprived Killaree of the chance to seek remedies before the contract was signed with the successful tenderer, but as there was no other infringement of substantive public procurement law by the Council there was no obligation upon the Court of Appeal to make a declaration of ineffectiveness. The Court of Appeal found that there was a mandatory obligation to impose an alternative civil penalty due to the failure to issue a standstill letter, even though it was not initially pleaded by Killaree, and remitted the civil penalty issue back to the High Court.

Why is this important: The case confirms established principles on abnormally low tenders and provides practical guidance to contracting authorities on how to proceed if they receive tenders that are suspiciously low and confirms that individual rates can be considered as part of an abnormally low tender assessment. The case also emphasises the importance of well-drafted exclusion letters and a reminder for contracting authorities to confirm the parties that are entitled to receive a standstill letter at the end of a tender competition. Finally, it serves as a novel case of the potential imposition of a civil financial penalty in a procurement challenge – the first reported instance in Ireland.

Automatic Suspension - One Medicare (t/a One Primary Care LLP) v NHS Northamptonshire Integrated Care Board [2025] EWHC 63 (TCC)

The NHS Northamptonshire Integrated Care Board ("**ICB**") issued an ITT for a contract to provide an Urgent Care Centre. Tenderers were notified that the tender of DHU Healthcare CIC ("**DHU**") had been identified as the most economically advantageous and ICB intended to award the contract to DHU. One Medicare (t/a One Primary Care) ("**OPC**"), the incumbent provider, challenged the award to DHU on the basis of breaches of transparency, scoring, and conflict of interest issues. This challenge imposed an automatic suspension on the award of the contract to DHU under Regulation 95 of the Public Contracts Regulations 2015. ICB applied to lift the suspension and this application was opposed by OPC.

ICB argued, amongst other things, that (1) damages were an adequate remedy for OPC (those damages being, if their claim is successful, loss of profit which is readily calculable), (2) ICB in contrast (if the suspension is maintained and it succeeds in its case) would suffer a loss that cannot be compensated in damages as the delay to the award of the contract would impede the delivery of enhanced healthcare services and pose risk to patient safety and (3) if being considered, the balance of convenience falls in favour of lifting the suspension.

OPC argued, amongst other things, that (1) damages would not be an adequate remedy because of a number of factors, including business disruption, loss of opportunities and reputational damage, (2) ICB identified no relevant or quantifiable loss and damage that it may suffer and/or no loss that is sufficiently tangible to weigh in the balance and (3) if being considered, the balance of convenience lies with maintaining the suspension in place.

With regard to the adequacy of damages as a remedy for OPC, Jefford J. decided that there was evidence which establishes that the lifting of the suspension is capable of causing disruption to OPC's business which cannot be adequately compensated in damages. However, she was not satisfied that that amounts to an arguable case that there will, in fact, be such disruption because of the more realistic likelihood that OPC will be financially supported by its shareholders.

With regard to the adequacy of damages as a remedy for ICB, Jefford J. decided that to maintain the suspension carries with it the risk that patients will be deprived of the benefits of the new contract with DHU which is a loss to the ICB that cannot be compensated in damages.

The judge found that the balance of convenience was "*firmly in favour of lifting the suspension*". Further, OPC failed to offer any undertaking in damages at all to ICB and only a partial and capped undertaking to DHU. Jefford J. held that the absence of the "*offer of a standard cross-undertaking in damages to either ICB or DHU is the strongest reason, if not the sole reason, to grant the application to lift the suspension*".

Why is this important: This judgment marks another successful application to lift an automatic suspension which should be welcome news to contracting authorities. It also provides detailed analysis of the relevant test for an application to lift a suspension, particularly regarding the adequacy of damages as a remedy, which will provide helpful guidance to contracting authorities when considering making such an application.

Contract modifications under Article 72(1)(c) - Fastned Deutschland GmbH & Co. KG and Die Autobahn GmbH des Bundes (Case C-452/23)

On 29 April 2025 the European Court of Justice ("**ECJ**") issued its judgment on this case which involved a dispute between Fastned Deutschland GmbH & Co KG ("**Fastned**") and Die Autobahn GmbH des Bundes ("**Autobahn**") regarding the modification of concession contracts for the operation of ancillary service facilities on German federal motorways so as to include the construction, maintenance and operation of fast-charging infrastructure for vehicle use (the "**Modification**").

The concession contracts were originally directly awarded (without a prior call for tenders) to an in-house entity of the contracting authority and were modified, after the in-house entity was subsequently privatized, by relying on Article 72(1)(c) of Directive 2014/24 (the "**Directive**") on the basis that the need for the Modification was brought about by unforeseeable circumstances.

Fastned challenged the modification on the basis that Article 72(1)(c) of the Directive does not apply to a modification of a public contract originally awarded to an in-house entity without a competitive tendering procedure.

The German Higher Regional Court (the "**Referring Court**") considered that the substantive conditions laid down in Article 72(1)(c) of the Directive were satisfied but sought a preliminary ruling from the ECJ regarding whether the scope of Article 72(1)(c) of the Directive also includes public contracts that were previously awarded to in-house entities outside the scope of the Directive but to which the conditions of in-house procurement no longer apply at the time of the contract modification.

The ECJ held (noting that this dispute concerns concession contracts meaning the Referring Court is querying the interpretation of Article 43(1)(c) of Directive 2014/23 (the "**Concessions Directive**"), the wording of which is essentially identical to Article 72(1)(c) of the Directive) that, if the conditions laid down in Article 43(1)(c) of the Concessions Directive are satisfied, the fact the contract was directly awarded to an in-house entity originally, which now no longer holds the status of an in-house entity, did not prevent reliance on this exemption to modify the contract, as, amongst other reasons, the specific requirements of the exemption did not relate to a public competition having been concluded. Further, any such limitation would be contrary to the purpose of the exemption, which was intended to introduce a certain degree of flexibility to be able to adapt a contract during its term due to external circumstances which could not be foreseen at the time of award of the contract.

The judgment also clarifies that the 'need for' a modification of a concession cannot be regarded as having been 'brought about', merely because its contractual terms do not cover the situation resulting from unforeseeable circumstances which have arisen.

The ECJ held that it is a matter for the Referring Court to determine whether the modification satisfies the criteria set out in Article 43(1)(c) of the Concessions Directive.

Why is this case important: This case confirms that if the conditions laid down in Article 43(1)(c) of the Concessions Directive are satisfied, a concession may be modified without a new award procedure, even where that concession was initially awarded, without a competitive tendering procedure, to an in-house entity and the modification of that concession is carried out on a date on which the concessionaire no longer holds the status of an in-house entity.

Contract modifications under Article 72 - Opinion of Advocate General Rantos in Polismyndigheten v Konkurrensverket (Swedish Police Authority v Swedish Competition Authority) (C-282/24)

Advocate General Rantos delivered his opinion on a question referred by a Swedish national court concerning whether modifying the payment model in a framework agreement, could be completed without triggering a new procurement process. In 2020, the Swedish Police Authority conducted a procurement process for towing services resulting in the award of two framework agreements. In mid-2021, the Swedish Police Authority and suppliers under the framework agreements agreed to amend the payment terms. The Swedish Police Authority justified these changes as being necessary to balance the internal cost distribution across different police regions and despite these changes, the total contract value would remain largely unchanged.

The Swedish Competition Authority argued the changes to the payment structure were substantial and so a new procurement process was required, as opposed to modifying the existing framework agreement.

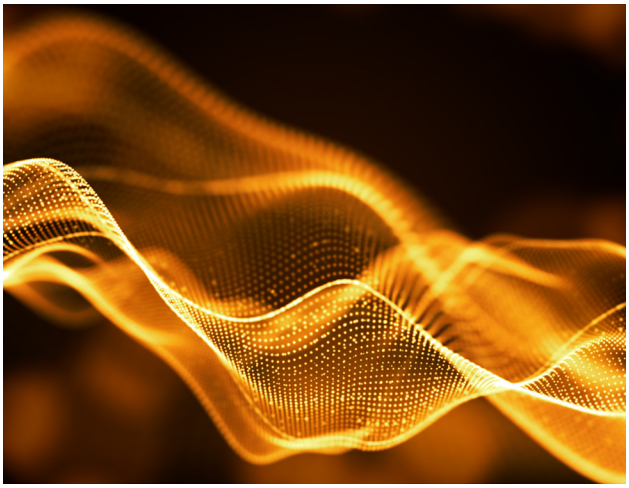
The question referred to the ECJ was whether this change had the effect of altering the overall nature of the framework agreement within the meaning of the de minimis exemption under Article 72(2) of the Directive and, consequently, of triggering the obligation to launch a new procurement procedure.

Article 72 does not define 'an alteration of the overall nature' of a contract, however Recital 109 of the Directive provides two examples of modifications resulting in an alteration of the nature of the overall procurement:

1. Where the supplies and services to be procured are replaced by something different; and
2. Where the nature of the procurement has fundamentally changed.

Advocate General Rantos differentiated between '*substantial modifications*' and '*alterations to the overall nature of the contract*' and opined that '*alterations to the overall nature of the contract*' required a new procurement process. The Advocate General observed that while all alterations to the overall nature of the contract are substantial modifications, not all substantial modifications reach the threshold of altering the overall nature of the contract. He considered that the modifications in question did not require a new procurement process because the services procured were not replaced with something different, the nature of the procurement did not fundamentally change and the changes to the pricing structure did not adjust the total contract value "*more than a marginal degree*".

Why is this case important: This case confirms that if the conditions laid down in Article 43(1)(c) of the Concessions Directive are satisfied, a concession may be modified without a new award procedure, even where that concession was initially awarded, without a competitive tendering procedure, to an in-house entity and the modification of that concession is carried out on a date on which the concessionaire no longer holds the status of an in-house entity.



Technical Specifications - DYKA Plastics NV v Fluvius System Operator CV (C-424/23)

This case centred around how a contracting authority may formulate technical specifications in public contracts and the interpretation of Article 42 of the Directive, which sets out the rules on technical specifications in public contracts. DKYA Plastics NV ("**DKYA**") were in dispute with the contracting authority, Fluvius Operator CV ("**Fluvius**") regarding the award of public contracts for drainage works that specifically required the use of sewage pipes made of vitrified clay and rainwater pipes made from concrete.

DYKA manufactured and supplied plastic sewage pipes and argued that its exclusion from Fluvius' public procurement procedure infringed Articles 18 and 42 of the Directive. In June 2020, DYKA unsuccessfully asked Fluvius to adapt its tender to allow the use of plastic pipes. This prompted DYKA to bring an action on the basis that Fluvius' technical requirements were anti-competitive.

Fluvius argued that contracting authorities should have broad discretion to define their own technical specifications based on their own needs. The ECJ rejected Fluvius's arguments finding that Fluvius failed to include the phrase "or equivalent" in their technical specifications. This was an automatic breach of Article 42 of the Directive and unless there is an objective justification for requiring those specific materials, a contracting authority must be open to equivalent alternative materials.

The ECJ held that Article 42(3) of the Directive must be interpreted as meaning that contracting authorities must draft specifications with reference to functional or performance criteria referring to technical standards, or allow for equivalent materials, or both. The ECJ also found a contracting authority will be deemed to have infringed Article 42(2) of the Directive if it fails to provide equal access to the procurement procedure and if the technical specifications are found to be restricting competition without an objective justification. It follows that contracting authorities are prohibited from creating unjustified obstacles to open competitions.

Why is this case important: The ECJ reiterated the principle that a contracting authority is not allowed to artificially obstruct the open competition and must accept equivalent products. The ECJ also confirmed that where a contracting authority specifies materials, it must be able to justify its preference by objectively demonstrating that the material is essential for its needs or alternatively be open to accepting equivalent materials. This judgment highlights that procurement processes should reflect the diversity of technical solutions available on the market.

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