

Opening the evaluation file: *Prime Way Care v. Southwark*

High Court confirms a pragmatic approach to early disclosure under the Procurement Act 2023

The High Court has ordered a contracting authority to disclose anonymised comparator evaluation records in the first reported judgment on early specific disclosure in a procurement challenge under the Procurement Act 2023. The decision confirms that the established principles in *Roche Diagnostics* remain highly relevant under the new procurement regime and suggests that, where pleadings have closed and ordinary disclosure is imminent, the traditional *prima facie* case threshold may have limited practical significance. Indeed, the judge questioned whether the *prima facie* case threshold should apply at all in this particular case.

Overview

In *Prime Way Care Limited v. Mayor and Burgesses of the London Borough of Southwark* [2026] EWHC 1845 (TCC), Constable J ordered disclosure of contemporaneous evaluation records for five bidders who scored 4 or more on a disputed selection question. The records are to be anonymised and disclosed initially into a lawyers-only confidentiality ring.

Southwark argued that Prime Way had not pleaded an equal treatment complaint and that the request was a fishing expedition. The court rejected both arguments. Reading the particulars of claim (which were drafted before the acting lawyers were instructed) as a whole, the court found a general, although imperfectly expressed, allegation of unequal treatment. Consistent with established procurement disclosure principles, the court emphasised the information asymmetry inherent in procurement challenges, observing that a claimant may lack access to the documents needed to particularise its case. The documents sought were directly relevant to that (unequal treatment) issue, narrowly defined, readily available and inexpensive to produce.

The judgment does not decide that Southwark evaluated bids inconsistently or relied on undisclosed criteria. It is a procedural decision. The decision suggests that contracting authorities may face difficulty resisting early disclosure of focused, relevant contemporaneous evaluation records once litigation is underway, particularly where confidentiality concerns can be adequately managed.

Background

Southwark conducted a two-stage procurement for a multi-lot framework for adult home care services, reported to have a value exceeding £200 million. At the first stage, bidders completed a Procurement Specific Questionnaire (PSQ). Question 22(ii) required a response of no more than 500 words explaining experience in managing a workforce, including recruitment and training, equality, diversity and inclusion, and arrangements for staff absence or changes of care workers.

Prime Way needed a minimum score of 4 to progress but received 3. Southwark's initial feedback identified limited supporting examples and insufficient detail. After Prime Way sought clarification and the moderation record, Southwark provided fuller reasons but refused to release individual evaluator notes, internal deliberations or detailed moderation documents. Prime Way alleged that the later explanation introduced new criticisms and amounted to *post hoc* justification.

Prime Way initially sought records relating to its own evaluation and all 33 bidders that had scored 4 or more. Its own records were provided during the application, and, at the hearing, the comparator request was narrowed to the five bidders still in contention for award. Southwark accepted that the information was held in a small number of spreadsheets and could probably be anonymised without removing the substance of the moderators' comments.

The High Court decision

The court applied Civil Procedure Rule (CPR) 31.12, and the principles in *Roche Diagnostics*¹ and later procurement authorities. Those principles recognise the information asymmetry inherent in procurement disputes that an unsuccessful bidder knows that it has lost, but the reasons and primary evaluation material are usually within the contracting authority's "peculiar knowledge". Subject to relevance, proportionality and confidentiality, a challenger should therefore receive the essential documents showing how the evaluation was actually performed.

A pleaded equal treatment case – The court accepted that the pleading could have been clearer, but paragraphs alleging "shadow benchmarks" and a violation of equal treatment, read with a reservation to further particularise the claim following disclosure, were sufficient to place unequal treatment in issue. A broadly expressed procurement pleading may be read with appropriate generosity where the lack of detail may itself result from the claimant's lack of access to the authority's records.

The *prima facie* case threshold – Constable J questioned whether a separate *prima facie* case threshold was required, or whether one was even required at all, because pleadings had closed and ordinary disclosure would be the next procedural step. Relevant documents would shortly be disclosable in any event, and if the threshold did apply, it was met. This is not a mini-trial or summary judgment exercise because the court looks at the claimant's side of the picture and asks whether a coherent case, potentially grounded at that stage in honest belief, is sufficient to warrant an answer.

No fishing expedition – The request concerned a single question, five bidders and a small number of readily available spreadsheets. Anonymisation and the confidentiality ring addressed commercial sensitivity. The court also noted that prompt disclosure may narrow or end the dispute if the documents demonstrate a consistent and fair process. Uncertainty as to the records' ultimate probative value carried little weight where the production burden was minimal.

Key takeaways

- The Procurement Act 2023 has not displaced the court's established approach to disclosure in procurement disputes. *Roche Diagnostics* and the later authorities remain central.
- Contracting authorities should maintain clear evaluation and moderation records and ensure later explanations reflect the contemporaneous material.
- A statutory assessment summary is not the limit of disclosure. The court may order disclosure of relevant records under the CPR.
- Comparator records may be disclosable in equal treatment cases, particularly where requests are narrowly focused.
- Confidentiality can usually be managed through anonymisation, undertakings and confidentiality rings.
- Disclosure may not establish that an evaluation was unlawful, but early production may expose weaknesses or help narrow the dispute.

Practical implications

For contracting authorities, the decision reflects the 2026 Technology and Construction Court (TCC) Guide's expectation that key decision-making materials should be provided at an early stage. Authorities should consider targeted voluntary disclosure before resisting a request outright, especially where the records are limited and a confidentiality ring is available. Repeatedly expanding the narrative reasons while withholding the source material may increase, rather than reduce, concern about *post hoc* justification.

For suppliers, the judgment rewards disciplined requests. The application should identify the pleaded issue, explain why comparator material bears on it and propose proportionate confidentiality protections. A request for specified evaluation records is materially stronger than a broad demand for competitors' tenders or an attempt to identify an unpleaded claim.

¹ *Roche Diagnostics Limited v. Mid Yorkshire Hospitals NHS Trust* [2013] EWHC 933 (TCC).

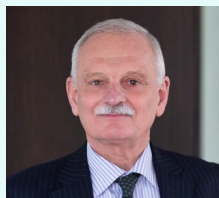
Contacts



Sam Hare
Director, London
T +44 207 655 1154
sam.hare@squirepb.com



Deborah Polden
Partner, Leeds
T +44 113 284 7227
deborah.polden@squirepb.com



Martin H. Rees
Consultant, London
T +44 20 7655 1137
martin.rees@squirepb.com



Dickie Chan
Senior Associate, London
T +44 20 7655 1163
dickie.chan@squirepb.com



Simon Sepesi
Trainee, London
T +44 207 655 1000
simon.sepesi@squirepb.com