

Objecting to disclosure in confidentiality rings – a note of caution for successful bidders...

A recent decision¹ has illustrated that a successful bidder who raises “unreasonable” objections to disclosure of its documents to a competitor may end up liable for that competitor’s legal costs, even if it isn’t a party to the procurement dispute.

Context

Merseytravel carried out a tender exercise for a multi-million pound supply contract in which Stadler Bussgang AG (**Stadler**) was successful. Bombardier, as an unsuccessful bidder, brought a number of claims against Merseytravel.

All of the parties involved agreed the terms of a confidentiality ring, into which a number of Stadler's documents and information relating to the evaluation of both Bombardier's and Stadler's bids was disclosed. The terms of the confidentiality rings were recorded in two consent orders.

After a hearing in early 2017, Bombardier was granted permission to amend an earlier consent order regarding disclosure of “highly sensitive documentation.” Merseytravel was neutral about the application, whereas, not surprisingly, Stadler opposed it. Stadler did not formally participate in the application, instead putting forward its position via Merseytravel. Its primary concern was that that Bombardier might be trying to misuse confidential information to gain unfair competitive advantage in the future, though evidence was not provided to support this allegation.

Decision

The court dismissed the allegation and, as Bombardier had been successful, it was entitled to recovery of its costs. Merseytravel was not liable to pay these costs as it had remained neutral in the proceedings. Instead, Stadler was held to be liable for Bombardier’s costs, on the basis that its objections had been unreasonable and contrary to the terms of the consent order.

The court didn’t accept Stadler's argument that it could only be the subject of an adverse costs order if it had displayed exceptional or unreasonable behaviour. The court held instead that Stadler should have agreed to what was a sensible and proportionate application. Stadler, as the only party that opposed the application, wasted the court’s time without demonstrating any evidence for its objections that Bombardier intended to misuse the information.

Implications

Following this judgement, successful bidders taking part in an appropriately structured confidentiality ring will need to carefully consider the balance between their confidentiality concerns; and the need for the challenger to receive fair disclosure to assess its position and resolve the challenge. Ill-founded or unsubstantiated claims are likely to result only in penalties for the successful bidder.

¹ Bombardier Transportation (UK) Limited v Merseytravel 2018