"Fail" = exclusion from the tender process?

A recent court decision[1] has suggested that this may not always be the case, where not explicitly set out in the tender documents.

Context

MLS was the incumbent provider of global port, maritime and other logistical support services to the Royal Navy and was unsuccessful in the re-procurement process, carried out by the Ministry of Defence (MOD) on behalf of the Royal Navy.

In the standstill letter, the MoD informed MLS that its tender received the highest quality score and offered the lowest price, however it would not be awarded the contract as it had "failed" a pass/fail question regarding safety and quality management in the supply chain.

MLS challenged this decision on the basis that the consequences of failing this question (i.e. that this would result in exclusion) were not clear from the tender documents. This consequence had, in contrast, been clearly stated (in bold text) in relation to other questions. The MoD, on the other hand, argued that it was entitled to exclude MLS and that the omission of an express statement in this regard was a result of an administrative error.

Decision

The court found that the MoD had breached its duties of transparency and equal treatment, as the tender documents did not make the consequences of achieving a fail in the safety question (i.e. disqualification) sufficiently clear to the 'reasonably well informed and normally diligent' tenderer. The court based its decision on the following:

- the tender documents were clear on the process for selecting the most economically advantageous tender, including worked examples, which at no point made reference to the safety question MLS had failed.
- as opposed to other questions, there was no clear statement that a fail for the safety question would lead to rejection of the tender.
- the tender documents did not indicate that a pass score for the safety question was a minimum standard (which the MoD admitted in court was a mistake).

Implications?

Whilst the court's finding in this case is not necessarily surprising or novel given the context above, it does raise some interesting issues for contracting authorities and bidders alike. In particular, it highlights that the contracting authority's interpretation of the documents may not always align with the bidder's and, as in this case, can sometimes be entirely different. Where this is the case, it may not be enough for the contracting authority to rely on the natural or implicit interpretation of the language used (in this case a "fail") as being sufficient to support its position (here a decision to exclude a bidder).

This decision reinforces that the principle of transparency is fundamental to public procurement. It is essential that contracting authorities ensure their indicators are clear and

[1] MLS (Overseas) Limited v The Secretary of State for Defence [2017]

drafted so that all bidders will interpret them in the same way. Similarly, the consequences of failure must be explicitly set out and not be left purposefully vague or assumed to be interpreted in a particular way.

For bidders, where the requirements are not clear or there are concerns as to transparency, the next move is perhaps not so obvious. Whilst raising a clarification on the issue may seem like the sensible next step, this case suggests that there could be some benefit, depending on the circumstances and the bidders' confidence in their submission, in holding off to see how the contracting authority interprets the provision and mounting a challenge, if necessary, at a later stage.