CARSON McDOWELL

Procurement Update.

Winter 2016

Contents

1. Welcome

This procurement update focuses on recent case law of both the European and national courts on public procurement issues and recent guidance published by both the Central Procurement Directorate and the Crown Commercial Service. Of particular note is the EnergySolutions case, which highlights the need for contemporaneous notes during the evaluation process, and the Faraday case which outlines circumstances in which a development agreement is not subject to the Public Contracts Regulations 2015.

As always, please feel free to get in touch if you have any queries on any aspect of this update or indeed on any other procurement issue. We would like to take this opportunity to wish you and your families a very happy Christmas and a successful and healthy 2017.

2. Summary of caselaw

2.1 Judge rules that procurement process was "manipulated" and "fudged" to achieve the desired outcome[1]

The English High Court has ruled that the procurement of a contract by the Nuclear Decommissioning Authority (NDA) was awarded in breach of both the rules of its own evaluation process and procurement law.

The contract was for the decommissioning of 12 nuclear reactors (with a value of approximately £4 billion). We previously reported on the interim hearing where the court found that damages for breach of procurement legislation were not discretionary, even where the claim form is not issued until the contract has been entered into, as was the case here.

EnergySolutions EU Limited (EnergySolutions) was part of an unsuccessful consortium (RSS) that submitted a tender for the contract. The contract was to be awarded to the Cavendish Fluor Partnership (CFP).

EnergySolutions alleged that there had been manifest errors in the evaluation process and that RSS should have been awarded the contract rather than CFP. The court gave a lengthy judgment covering many issues, however with key issues relate to findings of manifest error and the transparency of the procurement process.

Manifest error

The court considered previous case law on the issue of manifest error and highlighted that for the court to interfere in the evaluation process, the errors must be manifest and material. An error is not considered to be material where it would have no impact on the outcome of the procurement process.

The court found that, if the tenders had been evaluated in accordance with the process set out in the documents, CFP would have been disqualified. The court also found that, had the scoring process set out in the documents been applied, some scores would have been different. In the case of EnergySolutions, the court found that some scores should have been higher, which would have resulted in EnergySolutions being awarded the contract. The court went as far as to say that the process appeared to have been "fudged" i.e. an outcome had been chosen and the evaluation process was manipulated in order to achieve that outcome.

Transparency

The court criticised the manner in which the members of the evaluation team conducted the evaluation process. In particular, the fact that evaluation team members were discouraged from taking notes during the process and any notes taken were required to be shredded following evaluation meetings. This, the court noted, demonstrated an attempt by NDA to restrict the amount of information that would be available to potential challengers, as the NDA appeared to be particularly sensitive to this possibility. The court found that this approach was entirely contrary to the principle of transparency. The court also noted that, had the process been run correctly, the authority should have no concerns in relation to the disclosure of evaluation notes.

There were also no notes taken of the dialogue stages of the procurement process. This resulted in evaluators relying on their memories in respect of certain aspects of the process which further confirmed the court's concerns with the accuracy of the evaluation process and the scores awarded to EnergySolutions.

[1] EnergySolutions *EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TC), 29 July 2016.

Other significant issues with the process were as follows:

- The evidence provided by witnesses regarding the reasons for scores was contradictory.
- The evaluators had not reviewed the significant amount of information provided in the data room before commencing the evaluation process.
- "Final" scores were changed without record of the reason why.

Based on the court's findings, the proceedings will now move to the next stage i.e. directions and quantum of damages. We will update you on the next stage of the proceedings.

Comment

This case is the latest in a series of cases which highlight the importance of contemporaneous note taking in evaluation procedures. Contracting authorities must ensure that detailed contemporaneous notes are taken at all stages of the procurement process, particularly in processes where negotiation occurs. The case also confirms existing case law on manifest error but demonstrates that the courts will interfere with a contracting authority's discretion in the evaluation process where manifest error has occurred.

2.2 Is a contracting authority required to bring the evaluation method to the attention of tenderers?[2]

The Court of Justice of the European Union (CJEU) has handed down its judgment on a request for a preliminary ruling from the Belgian Council of State. The CJEU was asked to rule on whether a contracting authority must make its evaluation method known in advance.

This case relates to the procurement of services for a large-scale housing survey in Flanders. TNS Dimarso (TNS) submitted a tender for the contract but was unsuccessful and brought a challenge on the basis that the evaluation committee applied a process not referred to in the documents in relation to the evaluation of quality submissions. The procurement documents stated that tenders would be evaluated 50/50 on quality and price. The documents did not, however, contain any information about the methodology that would be used in that assessment, aside from each tender being given a rating for quality of high, satisfactory or low followed by application of the price criterion.

TNS argued that the "high/satisfactory/low" method of evaluation was so vague that the evaluation of price became the decisive factor. TNS argued that, if the methodology had been disclosed, this would have had an effect on tenderers' preparation of tenders.

The court found that the evaluation methodology could have affected the award criteria and their weightings (as price was given decisive weight) but did not expressly consider whether disclosure could have affected tenderers' preparation of their tenders. The court did not go as far as Advocate General Mengozzi who had stated that the evaluation should have been disclosed as there was a risk that it could have affected the preparation of tenders had it been known to tenderers.

Ultimately the court ruled that a contracting authority is not required to bring the evaluation method used to evaluate and rank tenders to the attention of tenderers in the contract notice or the tender specifications. However, that method must not have the effect of altering the award criteria and their relative weighting.

Comment

The ruling does not help contracting authorities work out whether its proposed evaluation methodology will affect award criteria or their weightings. The ruling also does not clarify when the evaluation methodology may affect tenderers' preparation of their tender submission. We would advise contracting authorities, in light of the principle of transparency, that evaluation methodologies should generally be disclosed and it is currently standard practice for contracting authorities to do so.

2. Case C- 6/15 - *TNS Dimarso NV v Vlaams Gewest*, 10 March 2016.

2.3 Can a contracting authority specify the percentage of works to be carried out by a contractor in a public contract?[3]

The City of Wroclaw issued a tender under the restricted procedure for the partial construction of a bypass. The project was co-financed by the EU Cohesion Fund and the European Regional Development Fund. The specification for the tender contained a requirement that the contractor appointed must perform at least 25% of the works using its own resources.

The CJEU was asked to rule on whether:

- The limitation on the use of subcontractors infringed national law and Article 25 of Directive 2004/18/EU (which applied at that time).
- The limitation also has a detrimental effect on the general budget of the European Union.

The CJEU considered that Directive 2004/18/EU provides for the use of subcontractors without limitation. A contracting authority is however entitled to prohibit the use of subcontractors whose capacities cannot be verified for the performance of essential elements of the contract. The CJEU decided that the requirement in question was incompatible with Directive 2004/18/EU as it imposed limitations on the use of subcontractors and was contrary to Article 48(3) of that Directive, which allows economic operators to rely on the capacities of other entities.

Comment

Directive 2004/18/EU has of course been replaced by Directive 2014/24/EU and implemented into UK law by the Public Contracts Regulations 2015, as amended. The new regime does allow greater scope for monitoring and controlling subcontractors. However, the fundamental principles of this case remain relevant i.e. that a contracting authority cannot unilaterally restrict the amount of work carried out by subcontractors in a public contract and that economic operators can rely on the capacities of other entities.

2.4 When will a development agreement not be a considered a public contract?[4]

Faraday Developments Limited (Faraday) challenged, by way of judicial review, the decision of West Berkshire Council (Council) to enter into a development agreement with St Modwen Developments Limited (St Mowden) to regenerate an area of industrial land largely owned by the Council (Development Agreement).

St Modwen was chosen as the successful tenderer following a competitive tender process which was not conducted in accordance with the Public Contracts Regulations 2015, as amended (Regulations). Faraday alleged that the Council had failed to achieve best consideration for disposal of its land in accordance with the Local Government Act 1972 and failed to comply with the Regulations. In relation to the application of the Regulations, Faraday argued that the Development Agreement was a public works contract within the meaning of the Regulations and, therefore, the Council's decision not to comply with the Regulations was unlawful.

The court considered the well-established principle that a contract will only be subject to the Regulations where its main object corresponds to the definition of one of the three types of public contract (i.e. works, services or supplies). The court held that the main purpose of the contract must be determined by an objective examination of the entire transaction to which the contract relates and that assessment must be made in light of, or having regard to, the essential obligations which predominate and characterise the transaction.

The court rejected the argument that the Development Agreement fell within the scope of the Regulations. The court held that the purpose of the Development Agreement was to facilitate regeneration by carrying out redevelopment works and maximising the Council's financial gain from the site. In this case, the court held that the services to be provided under the contract were not a main purpose in themselves and were merely to facilitate the Council's regeneration and financial objectives.

[3] Case C- 406/14 – Wroclaw – *Miasto na prawach powiatu* v *Minister Infrastruktury i Rozwoju*, 14 July 2016.
[4] *R (Faraday Developments Ltd)* v *West Berkshire Council* and another [2016] EWHC 2166, 28 August 2016.

Other factors the court considered relevant to its decision that the Development Agreement was not a public works contract were:

- The Development Agreement did not impose an obligation on the developer to carry out the redevelopment but merely gave the developer the option to acquire certain sites and to develop them.
- The Development Agreement did not provide for any specific development and it was for the developer to propose the plans for development, as opposed to the Council.
- The plans were subject to a steering group where the developer had an equal voice to the Council.
- The developer was required to make the planning applications.

The court therefore held that the Development Agreement was not a public works contract for the purposes of the Regulations; neither was the Development Agreement a services agreement as the services were not an end in themselves for the Development Agreement.

Comment

This case demonstrates that it may be possible for contracting authorities to structure development agreements to fall outside the scope of the Regulations. However, we would recommend that contracting authorities seek legal advice before proceeding with a development agreement that they consider to be outside the scope of the Regulations, as the penalties for getting it wrong are particularly severe (including a claim for damages and a potential declaration of ineffectiveness if the Regulations are found to apply).

2.5 Commission takes action for delayed procurement process[5]

The European Commission announced that it has sent a reasoned opinion to Slovakia in relation to its failure to properly implement European procurement rules.

The procurement process in question was a €250m railway reconstruction contract which was launched in 2009. The evaluation of tenders however still had not been finalised by September 2016. The Commission highlighted that the purpose of EU procurement rules was to ensure public procurement is transparent, efficient and gives all economic operators a chance to participate in a call for tenders for a contract. This anticipates that procurement processes, including evaluation of tenders, will be conducted in a timely manner and that award decisions are effectively implemented by contracting authorities and entities.

The Commission stated that by failing to finalise the evaluation of tenders, Slovakia had infringed Article 10 of Directive 2004/17/EU (which applied at the time) in relation to equal treatment and non-discrimination.

The Commission sent a letter of formal notice to Slovakia in October 2014 in respect of the award of this contract. Following this, the Supreme Court of the Slovak Republic cancelled all award decisions for this contract and ordered the re-evaluation of tenders for the contract. However, almost two years following this decision, the evaluation process was still not finalised.

Comment

This highlights that contracting authorities need to ensure that procurement processes are conducted in a timely and efficient manner. It demonstrates that the European Commission will take measures to ensure procurement processes are properly conducted.

2.6 Can a settlement agreement amount to the modification of a public contract?[6]

The CJEU has ruled that a settlement agreement can, in certain circumstances, amount to the modification of a public contract.

[5] Commission MEMO 16/3125, 29 September 2016.
[6] Case C-549/14 Finn Frogne A/s v Rigspolitiet ved Center for Beredskabskimmunikation, 7 September 2016.

A Danish contracting authority (Contracting Authority) carried out a procurement process for the award of a public contract, via the competitive dialogue procedure, for the supply of a global communications system.

Following a dispute between the successful tenderer and the Contracting Authority, the parties entered into a settlement agreement which significantly reduced the scope of services to be delivered under the contract. As part of the settlement, each party waived all rights arising from the original contract. The Contracting Authority published a voluntary ex ante transparency (VEAT) notice in the Official Journal of the European Union expressing its intention to conclude the settlement agreement.

A challenge was subsequently brought by a party that had not applied to participate in the procurement process. The referring court asked the CJEU to consider whether the settlement agreement constituted a contract which required a tendering procedure.

The CJEU noted that parties to a public contract were precluded from making material amendments to such a contract following its award where:

- The amendments would extend the scope of the contract considerably to include elements not initially included or to change the economic balance in favour of the successful tenderer.
- The changes would call into question the award of the contract i.e. had they been part of the original procedure, they would have allowed for the admission or acceptance of another tenderer.

The CJEU confirmed that a material amendment to a contract cannot be effected by direct agreement between a contracting authority and a successful tenderer unless it is provided for under the terms of the original contract. The CJEU stated that the fact that the material amendment did not result from the deliberate intention of either party to renegotiate terms of the contract but to reach a settlement to resolve objective difficulties did not justify the breach of the principle of equal treatment.

Comment

Often procurement litigation does not run the full course and ends up settling out of court. In these circumstances, both contracting authorities and economic operators must be wary of the fact that such a settlement agreement may result in a modification of the public contract in question and should seek legal advice before proceeding. Whilst this contract was awarded under the previous Directive 2004/18/EU, the court confirms in this case that the test for material variation is that contained in Regulation 72 of the Regulations.

2.7 When is a contracting authority obliged to accept information provided after the tender submission deadline?[7]

Renfrewshire Council (Council) conducted a tender process for appointment to a framework for the provision of demolition services to Scottish public authorities. The framework was divided into three lots and tenderers were permitted to bid for all lots.

Dem-Master Demolition Limited (Dem-Master) submitted a tender for all three lots on the final day for submission of tenders. Following this, the Council informed Dem-Master that it had failed to provide a commercial offer as it had not provided percentage figures for overheads and profit for Lots 1 and 2 and had submitted a blank template as part of its offer for Lot 3. Dem-Master responded to the Council, within less than two hours, providing the missing information. The Council subsequently advised Dem-Master that its offer would not be considered further. Dem-Master challenged this decision of the Council on the basis that the Council's failure to consider its response amounted to a breach of the principle of transparency.

The Scottish Court of Session was referred to the CJEU's decision in Tideland[8] in relation to proportionality. However, the court found that this was not relevant as that case related to an ambiguity, which did not exist in this case but rather a patent failure to comply with the instructions to tenderers. The instructions to tenderers made it very clear that failure to provide the required percentage figures and spreadsheet, which were missing from Dem-Master's submission, would result in the tender response not being considered.

7. Dem-Master Demolition Limited v Renfrewshire Council [2016] CSOH 150, 19 October 2016.
8. Case T-211/02 Tideland Signal Ltd v European Commission, 27 September 2002.

The court was also referred to the Manova[9] case which set out two requirements which must be met in these circumstances in order to avoid a breach of the principle of equal treatment. Firstly, the documents requested after the deadline must be able to objectively shown to pre-date the deadline. It did not appear to the court that the spreadsheet submitted in respect of Lot 3 existed prior to the omission being drawn to Dem-Master's attention. There was also no way for the Council to have known Dem-Master's intended percentage figures for Lots 1 and 2. Secondly, it must not be expressly set out in the tender documents that failure to provide the documents or information would result in the tender being rejected. As referred to above, this was unequivocally stated in the instructions to tenderers.

The court, in deciding that the Council had not breached the principle of transparency, highlighted that the insertion of the new information would, in effect, have amounted to a new tender and another successful tenderer may have reasonably challenged this as a breach of equal treatment. The court also noted that there are strong policy reasons for enforcing deadlines for submission of tenders, including fairness to other tenderers and avoidance of the risk of abuse.

Comment

The issue of failure to provide all required documentation in a tender process is a common problem for contracting authorities, particularly with the increased use of procurement portals. This case provides useful confirmation of the limited circumstances in which a contracting authority can accept information provided after the tender submission deadline.

The case also serves as a reminder to tenderers to ensure that tenders are complete and contain all requested information. It also highlights the risk of submitting a tender close to the submission deadline, as errors may occur which there is not sufficient time to correct.

3 Procurement News Roundup

3.1 Central Procurement Directorate issues guidance on selection and tender evaluation procedures[10]

The Central Procurement Directorate (CPD) has issued its latest procurement guidance note (PGN) which sets out the principles involved in the selection and tender evaluation stages of a procurement process. The PGN reflects the updated position following the introduction of the Public Contracts Regulations 2015, as amended, in February 2015.

The guidance notes that the selection of economic operators and the evaluation of tenders are crucial stages in the overall procurement process to achieve best value for money. The guidance aims to assist contracting authorities in avoiding procurement challenges which CPD recognises are both very time consuming and costly.

The PGN covers the following areas:

- Selection and tender evaluation panels
- Conflicts of interest and confidentiality
- Mandatory and discretionary exclusion of economic operators
- Selection criteria
- Pre-qualification questionnaires
- Award criteria
- Tender evaluation methodology
- Individual and consensus scoring

3.2 Crown Commercial Service issues guidance on social and environmental aspects under the Public Contracts Regulations 2015, as amended[11]

The Crown Commercial Service has issued its latest guidance which sets out how contracting authorities can ensure their supply chain is compliant with social, environmental and labour law and how these factors can be evaluated in a public procurement exercise.

9. Case C 336/12 Ministeriet for Forskning, Innovation og Videregående Uddannelser v Manova A/S, 10 October 2013.
10. Procurement Guidance Note PGN 04/16.
11. Crown Commercial Service – Public Contracts Regulations 2015 – Guidance on Social and Environmental Aspects.

The guidance recognises that there is considerable flexibility for contracting authorities to include social, environmental and labour law criteria in the procurement process and as contract performance conditions. Contracting authorities must ensure compliance with the relevant social, environmental and labour laws throughout the performance of public contracts and the guidance includes, at Annex B, sample clauses to be included in public contracts to allow for contract termination where breaches of these obligations occur.

The guidance sets out how contracting authorities can address these conditions at each stage of the procurement process including:

- At selection stage – where economic operators can be excluded where they have been convicted of, for example, child labour offences.
- In the specification for the contract – where contracting authorities can require economic operators to provide proof that the contract deliverables meet the specified environmental characteristics.
- At contract award and delivery stages – where the contract award criteria can include social or environmental aspects related to the subject matter of the contract e.g. how the economic operator will ensure the use of environmentally friendly products in a cleaning services contract.

The guidance also provides information on the steps to be taken where an economic operator has not complied with the Modern Slavery Act 2015.

Contacts

Declan Magee
Partner

+44 (0)28 9034 8827
declan.magee@carson-mcdowell.com

Dorit McCann
Partner

+44 (0)28 9034 8816
dorit.mccann@carson-mcdowell.com

Niamh McGuckin
Solicitor

+44 (0)28 9034 8817
niamh.mcguckin@carson-mcdowell.com