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UK Public Procurement Law Digest: Clarity on Clarification of Tenders

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One of the most frequently disputed areas of European public procurement is the extent to which a contracting authority has the right or obligation to ask a bidder to explain aspects of its tender.

The European Court of Justice has finally provided some much-needed guidance on the circumstances in which an authority may ask a bidder to clarify its tender or correct an obvious error.

BACKGROUND

One of the long-running themes of many of the cases on public procurement that have come before the courts in recent years has been the extent to which a contracting authority either has the right or the obligation to seek clarification of a tender received from a bidder, particularly where there are mistakes or errors in that bid.¹ Usually, the issue has arisen in the context of a bidder which, having mistakenly submitted an incorrect bid, alleges that the authority should have spotted the mistake and asked for it to be corrected.

A decision by the European Court of Justice (ECJ) has now provided helpful guidance on whether and how clarification should be sought. In short, the ECJ considers that there is no need for an EU Member State's national law to impose a *requirement* that contracting authorities seek clarification of bids before rejecting them on the grounds of imprecision or failure to meet technical requirements.

The ECJ has reiterated that contracting authorities have discretion to seek clarification or confirmation of details in a tender. However, this discretion should be exercised on an exceptional basis, and generally only where it's clear that there are manifest errors or details that require clarification. As previous cases have identified, in exercising this discretion a contracting authority must treat all tenders equally and fairly. So, for example, if a request for clarification is sent to one bidder, the request should also be sent to all other bidders in the same situation.

The ECJ decision is consistent with previous UK cases² in confirming that there is no obligation on an authority to overlook a problem of the bidder's making. The ECJ has helpfully provided extended guidance on when and how an authority can exercise discretion to ask for more details from a bidder to clarify a mistake or bid uncertainty.

¹ See our November 2011 update "[Caveat Venditor](#)" – e-tendering Systems and the Problem of Genuine Mistakes and the comments on the *Clinton* case in our May 2012 update [Successfully Setting Aside UK Procurement Contract Awards](#).

² *E.g.*, *J B Leadbitter & Co Ltd v Devon County Council [2009]*, a decision made by the English High Court in respect of a claim brought by an aggrieved bidder whose tender was rejected by the contracting authority on the basis that it was not properly submitted in accordance with the contracting authority's express instructions; the court held that the contract authority was within its rights to reject the incorrect tender and there was no obligation to exercise discretion to overlook the mistake. See our June 2009 update [Evaluation and Discretion](#).

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WHAT IS THE CASE?

The case is *SAG ELV Slovensko a.s. v Úrad pre verejné obstarávanie*, which is a reference to the ECJ for a preliminary ruling from the Slovakian court.

As a general principle, public procurement law requires that contracting authorities treat bidders equally and non-discriminately and act in a transparent manner. This requirement derives from Article 2 of Directive 2004/18 – the main legislative basis of the EU procurement regime that underpins the UK governing law, the Public Contracts Regulations 2006.

Various parts of Directive 2004/18 state that contract authorities may invite bidders to supplement or clarify any documents submitted in support of their applications to be selected to bid (e.g., Article 51 of Directive 2004/18). Additionally, a specific provision relating to abnormally low tenders says that a contracting authority must, before rejecting a tender on the grounds that it appears to be abnormally low, request details of the constituent elements of the tender which it believes to be relevant.

This case arose out of the Slovakian law that implements Directive 2004/18, which states that a contracting authority may ask a bidder to explain in writing its tender, as long as that does not constitute accepting a proposal from a bidder to make a change which would give that bidder a particular advantage.

In 2007, a Slovakian contracting authority (Národná diaľničná spoločnosť a.s. (NDS)) requested tenders under the restricted procedure for a contract to supply services relating to highway toll collection. During the procurement process, NDS sent requests for clarification to two bidders (SAG ELV and Slovak Pass) asking them to clarify apparently low prices that had been proposed. Both of those bidders provided responses but both eventually were excluded from the tender procedure. As a result, they appealed to the local Slovak court which, in turn, raised various questions of clarification before the ECJ.

The most interesting part of the ECJ's decision relates to the clarification of information about apparently imprecise tenders, or bids which don't meet the authority's technical requirements. The ECJ noted that Directive 2004/18 does not specifically contain a provision setting out the procedure to be followed if a contracting authority identifies that a bid is imprecise or doesn't meet the technical requirements. In particular for restricted procedure tenders, it is the nature of the restricted procedure that, once the bidders have been selected and the tenders have been submitted, the bids cannot be amended either at the behest of the authority or the bidder itself.

Accordingly, to allow a contracting authority to require a bidder to provide clarification of an imprecise or non-qualifying tender would be to run the risk of appearing to allow negotiation between authority and bidder (which, of course, is not permitted under the negotiated procedure). If that bidder were then successful, this would be to the detriment of the other bidders and be in breach of the principle of equal treatment.

The ECJ clarified that nothing in the public procurement regime *requires* contracting authorities to contact bidders for clarification. Bidders cannot complain about a failure to seek clarification if the lack of clarity of their bids is solely their own fault or attributable to their failure to exercise due care and attention in the preparation and submission of their tender.

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However, the public procurement rules do not prevent national law allowing a contracting authority to seek correction of obvious errors or clarification of unclear details in a tender where it is appropriate to do so, especially where it is clear that clarification or correction is needed. However, it is important that those clarifications – and any resulting amendments – do not lead to the submission of a new tender.

The overriding obligation of a contracting authority is to treat all bidders equally and fairly. Therefore, if an authority does decide to request clarification, it must not unduly favour or disadvantage the bidder to whom the request is addressed.

In addition, the ECJ noted that a request for clarification of a particular bid must only be made after the authority has looked at all the bids. Any request for clarification must be sent in the same way to all bidders in the same situation unless there is an objectively verifiable ground justifying different treatment.

In addition, the request must relate to all sections in the tender which are imprecise and don't meet the technical requirements. So, for example, a contracting authority could not ask for clarifications on one part of a tender and then reject the bid due to a lack of clarity in a part of the tender which was not covered in the request.

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