Client Alert.

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UK Public Procurement Law Digest:

"*Caveat Venditor*" – e-tendering Systems and the Problem of Genuine Mistakes

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Procurements run electronically seem to produce proportionately more claims of unfairness than the off-line variety. The cases that we summarise in this issue of our *UK Public Procurement Law Digest* all stem from on-line procurements run by the same contracting body in which accusations of unfairness arose. The Courts followed a clear prior line of cases to say that an authority owes no duty to make an exception where the supposed unfairness arose due to the bidder's own error – but it can be a different story where the authority itself set out ground rules regarding evaluation that discriminate against certain bidders.

If there were an award for "Services to Procurement Law", the UK's Legal Services Commission ("LSC") would be worthy, if unfortunate, winners. The LSC runs the legal aid scheme in England and Wales. Largely through no fault of the LSC itself, some of its recent procurement exercises have produced a series of helpful cases which illustrate points of principle under the UK procurement regulations. We summarise the outcome of a number of these cases in this edition of the *UK Public Procurement Law Digest*.

If nothing else, these cases demonstrate the perils of dealing with a category of bidders most likely to resort to legal challenge if they lose in circumstances that they feel are unfair: law firms!

WHAT ARE THE DEVELOPMENTS?

Although the *UK Public Procurement Law Digest* usually steers well clear of Latin, one phrase we do know is *caveat emptor* ("let the buyer beware" – *i.e.*, if you're buying something, make sure you know what you're getting). If there's a common thread through most of the recent LSC cases, it's that the opposite (*caveat venditor*) is true in terms of bidders on regulated public sector procurements. What this means is that it's vital that bidders make sure that they make no mistakes in the bidding process because any that they do make are likely to be held against them.

We have written before about the perils of e-tendering systems and what happens if bidders are not sufficiently careful about answering questions online or uploading documents. In the *J B Leadbitter v Devon County Council* case, a building contractor's tender was rejected by the contracting authority on the basis that it was not properly submitted in accordance with the authority's express instructions. The court held that the authority was within its rights to reject the incorrect tender.[1]

[1] For further discussion on this case, see our June 2009 update, Evaluation and Discretion.

Bidders on various tender exercises run by the LSC found to their cost that the risk lies with a bidder to make sure that the right documents are submitted with its tender and that contracting authorities can apply strict rules preventing the correction of even simple and obvious errors.

Unfortunately, the LSC hasn't had it all its own way and, in at least two cases, was found to be at fault.

CAN BIDDERS CORRECT A GENUINE MISTAKE?

In 2009-10, the LSC ran a tender exercise under the Public Contracts Regulations 2006 ("PCR") which invited various law firms to bid for publicly funded immigration work. Two losing bidders (Harrow Solicitors & Advocates and Hoole & Co) brought procurement claims alleging that the LSC ought to have overlooked procedural mistakes in their bids. Both Harrow and Hoole lost out, both in their bids and in court.

Harrow Solicitors & Advocates

The *Harrow* case arose because one of the LSC's selection criteria related to the operation of legal services drop-in centres. Harrow submitted a tender but mistakenly entered "no" to a question about its ability to offer a drop-in service. If it had answered "yes" (which it certainly could have done because the law firm did offer and advertise twice-weekly drop-in sessions), it would have received a higher score and would have been allocated a significantly greater amount of work under the contract.

The key issue was whether the LSC was obliged to allow Harrow to amend its tender after submission to correct a genuine error.

The court held that the LSC was within its rights when it refused to allow Harrow to correct a mistake in its submission following a tender, even though the error was objectively verifiable. The mistake did not give rise to any ambiguity in the terms of the tender which the contracting authority might have been subject to a duty to seek to clarify.

The court noted that it was an established principle of procurement law that all tenderers in a public procurement process must be treated equally and in a non-discriminatory fashion. It would be a violation of the principles of equal treatment if one particular bidder were permitted to change its bid after bidding had closed.

The court commented that there are circumstances when a contracting authority may retain the discretion to clarify information about a bid as long as that does not amount to a change in the bid. A court should not interfere with the exercise of that discretion unless it is exercised unfairly or unequally across affected bidders or where the authority refused to exercise that discretion even though it was clear that there was an ambiguity or obvious error which probably had a simple explanation and could be easily resolved. However, there is no basis for the suggestion that a bidder is entitled to rectification of a mistake and if a contracting authority doesn't perceive any obstacle to considering a bid (*e.g.*, if there is no ambiguity or other obvious deficiency), it is entitled to consider the bid in the form submitted even though this may have unfortunate consequences for the bidder.

Therefore, the LSC had not acted irrationally or disproportionately in refusing to allow Harrow to correct its bid.

Hoole & Co.

Hoole made a similar mistake to Harrow in responding to the LSC procurement through its e-tendering system. Hoole's mistake came as a result of selecting the wrong option from a drop-down list.

Various bidders had technical difficulties in relation to the different forms of text entry although the LSC provided technical support via advice lines. Hoole had problems because there was a difference between the screen version of the answers it selected and the paper version.

On evaluation, the LSC did not select Hoole for a contract award, partly because the bid actually received by LSC contained some sections that were blank in the screen version.

Hoole argued that there was a failure on the part of the LSC online system which resulted in its selected options not being saved electronically. Hoole alleged that the LSC was subject to a duty of fairness either to alert bidders where information was missing or to complete the missing information from the data submitted via other sources.

As in the *Harrow* case, the court concluded that the fault was Hoole's. It couldn't see conclusive evidence of a fault in the LSC e-tendering portal (and, in practice, these faults will be very hard to prove), and it was not technically possible for there to be a difference between what had been saved on screen and what had been printed out. The court held that the most obvious explanation was that Hoole had simply failed to complete and save the selection criteria and this was not a result of technical failure by the LSC.

The judge also held that all bidders had been provided with clear instructions as to what needed to be done and that Hoole had not used the available technical support line for assistance.

SUBMISSION OF WRONG DOCUMENTS

April 2011 was a busy time for the LSC because, during that month, the High Court also dismissed an application for judicial review of a separate contract award decision by the LSC stemming from a bidding process in relation to publicly funded legal services in the field of mental health.

All About Rights Law Practice

As in the *Harrow* and *Hoole* cases, the LSC rejected a tender and found itself challenged by the eliminated bidder, the All About Rights Law Practice. Unlike the *Harrow* and *Hoole* cases, however, the losing bidder in this case had erroneously submitted a blank version of a mandatory form when electronically submitting its tender documents. The case arose because the LSC refused to allow the bidder to provide missing information after the deadline when it realised its mistake.

Unfortunately for the claimant, no-one disputed that it fulfilled the criteria to be awarded a contract and would have been successful if the tender documents had been submitted correctly (it was the only firm specialising in mental health cases at the time in the relevant area).

As in the *Harrow* and *Hoole* cases, the LSC procurement terms required that bids be submitted in electronic form only using an e-tendering portal. The claimant submitted its bid documents but, by mistake, one of the submitted mandatory forms had been blank.

In assessing the submitted bids, the LSC took the approach that it would seek clarification from applicants where the information provided in a tender was ambiguous and where the bid was not capable of being assessed without clarification or where attachments were received in a corrupted format that could not be opened. However, the LSC considered that these situations were different from cases where a provider had failed to provide any information at all.

The court concluded that the LSC's approach was rational and consistent; and that it accorded with the principle of equal treatment. It found that the error was solely that of the claimant. There was no requirement of proportionality or equality which would justify the form being completed and accepted after the prescribed deadline. LSC was not obliged to point out the error or to accept submission of the missing information after the deadline. If it had done so, it would have been unfair to other tenderers and would have breached the principles of equal treatment and transparency.

Summary

These cases illustrate that it is very important for bidders to check their tender documents prior to submission and to be particularly careful when completing electronic tender documents, especially if there is a risk of simple errors in answering questions or in selecting a "drop down" choice. Where it's possible to check the documents before they have been submitted, then it's sensible to do so.

Courts typically side with authorities in these "bid error" cases and regularly apply the principle that the requirement for an authority to apply equal treatment across all bidders is more important than any obligation of fairness in relation to a particular bidder.

There is a clear difference between a situation where a contracting authority has a duty to clarify the ambiguous terms of a bid (in circumstances where, if it didn't do so, it would unfairly exclude a bidder from the process) and one where the authority is under no obligation to rectify a genuine mistake made by the bidder.

MISSED DEADLINES

Azam & Co is a firm of solicitors working in the immigration area. Its previous contract with the LSC was due to expire on 13 October 2010. The LSC began a re-procurement exercise but the law firm missed the deadline for submitting its bid. The LSC refused to allow Azam to submit a late bid. Azam claimed that its failure to submit a timely bid was due to LSC's failure to tell Azam itself about the deadline (i.e., to inform Azam specifically and directly, not merely to include the date in the procurement documents).

Azam argued (unsuccessfully) that the LSC breached the basic principle of proportionality by refusing an extension of time for submission of Azam's bid. In doing so, it contrasted the serious commercial damage likely to be caused to the firm by the refusal, and the fact that the LSC would have suffered no prejudice in allowing the extension.

The High Court ruled that this was Azam's problem, not the LSC's – and the Court of Appeal agreed. Both courts found that the LSC had not created a legitimate expectation that Azam, as an existing supplier, would directly receive any further information about the procurement exercise. The LSC had acted appropriately in not extending its deadline to accommodate Azam. If the LSC had extended the deadline, it would have acted unfairly in relation to other bidders and would have breached its obligations of equal treatment and transparency in the PCR.

EQUALITY OF TREATMENT IN EVALUATION

The LSC doesn't always get it right. We set out below two cases that illustrate areas where the LSC got it wrong in setting out its evaluation approach in a manner which failed to comply with transparency and equal treatment principles.

Public Interest Lawyers v Legal Services Commission

In this case, the High Court found that an LSC procurement for mental health law services breached the PCR on the

grounds that the LSC had breached the principle of equal treatment as its verification that the successful bidders had complied with essential award criteria prior to entering into the contracts was flawed and inadequate.

The case arose out of a 2010 procurement for contracts, in a number of areas of law, including public law and mental health. The LSC's procurement documents stated that bidding firms should meet minimum standards of supervision. Unfortunately, as part of its award procedures, the LSC didn't objectively verify that those standards were met.

Instead, following the award of the planned contracts, the LSC commenced a self-certification verification process to ensure that the successful bidders met the supervision criteria by the date the contracts were due to commence. In the end, the new contracts were entered into before the verification process had even been completed.

The Public Interest Lawyers group challenged the LSC's award decision on various grounds, most notably because the LSC failed to verify the quality standards met by bidders and that, it was alleged, was a breach of the principle of equal treatment as required by the PCR.

It is accepted law that award criteria must be applied objectively and uniformly to all bidders and that there is an obligation of transparency (*i.e*, to enable verification that each criterion has been complied with). Objective and transparent evaluation of the various bids depends on the authority (relying on the information and proof provided by the bidders) being able to verify effectively whether the bids submitted meet the award criteria.

Where the LSC got it wrong here was that it set out an award criterion in respect of which it neither intended, nor was able, to verify the accuracy of the information supplied by bidders. That approach was deemed to infringe the principle of equal treatment because the criterion did not ensure the transparency and objectivity of the tender process.

In principle, an omission to verify a qualitative award standard is as much a breach of duty by an authority as the setting of unverifiable criteria. The court did not completely rule out self-certification as a legitimate approach. An authority is entitled to take the view that it is legitimate (at least initially) to rely on statements made by a bidder bound by obligations of integrity and to decide that it would not be a sensible use of resources for it to seek independently to verify compliance by bidders.

The LSC's problem was that, in this case, the plan for verification fell short of the requirement for objectivity – especially as the self-certification procedure hadn't even been completed at the time the contracts were entered. The self-certification form itself was also deficient and far too general.

Law Society of England and Wales v Legal Services Commission

In this case, the High Court held that an LSC procurement for the provision of family law services was unlawful because the LSC failed to tell bidding firms about the requirements for caseworker accreditation in the tender selection criteria in sufficient time for caseworkers to become accredited.

In its procurement, the LSC had planned to use two types of selection criteria:

- **Essential criteria**: *i.e.*, the minimum qualifications which had to be reached before a contract would be awarded.
- **Selection criteria**: *i.e.*, the criteria by which the LSC sought to identify the best qualified firms in order of merit. In order to obtain the maximum score, at least one caseworker at the bidding firm had to be accredited under two different accreditation schemes.

Following evaluation of bids, the LSC confirmed that the number of firms providing family law services would be reduced from 2,480 to 1,300 (a reduction that was far greater than expected or anticipated). A large number of firms lost out because they did not have a caseworker who was accredited by both of the required schemes.

The LSC's big problem was that it was not possible to obtain such accreditation within the timeframe of the eight week bidding process (from announcement of the criteria to submission of bids).

The Law Society applied for judicial review of the LSC's decisions on the basis that the process adopted by the LSC was seriously and unlawfully flawed. It was claimed that the LSC acted unlawfully by failing to make it clear that the accreditation by two schemes would be necessary for maximum points to be achieved; and that the LSC should have given firms the opportunity to demonstrate that they had the necessary qualities by applying for, and acquiring, accreditation.

The court agreed that the LSC had acted improperly and that setting out a selection criterion which is effectively unachievable by a broad cross-section of otherwise well-qualified bidders is inappropriate. The LSC should have made it clear at a much earlier stage that the accreditation requirement would be so important. Doing so only when it was too late to allow unaccredited firms to achieve such accreditation is wrong.

For a copy of Morrison & Foerster's consolidated digest of recent cases and decisions affecting UK public procurement law, please click here.

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