PASS PROCUREMENT
LEARN • DEVELOP • ACCOMPLISH

LETTING INTERNATIONAL CASE STUDY

LETTING INTERNATIONAL V LONDON BOROUGH OF NEWHAM [2008] EWHC 1583 (QB)

CPD CERTIFIED
The Chartered Certification Service
Collective Mark

This case study will be considered within the following PASS Training Courses

Writing a Tender Specification

Preparing Perfect Tenders

PASS SERVICE GUARANTEE
IF YOU DON'T LEARN YOU DON'T PAY

Visit

www.passprocurement.co.uk

Letting International v London Borough of Newham [2008] EWHC 1583 (QB)

In *Letting International* v *London Borough of Newham* [2008] EWHC 1583 (QB), judgment of 7 July 2008, Silber J considered the difficult issue of the extent of the contracting authority's obligation to disclose criteria, sub-criteria and their weightings in advance of tender submission.

It has become frequent practice for contracting authorities to give fairly broad award criteria, reserving the detail to be decided during the procurement process itself. In that case a contracting authority, which, in many cases, has no expertise itself in the subject matter of the contract, may refine the assessment process during the procurement and determine the detailed criteria and weightings at a late stage of the exercise.

Equally, with the apparently increasing use of consultants to assist with the procurement process, assessment methodology seems to have become increasingly sophisticated.

Whereas a few criteria, impressionistically applied, might have sufficed in many cases, a whole plethora of more or less relevant criteria, sub-criteria and even in the present case sub-sub-criteria, seem now to be the order of the day. Inevitably unsuccessful tenderers will trawl through the assessment in the hope of finding some element of unfairness in what might be an extremely complex procurement process.

Outline

The London Borough of Newham ("Newham") advertised two framework agreements, one for the procurement, management and maintenance of private leased properties, and one for (only) the management and maintenance of private leased properties. The claimant is in the business of supplying such services to local authorities in order that the latter may meet their housing obligations, and it submitted tenders in respect of both. The claimant's tenders were not successful.

The information supplied to tenderers in the tender documentation was as follows. There were three criteria: compliance with specification (50%) to be assessed by reference to Method Statements; price (40%) to be assessed by reference to the pricing schedule; and suitability of staffing, premises and working conditions (10%) to be determined by a site visit.

What was not revealed to tenderers were the varying proportions the different Method Statements contributed to the assessment of the first criterion, and the 28 further matters against which the assessment was made. It was Newham's case that these were not criteria at all, but aspects of the specification.

A number of issues were raised by the claimants; those that are of general interest, and decided by the judge, concern only the degree of transparency required with respect to the criteria and weightings. He confirmed, in addition, that it was necessary for a claimant to show at least a "risk" of loss in order to bring a claim ("the loss of a significant chance of obtaining the contract"); and he considered that full marks could not be given in respect of a sub-criterion only if the submission exceeded the specification.

Judgment

It is probably a fair summary of that law to say that all criteria and sub-criteria were to be revealed, but the weighting of sub-criteria could be held back, if not already determined, where three conditions applied:

(1) the award criteria were not altered;

(2) the assessment did not contain elements that might have affected the tender;

(3) there was no discrimination between tenderers (these principles were set out by the judge).

These were the principles applied in *ATI* and justified the omission of weightings in that case. In *Lianakis* the court went further but "saved" *ATI* by distinguishing it on the

PASS Procurement
Medius, 60 Pacific Quay,
Glasgow G511DZ

e: pass@passprocurement.co.uk
e: consultancy@passprocurement.co.uk
t: 0845 270 7055

application of these principles to the facts of that case.

Silber J held, first, that the five Method Statements amounted to "criteria": they were factors that would determine the assessment; they were linked to the evaluation of the tender; they were consistent with the examples of criteria given in the regulations; they were described by Newham as "award criteria".

The judge also noted that to conclude otherwise would have "alarming consequences". In that case a contracting authority could provide as little information as the three categories and the percentages as set out above, and vary the weightings at will, including giving 90% of the marks to one Method Statement.

The judge accepted that, had the weightings of the Method Statements been known, the claimant's tender would have been differently prepared. Even though it was agreed that all the matters required had in fact been addressed in the tender, this, he held, was irrelevant as the regulations provide an unqualified duty to supply the criteria and weightings.

The judge also rejected the argument that the 28 "sub-criteria" were "methodology" rather than criteria. In other words, there is no useful distinction to be made between "sub-criteria" and "criteria": anything used to assess the "most economically advantageous tender" is a criterion.

As to whether full disclosure would not have affected the result, as argued for Newham, the judge was satisfied that:

(a) disclosure was a requirement of transparency and equal treatment, so that any effect or otherwise was irrelevant, but that,

(b) if he were wrong the test was whether it *could* rather than *would* have made a difference, and

(c) in this case it *would* have made a difference.

The judge also rejected Newham's point that there was an absence of prejudice to the claimant, on the grounds that a bid was bound to be superior if it took account of the criteria and weighting.

Review

Notwithstanding the attractiveness of the principle of transparency and the requirement of disclosing all criteria and weightings, the Directive and the judgments of the ECJ (referred to above) have been rather more liberal.

The present Directive states: *"...the contracting authority shall specify...the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread. Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority shall indicate...the criteria in descending order of importance."* (Article 53)

Article 30 of the previous Directive (for works) stated only that *"the contracting authority shall state in the contract documents or in the contract notice all the criteria it intends to apply to the award, where possible in descending order of importance"*.

It is true that there appears to be an assumption that all the criteria used to determine the outcome must be disclosed. What is unclear is whether the Commission, when drafting the Directive, and the ECJ when applying it, really intended that, in a case such as the present, the three main criteria identified above, plus the five Method Statements, plus the 28 sub-criteria should all be disclosed with appropriate bands of weightings, or in descending order of importance. The wording suggests that the obligation applies to something rather more "high level".

At a practical level, it is a curious fact that tenderers use the usual Question & Answer procedure to ask a number of questions (sometimes hundreds) on quite small points

PASS Procurement
Medius, 60 Pacific Quay,
Glasgow G511DZ

e: pass@passprocurement.co.uk
e: consultancy@passprocurement.co.uk
t: 0845 270 7055

of detail, but very rarely enquire as to the assessment process.

In such a case it must be questioned whether their tender depended upon an assumed method of assessment. In the present case the evidence was that the claimant assumed that each Method Statement would be equally weighted, whereas the "criteria" and their percentages were actually as follows: procurement of accommodation (5%); customer care (17%); responding to service users (12%); resource allocation (6%); management and monitoring (10%).

It is difficult to understand why an assumption of equal weighting would be made with respect to such qualitatively different "criteria", when, if it was important, the question could so easily be asked. Because the undisclosed information only becomes available at the debrief stage, the issue of the limitation period and the failure to enquire is presumably problematic.

Because in the present case the judge was satisfied that the failure to disclose all the criteria and weightings affected the preparation of the tender, the question of "materiality" and the extent of the requirement of transparency has yet to be fully explored. Meanwhile it is to be expected that contracting authorities will be consigning their carefully prepared scoring criteria to the shredder!

PASS Procurement
Medius, 60 Pacific Quay,
Glasgow G511DZ

e: pass@passprocurement.co.uk
e: consultancy@passprocurement.co.uk
t: 0845 270 7055