

MEARS LTD CASE STUDY

MEARS LTD V LEEDS CITY COUNCIL



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Writing a Tender Specification

Competitive Dialogue or Competitive Procedure?

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Mears Ltd v Leeds City Council

Summary

The local authority sought to award contracts for a ten-year period for large-scale works to housing stock managed by two of their ALMOs, with an estimated value of up to about £420m.

The procurement process

They commenced a procurement process on 21 October 2009 (accordingly prior to 20 December 2009 when further amendments to the Regulations took effect) by publication of a contract notice in the Official Journal of the European Union ("OJEU"), using the competitive dialogue procedure. Following assessment of pre-qualification questionnaires, the Claimant was one of nine bidders selected by the authority for the Invitation to Participate in Competitive Dialogue ("ITPD") stage. Three bidders were then to be selected to proceed to the remaining stages of the competitive dialogue procedure, culminating in the submission of final tenders by those bidders. It was expected that the award of the contracts would take place in late November 2010.

In March 2010, the authority sent bidders the ITPD documentation, which explained that submissions were to be evaluated on the basis of scoring, of which 40% was to be for price and 60% for quality.

Bidders' pricing submissions were to be completed on a detailed spreadsheet issued by the authority containing a range of data. In respect of quality, 100 marks were available, distributed between eight criteria in varying, weighted amounts shown in a table; in respect of each of the criteria, bidders were required to answer questions which were indicated in the table by reference to the paragraph numbers in the ITPD under which the questions respectively appeared.

The number of questions for each of the criteria varied; for three of the criteria, the questions were grouped under more than one paragraph number. The OJEU

contract notice and the ITPD referred to innovation from bidders as being one of the features which the authority were looking for.

The ITPD reserved the right of the authority to call for more information from bidders in order to clarify their bids. Bidders could likewise request further information, the authority's responses to such requests being notified to all bidders. The Claimant and the other eight bidders made their submissions to the authority by the deadline on 5 May 2010. On 14 May 2010, the authority notified all bidders by letter of a number of changes to the pricing spreadsheet and required them to re-submit their pricing submissions with any alterations by 18 May 2010. The Claimant and other bidders all complied.

During the evaluation period, the authority issued written guidance to those personnel who were involved in scoring bidders' answers to the questions concerning quality. The guidance – which was not disclosed to bidders – included a scoring table setting out scores on a range of 0 to 10, with a description for each score ranging from "question is unanswered" for a score of 0 to "comprehensive and value-adding response that is innovative includes full evidence of techniques and measurements employed, capable of exceeding expectations" for a score of 10. For each of the scores above 7, the table referred to innovation.

The guidance also set out each of the questions to be answered by bidders and, following the respective questions, a "model answer" to be used in the scoring exercise. Each of the answers submitted by a bidder was scored on a range of 0 to 10. The average of the scores for all the questions under each of the eight criteria was then calculated; each such averaged figure was then weighted according to the table in the ITPD, producing a total score for quality out of a maximum of 100.

The total was multiplied by 0.6 to produce a mark for quality out of 60, to which was added the mark for price,

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producing a combined maximum mark of 100. The bidders with the three highest scores were then selected for the next stages in the competitive dialogue procedure. On 2 July 2010, the Claimant was notified that it had been unsuccessful in relation to the contracts for building works, which comprised the very large majority of the overall value of the contracts to be let in the procurement process. Correspondence between the parties and their legal advisers followed, which included feedback provided by the authority referring to the model answers.

The proceedings

A claim was issued on 12 October 2010. Particulars of claim were served on 2 November 2010 alleging breaches of the Regulations: first, in respect of the clarification issued by the authority on 14 May 2010; and second, in respect of non-disclosure to bidders of the scoring table, the reference in the table for a score of 10 to an answer "capable of exceeding expectations" and the equal weighting of the quality questions resulting from the averaging of scores.

On 3 November 2010, the Claimant issued an application for an interim injunction, seeking to suspend the procurement process pending trial; the interim application was listed to be heard on 19 November 2010.

On 12 November 2010, on the authority's application for an adjournment, Ramsey J ordered that the hearing of the interim application be adjourned to 10 December 2010, on terms requiring the authority to give disclosure of documents.

The authority's written evidence in response to the interim application included reference to the model answers, and exhibited a copy of part of the guidance but set out reasons why the content of the model answers was not being disclosed, including that the procurement process was still continuing.

At the hearing on 10 December 2010, the Claimant sought an order for disclosure of an unredacted copy of the guidance, including the model answers; the authority applied to have the claim struck out in respect of the

clarification issued on 14 May 2010. The judge granted both applications, for reasons to be given later; it was common ground that the application for an interim injunction should be adjourned pending a hearing of preliminary issues. The authority accordingly disclosed an unredacted copy of the model answers, but subject to a confidentiality ring.

At the subsequent trial of preliminary issues, the Claimant sought to amend the particulars of claim in order to allege a breach of the Regulations additionally in respect of non-disclosure of (among other matters) a number of parts of the model answers, the use of the model answers in the scoring, and the references in the scoring table to innovation for scores over 7.

The court's rulings

In respect of the hearing on 10 December 2010, the court held:

- 1 In principle, the obligation of disclosure under the order of 12 November 2010 included the model answers; the court would treat the model answers as containing confidential matters but of itself that did not prevent them from being disclosed; disclosure was necessary for disposing fairly of the proceedings and determining whether there were criteria, sub-criteria or weightings which were not disclosed; confidentiality should, however, be preserved by a confidentiality ring limited to named solicitors and counsel and (if necessary) a person within the Claimant organisation not involved in the procurement process.
- 2 The allegations concerning the clarification of 14 May 2010 should be struck out for being out of time for the purposes of reg47(7)(b); what was alleged were discrete breaches of the Regulations which did not depend on whether or not the Claimant was ultimately eliminated from the procurement, and it was clear that in May 2010 the Claimant had full knowledge.

In respect of the trial of preliminary issues, the court held as follows:

- A The legal principles as to the application of the

Regulations, derived from a detailed analysis of European and domestic case law, were:

- 1 The contracting authority must disclose to tenderers those award criteria or sub-criteria which it intended to apply to the award.
- 2 The contracting authority was obliged to disclose to tenderers any rules for the relative weighting of the selection criteria which it intended to use.
- 3 The contracting authority could attach specific undisclosed weight to sub-criteria by dividing among those sub-criteria the points awarded to a particular criterion if that weighting:
 - a did not alter the criteria for the award of the contract set out in the contract documents or the contract notice;
 - b did not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;
 - c was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.
- 4 There was a distinction to be drawn between award criteria aimed at identifying the tender which was economically the most advantageous and criteria linked to the evaluation of the tenderers' ability to perform the contract in question.
- 5 There was a level of assessment below the criteria, sub-criteria and weightings which the contracting authority may use in evaluating the award criteria which it did not have to disclose for a number of reasons.
 - a First, because it did not, on a reasonable view, introduce different or new criteria, sub-criteria or weightings. This aspect had to be considered in the light of what would be reasonably foreseeable to a reasonably well-informed and normally diligent tenderer.
 - b Secondly, because it could not have affected the tenders.
 - c Thirdly, because it was not a matter aimed at identifying the most economically advantageous

tender but instead was linked to the evaluation of the tenderers' ability to perform the contract in question.

In each case, it was a matter of fact whether the matters alleged came, on balance, within any of those categories.

B On the evidence:

- 1 By failing to notify tenderers of the weighting they intended to apply in evaluating the individual sections in the table in the ITPD, the authority breached the requirement for transparency (in reg4(3)) and express provision to disclose weightings (in reg30(3)).
- 2 There was no such breach in relation to the reference to innovation in the scores of 8, 9 and 10 in the scoring table or in the reference in the score of 10 to responses "being capable of exceeding expectations".
- 3 The breach in relation to weighting could have affected the preparation of the tender and the Claimant suffered a risk of loss because of the loss of a chance of being one of the three tenderers who were selected to go through to the next round.
- 4 There was a limited breach of regs 4(3) and 30(3) in respect of two of the model answers but no risk of loss as the Claimant would not have been successful in proceeding to the next round and its risk of loss was fanciful in this respect.
- 5 The possible remedies under reg47(8)(b) were to set aside the decision as to which tenderers succeeded at the ITPD stage or an order for damages or both; this depended on the exercise of discretion based on a balance between the public interest in the authority proceeding with the award of contract and the private harm to the Claimant by not having the chance to be included in the next stage of the tender, taking account of the underlying principle that public tenders should be carried out in compliance with the Regulations. Overall, the balance lay in favour of limiting the remedy to damages and not setting aside the procedure.