

Procurement Law Update

Caselaw Briefing May 2009

TENDERERS MISS DEADLINES AT THEIR PERIL

Overview

The English High Court gave judgment on 1 May 2009 in a case concerning the late submission of a tender – JB Leadbitter & Co Ltd v Devon County Council. The case demonstrates the importance of complying with tendering formalities – and in particular, the meeting of deadlines – and provides a salutary lesson for any entity participating in a public procurement process.

The claimant, Leadbitter, was one of twenty-five candidates invited by the defendant, Devon County Council, to submit a tender in relation to a four-year procurement agreement for construction works. The Invitation to Tender (ITT) clearly specified 12 noon on 16 January 2009 as the fixed deadline for the submission of complete tenders via a secure electronic portal. This was later extended to 3pm on the same day, due to a power failure which was outside the control of one particular tenderer and prevented it from submitting its bid by the original deadline. Tenderers were warned in the ITT that it would not be possible to make more than one submission via the portal and they were advised to upload their submissions in good time.

The claimant submitted its tender at 12.05pm on the closing date, in advance of the 3pm deadline. However, at 2.45pm the claimant realised that the submitted bid was incomplete – an integral part of the tender document (four case studies) had been omitted from the submission in error. The claimant telephoned the Council to explain the situation and immediately sought to

re-submit the missing information via the portal but this attempt was unsuccessful as (in accordance with the ITT) the system did not permit the uploading of additional documents.

The deadline passed and the missing information was eventually submitted via email at 3.26pm the same day. The Council rejected the claimant's tender (as submitted at 12.05pm) on the grounds that it was incomplete.

The claimant sought an injunction requiring the Council to consider its tender or, in the alternative, pay damages for loss of the opportunity to be selected as a contractor under the framework.

The Court declined to grant any remedy to the claimant.

The Court held, firstly, that there was no question that the claimant had been treated in an unequal or discriminatory manner vis-à-vis other tenderers and, in particular, the tenderer affected by the power failure. The Court found that the circumstances of that tenderer were very different, entirely outside its control, and that the deadline had been extended for all tenderers participating in the completion.

The claimant's argument that the ITT offered all tenderers the possibility of rectifying errors in their tender after the deadline and that such opportunity ought to have been afforded to tenderers who had not submitted complete bids, was also dismissed. The Court's view was that the claimant's tender was substantially incomplete and that rectification of this kind of omission was not what the ITT had contemplated. This was not a case of an error having been identified in a complete, properly submitted tender.



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A further argument of the claimant, that the Council ought to have exercised a discretionary power to waive strict compliance with the ITT and, by failing to do so, had acted disproportionately, was also rejected. Although it accepted that the principle of proportionality was capable of applying to the implementation of the terms of a procurement process, the Court held that the exercise of discretionary powers necessarily involves judgment on the part of the contracting authority which the Court would not interfere with unless the decision taken was “unjustifiable” or where a “manifest error” had been made.

The Court added that any waiver of terms which are stated to apply without exception would be a departure from the terms of the procurement process and any such waiver “*carries the very risks of unequal treatment, discrimination and a lack of transparency which the contracting authority is required to avoid*”.

The Court considered whether any special circumstances existed which demonstrated that the Council had acted disproportionately. In this regard the Court took into account that the tender had been last modified at 10.28am on 16 January 2009, that no advantage had been gained by the claimant in submitting the completed documentation late, and that the consequences of missing the deadline were serious for Leadbitter.

The Court acknowledged that the claimant's position may be considered stronger than that of many tenderers who are simply late – in particular, the tender documentation had been finalised in good time, an unintended technical error had arisen and no unequal treatment may have arisen with the acceptance of the missing information. Nevertheless, the Court held that the Council was still entitled to reject Leadbitter's tender and was not acting disproportionately in doing so.

The ITT had been very clear about the submission requirements and these should be observed in the interests of fairness to all tenderers. The ITT had clearly stated that a single upload of documentation had to be made before the deadline and that late submissions would not be accepted. These requirements were well understood by the claimant.

The Court stated that “[t]here may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or the significant portions of a tender, most obviously where ... it results from fault on the part of the procuring authority. But in general, even if there is discretion to accept late submissions, there is no requirement to do so, particularly where, as here, it results from a fault on the part of the tenderer”.

This document is not a complete or definitive statement of law. Specific legal advice should be obtained before taking action.

FURTHER INFORMATION...

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