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Arthur Cox is one of the few Irish law firms to have a dedicated team of construction law specialists, offering expert advice to all parties involved in construction and engineering projects. Our Construction Group is able to combine a depth of experience and expertise in all matters relating to construction and engineering with an understanding of commercial objectives and imperatives of our clients.

This memorandum is a general summary of developments and is not a complete statement of the law. Specific legal advice should be obtained before taking action.

■ Tender Litigation

A number of decisions in the Northern Ireland High Court have been handed down recently which illustrate the challenge in managing major projects including PPP projects. While many of these decisions are interlocutory they provide valuable insights into the challenges which can face awarding authorities and also as to the thinking of the Courts in applying relevant procurement law principles.

Scott and Others v. Belfast Education and Library Board [2007]

The plaintiffs sought an injunction against the defendant restraining it from proceeding with its tendering process in relation to various works. The Court held that an implied contract between an authority and a tenderer can arise by inference: from the presumed intention of the parties; and also from a tendering process for a works contract (notwithstanding the particular contract is below the financial threshold set out in the Procurement Regulations).

A duty to consider the tenders "fairly and in good faith" was also implied into the contract, which extends to ensuring the "absence of any material ambiguity in the tender documents that would significantly affect the tender". The authority must interpret award criteria throughout the process objectively and uniformly.

J & A Developments Limited v. Edina Manufacturing and Others [2006]

J & A was invited to submit a tender for the construction of offices. Notwithstanding that the Procurement Regulations did not apply to the contract, the conditions of tender stated that the tendering procedure was in accordance with the principles of a code of practice. While the Code imposed no obligation upon the defendants to accept the lowest tender, they bound themselves to accept either no tender at all or one at the price at which it was submitted; subject to the possibility of negotiations with the lowest tenderer for a reduction in price in return for an appropriate modification to the specification of the work (only if these negotiations failed could the next lowest tenderer be approached). Although J & A submitted the lowest tender, the defendants invited three tenderers to lower their quotes and ultimately accepted an offer lower than J & A's tender in breach of the Code. The Court held that the Code was incorporated into the tendering process and any failure to follow the procedure was a breach of a collateral contract between the contracting parties and the employer. Damages were awarded to the plaintiff.

Natural World Products Limited v. ARC 21 [2007]

ARC 21 sought to award a contract for the provision of organic waste services. The Court held that, in breach of both the duties to consider fairly the bids of all tenderers in a project and in breach of the Public Regulations (allowing for supplementary information to be provided), the awarding authority had decided that it would be inappropriate to take account of an alternative facility, which the bidder alleged would be available to it for support in the event that the facility to be constructed might not have been able to cope with the relevant tonnages. An injunction was granted requiring the awarding authority to reconsider the bid of the applicant company.

Partenaire Limited v. Department of Finance and Personnel [2007]

This concerned a project to award a very large contract for the refurbishment/build

of the NICS office estate. The applicant alleged that four representative examples of errors had been committed by the DFP in the evaluation of its tender. The Court granted an interlocutory injunction ruling that there was a fair issue to be tried, that the balance of convenience rested in favour of granting the injunction, that an undertaking in damages had been made and that an early trial date had been set.

Henry Brothers (Magherfelt) Limited and others v. Department of Education for Northern Ireland [2007]

The plaintiffs sought an interim injunction against the DE as they objected to the DE's criteria for choosing between tenderers. The relevant criteria required each of the tenderers to specify their respective fee percentage within hypothetical ranges of contract value. The Court placed importance upon establishing an objective evaluation of the cost of a contract in the course of assessing the most economically advantageous tender. The fee percentages were arguably flawed in that they made no attempt to determine the actual cost of the works objectively.

The Court declined to grant an injunction, but commented that there was a serious question to be tried with regard to whether the criteria were lawful in view of the issues in respect of objectivity in evaluating the tenders. This case may now proceed to full hearing.

Sheridan Millennium Limited v. Department for Social Development and Laganside Corporation [2007]

In this case, the Court had granted an application for leave to bring judicial review against a decision by the DSD (to terminate the applicant's appointment as a preferred developer); and of Laganside Corporation (that it could not make a recommendation as to whether DSD should enter into an agreement with the applicant). The respondents argued that although they were public bodies the decisions were made during the due diligence stage (a confidential process which excludes judicial review). The Court disagreed, stating that the fact that a due diligence examination had been prescribed did not preclude judicial review. Having granted further discovery in November 2007, the Court in January 2008 rejected the applicant's case on the basis that the company's deficiencies were the real reason it had lost its status.

McLaughlin and Harvey Limited v. Department of Finance and Personnel [2008]

The plaintiff sought an order suspending the procurement process being conducted by the defendant with the aim of concluding a framework agreement. The plaintiff claimed that the defendant had marked its tender with a methodology which had not been disclosed in advance and that this was in breach of the EU obligations of transparency and in a way which was unfair to the plaintiff. The defendant argued that the methodology contained no new criteria but was a perfectly legitimate working out in detail of material which had been included in the tender documents.

The Court applied established principles for interlocutory injunctions and concluded that the plaintiff had shown that there was a serious issue to be tried. The Court noted that a full trial was likely in the relatively near future, namely, mid 2008 and with judgment in or around autumn 2008. On balance, the Court refused to grant an injunction but would seek to facilitate an early trial.

Conclusion

1. The cases illustrate that the Courts require all interested persons to adhere strictly to the terms of relevant tender documentation and further to have regard to the EC requirements of Equality, Fairness, Objectivity and Transparency.
2. They highlight the difficulties facing a contracting authority in avoiding ambiguities and deciding upon the most appropriate course of action when they arise.
3. Finally, the cases highlight the way in which a project is open to delay by an interlocutory injunction notwithstanding that the issues have yet to be teased out and determined at full hearing.

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