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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Public procurement - was the process flawed?

Mears Ltd v Leeds City Council

[2011] EWHC 1031 (TCC)

We have reported on this case before in issue 128. Here Mr. Justice Ramsey had to consider Mears' substantive claims about the alleged failing of the procurement process. For example, Mears contended that the Scoring Table contained undisclosed weightings. Mears also said that the Model Answers used by Leeds in carrying out the evaluation of the tenders included matters which should have been disclosed to tenderers. Having considered the principles from recent court cases, Mr. Justice Ramsey held that:

(1) The contracting authority must disclose to tenderers those award criteria or sub-criteria which it intends to apply to the award.
(2) The contracting authority is obliged to disclose to tenderers any rules for the relative weighting of the selection criteria which it intends 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) does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;
(b) does 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 is a distinction to be drawn between award criteria which are aimed at identifying the tender which is economically the most advantageous and criteria which are linked to the evaluation of the tenderers' ability to perform the contract in question.
(5) There is a level of assessment below the criteria, sub-criteria and weightings which the contracting authority may use in evaluating the award criteria which it does not have to disclose for a number of reasons. First, because it does not, on a reasonable view, introduce different or new criteria, sub-criteria or weightings. This aspect must be considered in the light of what would be reasonably foreseeable to a reasonably well-informed and normally diligent tenderer. Secondly, because it could not have affected the tenders. Thirdly, because it is not a matter aimed at identifying the most economically advantageous tender but instead is linked to the evaluation of the tenderers' ability to perform the contract in question...."

The Judge reviewed the Evaluation Table used by Leeds which set out a series of sections which identified one or more criteria on which quality was to be evaluated. The overall score for each section and therefore the weighting between the sections was clearly identified. However, each of the criteria within a section then had a number of questions posed which the tenderers had to answer. When it came to the weighting as between the individual criteria and as between the questions within each of the criteria, the table was silent. The Judge considered that the criteria or sub-criteria referred to in the Evaluation Table were matters which Leeds should have disclosed.

The Judge considered the status of the Model Answers. He had no doubt that the intention was that the Model Answers were provided to the Evaluation Panel so that they were aware of particular aspects which might be expected to be in the answers. If the Model Answers introduced relevant new criteria, sub-criteria or weightings they should, in principle, have been disclosed. He then evaluated the complaints made by Mears and found that two Model Answers introduced criteria, sub-criteria or weightings which Leeds should have disclosed. The other Model Answers covered matters which would have been reasonably foreseeable and which a reasonably well-informed and diligent tenderer such as Mears might have been expected to deal with under this question in response to the relevant question. They dealt with aspects which were covered by the tender instructions and not new criteria and were within the margin of appreciation or discretion where the court will only disturb the contracting authority's decision if the authority has committed a manifest or clear error. The Judge therefore concluded that:

"Where, as is now common, the contracting authority provides those people who evaluate tenders with information such as model answers then, as shown in this case, there is generally no reason to disclose those. I accept that to have to do so would raise practical difficulties in being able to assess tenders when the tenderers had seen those model answers. However, the information such as model answers needs to be scrutinised to ensure that undisclosed criteria, sub-criteria and weightings are not introduced in this way. "

However although there was a limited breach of the Public Procurement Regulations, there was no loss arising from that breach. Even if the other tenderers had remained at their current scores and Mears had achieved scores of 10 in respect of all the questions they complained about and not just the one aspect which the Judge found was made out, Mears' score would still not have achieved a score sufficient to place it in third place so as to pass through to the next stage. On that basis any chance which Mears might have had was held to be fanciful and would not provide a route to the recovery of damages. The situation was slightly different in terms of the Evaluation Table. Here, the Judge considered that there is a real or significant, chance that Mears would have been successful given that Mears and the other tenderers were not provided with the weightings to be applied and with that knowledge, the tenderers would have had the opportunity to concentrate on the answers to the questions which gave the greater share of the marks.

What then about the remedy? In this case the possible remedies were either to set aside the decision leading Leeds to have to re-tender or to award damages. It was common ground between the parties that, in exercising that discretion the court needed to balance the public interest in Leeds proceeding with the award of contract and the private interest to Mears of the harm of not having the chance to be included in the further stages of the tender. There was not a presumption in favour of one remedy but rather the matter is a question of the exercise of discretion based on the facts and circumstances of a particular case.

The relevant factors here included that Leeds currently had no contractual arrangements in place from 1 April 2011 for capital improvement works for 37,000 houses or for repairs to 14,000 houses. Second, it would take a minimum of 9 months to the end of October 2011 to re-run the tender from ITPD stage to contract award. The lack of proper arrangements for the provision of services was to the detriment of the occupants of the housing because the standards of housing currently achieved would be unlikely to be maintained. Leeds also said that the award of damages would properly compensate Mears for the loss and the Judge noted that whilst damages may be difficult to assess and may not be a perfect remedy, they are an adequate remedy. Against that whilst damages would compensate Mears for the loss of a chance in the Procurement, that would not put them in the position of being able to make use of that chance. Here the Judge concluded that:

"In this case, I am clear that the overall balance favours awarding Mears the remedy of damages alone and not setting aside the Procurement. The prejudice in terms of the housing arrangements for a significant number of tenants and the delay in the provision of those arrangements weigh heavily against requiring the procurement process to start again. This is a case where Mears loss or risk of loss can be adequately compensated by damages and that provides a proportionate remedy."

Bonds and guarantees - the dangers of email

Golden Ocean Group Ltd v Salgaocar Mining & Anr [2011] EWHC 56 (Comm)

Golden Ocean was a shipping company. The second defendant, Mr Salgaocar, was a majority shareholder in Salgaocar Mining ("SMI"). In early 2008 Golden Ocean offered to charter to SMI (or an account guaranteed by SMI) a vessel with an option to purchase the vessel at the end of the charter period. The entity nominated by SMI to enter into the charter was Trustworth Shipping Pte Ltd. Trustworth was a related company. The negotiations following this offer were conducted by email and proceeded on the basis "Trustworth fully guaranteed by SMI." Golden Ocean later alleged that the charter had been repudiated by Trustworth and, further, that the charter had been guaranteed by SMI. The defendants applied for permission to set aside an order giving Golden Ocean permission to serve their claim form on them in Goa.

They argued there was no "serious issue to be tried" as Golden Ocean could not demonstrate its claim against SMI had a reasonable prospect of success. In particular, the guarantee was unenforceable under section 4 of the Statute of Frauds 1667. This provides:

"No action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriage of another person unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."

They further argued that the email chain was too disjointed and insufficient to constitute a guarantee. Mr Justice Christopher Clarke dismissed the defendants' arguments and held that Golden Ocean had a "well arguable case" that the guarantee was in writing and did not fall foul of the Statute. First, the Judge did no accept that, if the parties agree by email the basic terms of a charterparty including a guarantee, and then the detailed terms of the charterparty, so that the concluding emails in the sequence of negotiations no longer made reference to the guarantee, their final agreement was not, including the guarantee, an agreement in writing for the purpose of the Statute. The use of the phrase "fully guaranteed by [SMI]" signified that the charterparty, once its terms were agreed, was one that was guaranteed by SMI. The words did not have any element of futurity about them. For example, they did not say "to be guaranteed." It did not matter that there was no form of recap of the terms at the end of the negotiations. Neither did the Judge accept that, if an agreement has been made in writing, there was some limit to the number of documents to which reference is permissible. As a matter of commercial good sense it was "highly desirable" that the law should give effect to agreements made by a series of email communications which follow, *"more than clearly than many negotiations between men of business, the sequence of offer, counter offer, and final acceptance by which, classically, the law determines whether a contract has been made."*

In relation to the question of whether the guarantee was signed, the Judge noted the emails which constituted the contract were signed by the electronically printed signature of the persons who sent them and that this was sufficient to constitute a signature for the purpose of the Statute of Frauds. The Judge did not have to decide whether the email chain in question was in fact a guarantee only whether there was a "serious issue to be tried". Nevertheless, those conducting commercial negotiations over email should be more careful than ever that they do not enter into binding agreements, or indeed guarantees, inadvertently. A failure to manually sign a guarantee is not necessarily sufficient to prevent one being entered into. The signature block at the end of your email may do this for you.

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