Fenwick Elliott
The construction law specialists

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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.

Procurement - rejection of an incomplete tender

J B Leadbitter & Co Ltd v Devon County Council
[2009] EWHC 930 (Ch)

Leadbitter claimed that its tender had been wrongly excluded from a procurement process being undertaken by Devon in relation to a four year framework agreement. The invitation to tender ("ITT") required tenders to be supplied electronically to a secure portal by noon on 16 January 2009. Because of a power failure that day, which prevented one tenderer from submitting its tender on-time, Devon extended the deadline by three hours. An integral part of each tender was the need to include case studies. Leadbitter took advantage of the additional time to make a final check and sent in its bid at 12.05pm. At 4.45pm, Leadbitter realised that in error the case studies had not been included. Leadbitter immediately attempted to submit them to the secure portal, but this was not possible. Leadbitter called Devon's helpdesk shortly before the 3pm deadline and also spoke to a procurement officer again before that deadline. However, the case studies were not submitted in any form before the deadline. Devon rejected the tender as a complete tender, including the case studies, had not been submitted on-time.

Leadbitter alleged that in rejecting the tender, Devon was in breach of the European regulations and its obligation to treat tenders equally and in a non-discriminatory way. Leadbitter also said that as a general principle of community law, Devon owed an obligation to act proportionately in relation to its treatment of the tenders.

Mr Justice Richards reviewed the ITT process. This made clear that a fully compliant tender submission was to be made without qualification, and that the main elements of the tender must be uploaded to the relevant system and submitted by the stated deadline. It was stressed that a failure to comply with this instruction may mean that the tender will not be considered. Tenders had to be submitted electronically to the secure portal. The submission of the complete tender was a onceonly option. No other method of submission was allowed. The case studies were one of the main elements of the tender. However, should a material and genuine error be discovered in a submission during the evaluation period, then the tenderer would be given the opportunity of confirming their offer or of amending it to correct the error.

Leadbitter said that Devon had the power to waive strict compliance with the requirements of the ITT as to the time and method of submission of tenders. It did so, for example, in extending the original noon deadline. The refusal to do so as regards Leadbitter, amounted to unequal and discriminatory treatment. The Judge disagreed.

The deadline was extended for all tenderers and in fact Leadbitter took advantage of this. Leadbitter here were arguing for special treatment for itself only. Further, the Judge did not consider that Leadbitter could argue that its tender, as submitted before the deadline, contained an error , which could be corrected in accordance with the ITT. The tender was incomplete, because it did not include the case studies.

The Judge noted that a waiver of the ITT terms carries the very risks of unequal treatment, discrimination and a lack of transparency which a contracting authority is required to avoid. Further, the Judge accepted that, for reasons of security, Devon could not be required to accept the case studies by email before the deadline. The issue before the Judge was whether the principle of proportionality required Devon to permit Leadbitter to send its case studies in after the deadline. Leadbitter accepted that it would not generally be appropriate to accept a late tender. However, Leadbitter argued that there were special circumstances here. Leadbitter passed the initial pre-tender stage and was invited to submit a tender. Its bid was therefore assumed to be serious. Its tender excluding the case studies was uploaded and submitted before the deadline. Its case studies were finalised before the deadline. Leadbitter was not taking advantage of its error to submit a document revised after the deadline. It had tried to upload the missing cases before the deadline and contacted Devon before the deadline to seek a solution. The submission of the missing case studies would fill a gap, not change any part of the tender already submitted.

However, the Judge held that Devon was entitled to reject the Leadbitter tender. It relied on the simple preposition that aprocurement process requires a deadline for the submission of tenders and that a deadline is a deadline. The ITT could not have been clearer on the requirement for a single upload and submission before the deadline. There were clear statements of policy in Devon's code of business conduct that late tenders were not considered. Whilst the deadline was extended for three hours to accommodate a particular tenderer, this extension was agreed before the expiry of the existing deadline. It was caused by an event outside the control of the tenderer in question and it applied to all tenderers. Fairness to all tenderers, as well as equal treatment and transparency, required that the key features of the ITT, including the deadline, should be observed. Whilst, there may be circumstances where proportionality will require the acceptance of the late submission of the whole or significant proportions of a tender, these will be rare and most obviously where this results from the fault on the part of the procuring authority.

Accordingly, Leadbitter's claim was dismissed.

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Procurement - time limit for bringing a claim

Amaryllis Ltd v HM Treasury

[2009] EWHC 1033 (TCC)

Amaryllis submitted a pre-qualification questionnaire in respect of a framework agreement for the supply and installation of furniture on a national basis. The agreement was to be divided into six lots. Amaryllis was informed by letter on 17 March 2008, that it had come though the first stage on four of the lots. On 9 April 2008 there was a meeting between the parties at which the question of Amaryllis' unsuccessful tender on Lot 1 was raised. Although there was a considerable dispute as to the way in which the topic was raised, it appeared to Mr Justice Coulson to be "beyond argument" that Amaryllis wanted to know why their bid on Lot 1 was unsuccessful and that HMT did not give them very much information in response. Amaryllis wrote to HMT on 15 April 2008 seeking an explanation. HMT responded on 21 April 2008 in a letter which the Judge again felt did not provide a clear or cogent explanation as to how and why Amaryllis had been unsuccessful.

On 23 May 2008, Amaryllis said it would not be submitting a tender for Lots 2-5 because it had no confidence that any tender submissions would be given a fair and valid assessment. On 4 June 2008, Amaryllis indicated its intentions to bring proceedings, but again requested reasons as to why the Lot 1 bid was rejected. Amaryllis were of the view that they had to commence proceedings by 16 June 2008, 3 months after they received notice of their rejection on Lot 1. They duly did so even though HMT had not provided any response to the June letter. Amaryllis made a number of claims. First, it appeared that no marks were allocated to section F which dealt with previous experience when the tender information stated that all sections would be marked. Amaryllis also complained that HMT had evaluated the responses without having informed any tenderer as to the relative importance ascribed to each question - in particular the importance and weighting to be given to the environmental management issues. The Judge described this as being a bit like being required to do an exam without knowing what marks were available to any given question. Finally, Amaryllis complained that it was given a zero under a business heading on the basis that it brought in furniture rather than manufacture it itself.

HMT said that Amaryllis were not entitled to bring a claim because it had not provided notice of its intentions and had not brought its claim in time. Under Regulation 47(7)(a) of the Public Contracts Regulations 2006, a party is required to provide written notice of the breach and its intentions to bring proceedings. Here, Mr Justice Coulson thought that adequate notice was provided. The regulations were clearly identified in the June 2008 letter and both Amaryllis' intentions and the actual breach complained of were clearly identified. Finally, the Judge said that the adequacy of the notice had to be considered against the backdrop of the (lack of) information provided by HMT. Under Regulation 47(b) any proceedings must be brought "promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period..." HMT said that Amaryllis did not act promptly. The Judge said that the starting point is when the specific breach of the regulations actually occurred. That will often be when the actual decision is made to exclude a tenderer. However, here the grounds for bringing the proceedings first arose when the irrevocable decision was taken by HMT to exclude Amaryllis on Lot 1.

Therefore, the relevant date was the date on which HMT wrote to inform Amaryllis that its bid had been unsuccessful, 17 March 2008. Note too that the three month period is intended to be a maximum period. Even if the proceedings have been commenced within that period, it is still necessary for the court to consider whether or not they have been commenced "promptly". Therefore, here, even though proceedings were brought within the three month period, the Judge had to review what had actually happened.

Between 17 March and 22 April 2008, there was no culpable delay on the part of Amaryllis. It received a letter at the start of Easter week and a meeting was arranged in the first full working week after Easter. Amaryllis then wrote on 15 April 2008, receiving an inadequate answer on 22 April 2008. HMT focussed on the fact that between 22 April 2008 and 4 June 2008, little, if anything, outwardly happened to progress this matter. However, the Judge disagreed that nothing relevant happened during this period. The evidence was clear that Amaryllis was involved in making enquiries with other potential tenderers to try and piece together the possible reasons for their exclusion. Amaryllis knew that it had been excluded. It was entitled to gather what information it could about the reasons for its exclusion and then balance the results of those researches against the risk of commencing proceedings against a party with whom it had an ongoing commercial relationship. Finally no criticism of Amaryllis could be made of the period 4 June and 16 June 2008, the period where it was awaiting a response to a letter from HMT.

In addition, the Judge thought it fair to compare Amaryllis' speed of reaction with HMT's conduct during the relevant period. HMT was anything but prompt. Indeed, had it been necessary to consider whether Amaryllis needed any extension of time, Mr Justice Coulson felt that HMT's conduct during the relevant period was likely to have been the main cause of any delay and that no prejudice would have been suffered by HMT as a consequence of that delay. Therefore Amaryllis would have had a real prospect of demonstrating good reason for any delay, had it been necessary. Accordingly, the Judge concluded that Amaryllis was duly entitled to pursue its claim against HMT.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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