



Dispatch

Dispatch highlights a selection of the important legal developments during the last month.

Procurement

■ Letting International Ltd v London Borough of Newham [2008] EWHC 1583

In Issue 93 we reported on the European decision of *Lianakis v Alexandroupolis* where the court confirmed that tenderers must be placed on an equal footing throughout the tender process, which itself must be transparent. This decision was applied here by Mr Justice Silber. As the Judge said, the requirement of transparency means that parties proposing to tender have the right to be informed both of the criteria to be used in selecting the successful tenderer and their respective significance.

LIL tendered for a position under a framework agreement. The tender evaluation criteria stated that the contract would be awarded on the basis of the most economically advantageous tender. The evaluation of the tenders was to be based on the detailed written response, pricing and site visits. The evaluation criteria was weighted as follows, specification (50%), price (40%) and suitability of premises, staffing and working conditions (10%). After LIL failed in its effort to become one of these successful tenderers, it sought details from Newham as to how the tenders had been marked.

It emerged that the proportions attributed to the subject matter of the method statements establishing compliance with specification were not equal but varied between 5%-17% for the various items. These weightings were established after the tender document had been published but before any tenders had been received. Secondly, LIL learnt that the overall criteria of compliance with the specification had been broken down into 28 sub criteria. The weightings had not been previously disclosed to the tenderers. Finally, when evaluating the sub criteria, full compliance with the specification received three marks out of five, whilst the next highest mark was reserved for tenders which not merely met but actually exceeded the specification. Consequently, in November of 2007, LIL obtained an interim injunction, upheld by the CA, restraining Newham from entering into any contract or framework agreement pursuant to the above tender arrangements.

Mr Justice Silber therefore had to decide whether Newham had acted without the requisite degree of transparency, whether Newham had made a number of manifest errors in its tender process and whether it was necessary for LIL to establish loss or risk of loss as part of its cause of action.

Following the *Lianakis* case, and in accordance with the Public Contracts Regulations 2006, the Judge noted that if parties wish to use sub criteria, they must state them in the tender notice. The requirement of transparency means that all criteria used to enable a contracting party to determine which tender will be accepted have to be disclosed. The weighting here should, in the view of the Judge, have been disclosed. The critical factor was not whether the disclosure of the weightings would have affected the preparation of the tenders but whether they could have affected the tenders.

If a tender meets and focuses on the sub criteria considered most important by the contracting authority, it is much more likely to obtain higher marks than one which deals not only with those issues, but also matters which fall outside the key sub criteria which have been selected. A claim for breach of the EC regulations is not dependent on a party showing that if there had been full disclosure of the relevant criteria and approach, the party's tender would have been different. All the party has to show that as a result of the breach of the regulations, it risked suffering loss and damage. Thus, the contention that Newham had failed to mark its tenders fairly, reasonably and objectively became academic as it would not alter the relief to which LIL was entitled. (As it happened, LIL failed in this part of their case.)

The Judge concluded that if LIL had been informed as it should have been, first of the weight attached to each item in the method statements and second that to obtain full marks it had to exceed the specification, then it would have had a "significant chance" of being both a successful tenderer and then successfully obtaining some work under the framework agreement. That was enough to justify bringing its claim for breach of the transparency provisions.

During the case, the parties had agreed that if the Judge reached the conclusion which he did, he should then invite the parties to agree on the remedy which should be adopted. This he did although noting that:

"rather than having a new tender procedure, Newham might consider it prudent merely to add the name of the Claimant as one of the successful tendering parties. This is merely a suggestion and I will happily hear submissions if this were not to be mutually acceptable."

Dispute Resolution Agreements

■ Ardentia Ltd v British Telecommunications Plc

[2008] EWHC B12 (Ch)

Ardentia and BT entered into a project agreement relating to the provision of information technology to the NHS. A dispute arose in respect of licence fees. Ardentia also believed that BT was intending to engage others to develop new software in breach of an exclusive supplier clause. Ardentia sought an injunction against BT who replied with an application for a stay under section 9 of the Arbitration Act 1996. What this meant was that Judge Donaldson QC had to decide whether the parties had followed their own dispute resolution procedure. By clause 66.1 of the contract any dispute was to be resolved in accordance with a Dispute Resolution Procedure ("DRP"). The DRP was a dispute escalation clause, initiated by a notice in writing. Two nominated representatives then met. If they could not resolve the dispute, it would move to management level, and finally to CEO level. If that failed the parties could then "consider mediation".

Paragraph 7 of the DRP said that the parties should not institute court proceedings until the applicable procedures had been exhausted save that BT could at any time prior to court proceedings serve a notice requiring that the dispute be referred to arbitration and that if Ardentia intended to start court proceedings it had to serve notice on BT who then had 15 days to serve its own notice requiring arbitration. Paragraph 2.2 of the schedule to the DRP said that nothing in the DRP would prevent a court from having jurisdiction to give an interim order.

The Judge held that paragraph 7 imposed three restrictions on the commencement of court proceedings by Ardentia:

- (i) The procedure up to and including the "consideration" of mediation must have been exhausted;
- (ii) Ardentia must have given a 15 day notice of its intention to commence court proceedings; and
- (iii) If BT served a notice within the 15 day period, then the matter was to be referred to arbitration, and so a stay under section 9 would have to be given.

From the facts of the case it appeared that the parties had followed the initial procedure, and then considered mediation. They had also considered referring the dispute to an early neutral evaluation process. However, as the dispute was not resolved, the key questions were whether the appropriate notices had been given and whether the 15 day period had expired. The Judge held that paragraph 2.2 had to be read within the context of DRP. Interim relief was only to be given in very limited circumstances and in order to support the DRP process. It was not there to avoid the DRP process, and an injunction was not available. Ardentia had not served the initial notice; however BT had served a notice requiring a reference to arbitration and the Judge duly granted an order under Section 9 to stay the proceedings pending arbitration. Here, the court's support was only available to provide interim relief, not to deal with the substance of the dispute that was progressing through the dispute resolution process. In other words, Ardentia could not use the courts to avoid the contractual dispute resolution process that the parties had agreed.

Letters of Intent ("LOI")

■ Diamond Build Ltd v Clapham Park Homes Ltd

[2008] EWHC 1439 (TCC)

CPH invited Diamond to tender for a refurbishment project. A LOI was entered into which provided that a standard form would be issued in due course. Work progressed, but relationships deteriorated and CPH determined the contract. Diamond said that CPH's reasons for terminating were inaccurate and misleading and that they could not limit their liability towards Diamond as originally stated in the LOI. Further, Diamond said that as they were in contract with CPH based upon the JCT IFC 2005, CPH were bound to follow the JCT rules. Diamond said that the parties had proceeded on the basis that the LOI had been abandoned and that the full JCT contract was regulating their relationship. Mr Justice Akenhead held that a simple contract had been formed. It had sufficient certainty including a commencement date, a requirement to proceed regularly and diligently, a completion date and an overall contract sum. Once the LOI was accepted, its real purpose was to cover the period up to the execution of the formal contract. However, the Judge disagreed with Diamond's second argument and dismissed their claim because:

- (i) The parties' constant references in meeting minutes to "Contract Docs to be issued" demonstrated they were still expecting the formal contract to be executed;
- (ii) Neither party ever stated that the LOI was being abandoned;
- (iii) The fact that valuations were based on tender rates and prices was neither inconsistent with the LOI which allowed overheads and profit on work carried out nor inconsistent with the parties' belief that sooner or later a formal contract would be executed.

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