



## LEGAL BRIEFING

### *Turning Point Ltd v Norfolk County Council* [2012] EWHC 2121 (TCC)

#### *The Facts*

In September 2011 Norfolk County Council ("the Council") published a Contract Notice in the Official Journal of the European Union for a contract regarding an Adult Drug and Alcohol Treatment system. Turning Point Ltd ("Turning Point") successfully pre-qualified having submitted their completed Pre-Qualification Questionnaire ("PQQ") in November 2011. In December 2011 the Council invited Turning Point and others to tender for the project, sending them the Invitation to Tender ("ITT"). The ITT contained key information, the contract requirements/terms, the overall weightings to be given in the evaluation of the tenders, and a condition stating that the Council "will accept no caveats to proposals or variant bids..."

Turning Point submitted a number of questions seeking clarification on the ITT. The Council responded in January 2012. Even with the Council's answers, Turning Point still considered that the Council had not provided adequate or complete information from which they could accurately estimate certain costs. Nevertheless, Turning Point submitted a tender in February 2012 within the specified time. They did however include a note on their pricing schedule ("the Note") stating that:

*"...due to the lack of full and complete TUPE information, it is assumed that the restructure of staffing will be achieved through natural wastage and therefore we have assumed no redundancy costs. If redundancies were to occur, we would wish to enter into further discussions."*

On 12 March 2012 the Council informed Turning Point that they had not been successful as their tender contained a qualification by way of the Note. Turning Point complained and on 28 March 2012 issued proceedings challenging the Council's award, claiming that the information provided at the tendering stage was wholly inadequate and incomplete and that the Council was in breach of the Public Contracts Regulations 2006 ("the 2006 Regulations"). Furthermore, Turning Point claimed that there was a breach on an implied contract that the Council was required to act fairly towards them in the tendering/assessment process.

The Council denied any breach of the 2006 Regulations and asserted that the proceedings were brought too late as they were not within 30 days of when Turning Point either did or should have become aware of the inadequacies (if any) in the tender information – as required by Regulation 47D.

The Council then issued an application to strike out the Turning Point's Claim either because it was brought out of time under the Regulations or it had no prospect of success.

#### *The Issues*

As summarised by Mr Justice Akenhead, the issues in this case are:

- (i) Whether all or any of the allegations of breach of the Regulations as against the Council are barred by the 30 day provision in Regulation 47D?
- (ii) If so, is Turning Point entitled to an extension of time to overcome such a bar?
- (iii) Did the Note qualify or caveat the tender or otherwise evidence non-compliance with the ITT?
- (iv) If so, should the Council have sought clarification from Turning Point before rejecting its tender and provisionally accepting someone else's?

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- (v) Was there an implied contract? If so what were its terms and does it add a claim which is not time-barred?

### ***The Decision***

Mr Justice Akenhead considered recent case law regarding the limitation period for bringing a claim in matters of public procurement and held that the allegations relating to breaches of the 2006 Regulations as to the inadequacy or incompleteness of information provided by the Council were barred by the 30-day statutory limitation period under Regulation 47D.

He found that Turning Point must have known of the inadequacies (if any) of the information by no later than 9 February 2012 when they submitted their tender to the Council. As such, Turning Point was time barred as they did not issue their claim until 28 March 2012.

Whilst the Court may extend the 30-day time limit, the Judge did not consider that there was any good reason to do so. He stated that:

*"a good reason will usually be something which was beyond the control of the given Claimant; it could include significant illness or detention of relevant members of the tendering team."*

With regard to the Note, Mr Justice Akenhead held that this was a clear qualification or at the very least a caveat. He considered that the Note was either an actual or prospective contractual document as, if accepted, it would have been incorporated into the subsequent contract. Had the Council accepted it, they would have been responsible for redundancy costs. The Judge did not consider that the Council should have sought clarification from Turning Point before rejecting their tender as the ITT had made it clear that there were to be no qualifications or caveats – a requirement which he considered was perfectly fair, reasonable and common. Furthermore, there was no express entitlement within the ITT for the Council to go back to tenderers on the pricing schedule for clarification – nor did he consider there to be an implied obligation for the Council to do so.

As to the allegation that there was an implied contract, the ITT contained expressed terms that the Council does not make any binding commitment to tenderers *"other than to abide by its statutory obligations and the express terms of this Important Legal Notice"* and that *"no other obligation on the Council shall be implied into any contract which may arise between the Council and any applicant..."* As such, the Judge held that there was no room for any implication of any other terms such as those alleged by Turning Point.

Mr Justice Akenhead therefore struck out Turning Point's claim and entered judgment for the Council.

### ***Commentary***

On 1 October 2011 the Public Procurement (Miscellaneous Amendments) Regulations 2011 came into force. Amongst other amendments, these Regulations provide that where a claimant is aware of a breach in the 2006 Regulations, proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen. Previously, the limitation period had been that proceedings must be started promptly and in any event within three months beginning with the date when grounds first arose.

This case provides a strict reminder to those seeking to make a claim that they must do so within the prescribed 30-day period and the Court is only likely to extend this time for a "good reason" – this being usually something which was beyond the control of the claimant.