

How confidential is bid evaluation?

Mears Limited (Mears) was a bidder for a housing repairs and maintenance contract being let by Leeds City Council (the Council) under a competitive dialogue procurement procedure, pursuant to the Public Contracts Regulations 2006 (the Regulations)[1]. Out of 22 tenderers Mears had made it to the shortlist of 9. Each shortlisted tenderer then had to submit Quality and Cost submissions for evaluation.

After all the tenders had been received the Council issued clarification asking the tenderers to take into account altered pricing instructions and to resubmit a pricing sheet.

Following the evaluation Mears was told that it had not been successful in getting to the next stage. Mears sought feedback on the decision and this was provided by the Council.

Then Mears issued proceedings seeking an injunction to suspend the procurement process and re-run it. Mears argued that the Council had failed to act with transparency and/or treat Mears equally and in a non-discriminatory way. The Particulars of Claim stated that the Council had

1. issued changes to the pricing aspects after having received the tenders;
2. provided an inadequate period of time to respond to the changes;
3. evaluated the changes using undisclosed criteria and weightings, in particular;
 - (a) using guidance attached only to their much later feedback letter;
 - (b) on the basis that each sub-question carried the same weighting.

The Council in its defence said that the 3 month time limit in respect of claims 1 and 2 had expired by the time Mears issued its claim. The court then gave directions for the Council to serve relevant documents. Subsequently Mears applied for disclosure for certain specific documents which might impact on their application for an interim injunction.

At the hearing on the disclosure application and time-bar issue, the judge considered the Council's feedback which made reference to "model answers". In reply to the feedback Mears had said "This does not assist us in understanding where we have lost marks since we do not have copies of the model answers". Mears contended that the scoring guidance contained undisclosed weightings which should have been disclosed under Regulation 30.

The issue before the court was whether the Council should disclose their model answers.

The Council submitted that it was not obliged to provide the model answers under Regulation 32, and that the answers should be treated as confidential. It pointed to the problems that would arise if the model answers were provided and the court subsequently decided that the Council did need to re-run the tender. The tenderers would then be able to use the model answers which would make it impossible for the Council to differentiate between them.

In reply Mears submitted that this was not an application under Regulation 32 but an application under the Civil Procedure Rules for disclosure, and moreover that the confidentiality concern could be dealt with by way of a "confidentiality ring".

The judge agreed that the "model answers" were disclosable, but should be treated as containing confidential matters. The fact that they were confidential did not prevent them from being disclosed. The test is whether disclosure is necessary for disposing fairly of the proceedings. On this he had no doubt. However he believed that a "confidentiality ring" could be applied to a large organisation like Mears. He therefore ordered that in the first place disclosure should be limited to named solicitors and named counsel. If the lawyers considered there were grounds for contending that the model answers (once seen) should have been disclosed to tenderers, then Mears was to nominate a person such as a director who would not be involved in any future re-run of the procurement. That person would give instructions to the lawyers.

On the time-bar issue the judge agreed that claims 1 and 2 in the Particulars of Claim were not commenced within the 3 month period under the Regulations. Those heads of claim were therefore struck out.

This case illustrates the enormous difficulties for both the Contracting Authority and the tenderers in public procurement. Firstly a tenderer has to issue any procedural challenge promptly upon any discrete breach of the Regulations, whether or not they are ultimately eliminated from the procurement.

Further, the Contracting Authority will be subject to the normal Civil Procedure Rules on disclosure and needs to bear this mind when preparing its criteria and weightings for evaluating bids.

[1] Mears Limited –v- Leeds City Council [2011] EWHC 40 (QB)

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