VALUABLE LESSONS IN TENDER EVALUATION

A VALUABLE LESSON IN HOW NOT TO CONDUCT TENDER EVALUATION

Deciding on who to award a public contract is becoming an increasingly challenging experience for contracting authorities and practitioners alike. Gone are the days where unsuccessful suppliers would simply walk away or send a few threatening letters on the company letter head, before moving on to focus their attention on the next opportunity.

Now, the growing trend is for decisions of contracting authorities to be forensically scrutinised, followed by calling in procurement litigation lawyers to extract as much information as possible, and then to issuing a claim that could put an automatic stay on further action, unless the court decides otherwise. Not only that, but just like in an average espionage movie, suppliers covertly recording conversations with officers could potentially be played back at the trials to try and swing the decision in their favour.

This is exactly what happened in the case of Bromcom Computers Plc v United Learning Trust [2022] EWHC 3262 (TCC) where the defendant, one of the largest multi-academy trusts with over 70 schools, was accused of making multiple breaches of the Public Contracts Regulations 2015 (PCR 2015).

While some of Bromcom's claims were not upheld, the judge determined that in awarding the contract to Arbor (co-incidentally they were the incumbent supplier to 15 other schools within the United Learning group (ULT) under a separate contract outside the scope of this procurement), ULT were guilty of several breaches of procurement law – and had they not occurred, would have resulted in the claimant Bromcom winning the contract as the highest scoring bidder by a significant margin. These breaches were also deemed to be "sufficiently serious".

WHY DID BROMCOM BRING A CHALLENGE?

ULT undertook a competitive dialogue process for the award of a £2 Million 5-year contract to provide a cloud-based Management Information System to 57 of its schools. There were only 2 short-listed suppliers, however, when Arbor was chosen as the preferred bidder (and following a protracted and slightly confrontational standstill period which was the subject of an earlier hearing, where it was held that Bromcom had, in fact brought the challenge within the strictly applied 30 calendar day limit

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(Regulation 92(2), PCR 2015); Bromcom Computers Plc v United Learning Trust & Anor [2021] EWHC 18 (TCC) (07 January 2021)), Bromcom sought judicial redress to the way the procurement process had been conducted. The claimant presented numerous allegations of manifest error committed by ULT in the way scores were calculated and awarded during the evaluation stage.

KEY OBSERVATIONS FROM THE CASE

The 73-page judgment provides useful guidance for carrying out key stages in a procurement exercise as well as a review of notable caselaw covering routine contentious issues, which practitioners are encouraged to follow. For the purpose of this article, we will concentrate on a few of the most important lessons.

WHAT SHOULD I BE AWARE OF IF I AM ASKED TO EVALUATE A TENDER?

Tender evaluation is a critical stage in the procurement process that suppliers frequently question and challenge. This is not surprising given that anyone who has participated in a tender process will notice that there is very little guidance on how to carry out this crucial role. In instances where the tender contains complexities (as most do), the aggrieved supplier will have little difficulty exposing this in court. Anyone who is asked to be an evaluator should be given appropriate training or a practical written guide to familiarise themselves with the key obligations and practises to avoid. This should be documented in the procurement file.

WHAT IF I INCLUDE COSTS THAT A BIDDER MAY HAVE OVERLOOKED?

ULT had assembled a team of 13 evaluators (including a headteacher, school business managers and several members of staff with an ICT background). The judge determined that the evaluators had incorrectly added £4,405 to Bromcom's cost model for data transfer from its MAT Vision Solution to ULT's own data warehouse. There was also a failure to seek clarification from Bromcom, despite the fact that the evaluators had detected potential anomalies in the information contained in two different appendices. The judge agreed with Bromcom that these costs were already included in the pricing model submitted, and ULT's actions constituted a manifest error and a breach of procurement law.

CAN I USE A CALCULATOR AND GIVE HALF MARKS WHEN SCORING AND EVALUATING RESPONSES?

The court determined that ULT, rather than following instructions in the invitation to tender, marked the responses for various elements that were not whole numbers (for example 4.12 out of 5). Following consideration and determination of each evaluator individual score, their reasoning should have been discussed at a convened moderation meeting with other panel members present to agree on a consensus score. Instead ULT simply averaged all the evaluators' individual scores, pulled out a calculator and used the average scores. This meant that ULT was unable to explain how the final scores had been reached.

The judge commented that while "…. averaging in this way … is not a case of irrationality per se … it is a breach of ULT's obligation to act transparently which itself requires the giving of its reasons for the scores which it made."

DO EVALUATORS (JUST LIKE SCHOOL EXAMINERS) NEED TO CROSS-CHECK THEIR INDIVIDUAL SCORES WITH THE OTHER PANEL MEMBERS?

ULT had failed to hold a moderation meeting (there was no mention of this in the procurement documents), however the judge still felt that this was necessary and a function of reaching a reasoned decision. This meant that any incorrect scores awarded by an individual evaluator could not be corrected by a process of moderation, and there was no way to reach a reasoned conclusion for the final scores awarded to each bidder. This failure also denied ULT an opportunity to identify any outlying scores which the judge noted would result in some bidder's scores being inflated. Overall, if the person on the Clapham omnibus was to objectively look at the evaluation, the tender documents and actions of the contracting authority would not satisfy the test of the reasonably well informed and normally diligent tenderer.

Surprisingly, the judge was sympathetic to one of the evaluators, who had not kept a contemporaneous record of the reasons for her scores. The judge acknowledged that the evaluator was constrained due to managing the school during the pandemic. Would a teacher, on the other hand, accept a student who makes no notes in their exercise book for an important exam in few months?

There is no principle of law that automatically excludes a statement of reasons given after the event, even some time after the event, by an evaluator which are unsupported by contemporaneous notes but which the evaluator can recall. It is all comes down to weight.

IS IT POSSIBLE FOR THE BIDDER TO RETAIN CONTROL OF THE TENDER SUBMISSION AFTER THE DEADLINE?

Bidders were instructed in the procurement documents to send their final submission by email. Rather than attaching its response to an email, Arbor submitted it via a "drop-box" link, (which it hosted and had access throughout), from which ULT could download their bid. Arbor's continuous access meant that ULT had no way of knowing whether the bid had been changed after the stated tender deadline.

While there was no evidence that Arbor made any changes post-tender, and there was nothing in the Invitation to Continue Dialogue ("ITCD") which prohibited this manner of response, the court held that the use of a drop-box amounted to a breach of Reg 22(16) PCR 15, because it did not provide a single point in time (and date) when the bidder's submission had been electronically filed.

On this point, the judge however concluded that, because Arbor's tender had been submitted several hours early (in fact there was no time deadline set out in the ITCD and the court accepted that this could therefore be up to midnight on the relevant date), as a counterfactual, ULT would not have rejected the tender, but more likely informed Arbor that their method of submission was non-compliant giving Arbor another opportunity to re-submit the bid using an email before midnight. In a school setting, it would be interesting if a student could choose how and when to hand in their homework!

IS IT THE RESPONSIBILITY OF CONTRACTING AUTHORITIES TO BALANCE OR EVEN NEUTRALISE THE ADVANTAGE OF AN EXISTING SUPPLIER?

One of Bromcom's key challenge was that Arbor was seeking to "leverage its incumbency" by including in its price bid a rebate it had offered on a separate contract with ULT (contract with the 15 other schools), which fell outside the scope of this procurement.

The judge confirmed previous caselaw in this area stating that "…there was no general obligation upon a contracting authority to neutralise absolutely all advantages enjoyed by the incumbent provider … but only to the extent that it is technically easy to effect such neutralisation, where it is economically acceptable and where it does not infringe the rights of the existing contractor or the said tenderer."

Applying these principles to the present case, the judge agreed with Bromcom that this prevented ULT first adding costs relating to the data interface to its pricing submission, as it would not apply it in the case of Arbor as they were already an incumbent supplier to some of the schools. Furthermore, to allow the rebate was contrary to Reg 67(2) and (5) PCR15, because the tender award criteria did not require this, and ULT had rewarded Arbor for offering something which did not relate to the contract in question.

WHAT LESSONS CAN BE LEARNED FROM THIS CASE?

This is an important judgment that practitioners should think about to avoid ending up in a similar situation. More specifically:

- The courts recognise that procurement is not an exact science and mistakes can occur, the contracting authority is given a margin of discretion in how it applies its judgment.

- However, where there is failure to comply with the all-important procurement principles contained in Regulation 18 PCR15, they are likely to resist this and find manifest error.
- It is highly recommended (unless it is a routine low value tender) to have a scheduled moderation process as part of the evaluation stage to iron out deficiencies in individual evaluator scoring. It is beneficial to speak with other evaluators, share perspectives and observations and reach an agreement.
- While the judge in this case did not rule out the possibility of averaging scores per se, it is strongly advised that individual evaluator scores be moderated, and a consensus score agreed upon (without mechanical intervention) with all the evaluators present.
- Seek clarification from bidders if any aspect of their submission is unclear, rather than attempt to second guess what they may have stated or said.
- Contracting authorities can accept tender documents after the tender deadline if the missing document is not mandatory (already existed at the time of the tender deadline), and they can even allow minor corrections if there are no statements to the contrary in the procurement documents (especially if the change puts the bidder in a worse position), and importantly equal treatment is provided to other bidders. In short, notify other bidders that the contracting authority has permitted an addition or minor correction to be made and provide them with the same opportunity.
- The evaluation process is full of legal and procedural hurdles. Evaluators will benefit from general training and guidance to limit technical errors that could jeopardise the procurement's success.

The Commercial team at Pathfinder Legal Services Ltd is on hand to provide any advice to address these procurement issues and mitigate the risk of complaint or challenge.

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