

## Legal Updates & News

### Bulletins

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## Recent Developments in Public Procurement Law in the UK

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### Sourcing Update, December 4, 2008

#### Evaluation criteria and weighting: disclosure and transparency are mandatory, not discretionary

In the past, it has been common for authorities to disclose only top-level evaluation criteria and weightings during the early stages of regulated public sector procurements. That approach may have to change in the light of a 2008 case. A Court has upheld a bidder's procurement challenge on the grounds that a contracting authority breached the procurement regulations because it did not disclose in the tender documents all of the contract award criteria and their respective weightings. The effect of this case will be to require authorities to decide on evaluation criteria (including, crucially, any sub-criteria) earlier in their procurement exercises, to disclose those criteria and sub-criteria, and to stick to them. Many authorities will regard this as a reduction in flexibility.

#### What is the case?

The case is *Letting International Limited v London Borough of Newham [2008] EWHC 1583*, a decision of the High Court in a claim brought by Letting International ("LI"), an aggrieved unsuccessful bidder in a series of procurements by London Borough of Newham ("LBN"). LI claimed that LBN had acted in breach of the Public Contracts Regulations 2006 ("Regulations"), and had failed to provide transparency in the operation of its procurement. The Court agreed with LI and upheld an injunction preventing the authority awarding any work under the improperly procured contracts. This case takes into account the latest approach of the European Court of Justice to the issue of transparency, as seen in cases such as *ATI ETC Case C-331/04* and *Lianakis Case C-532/06*.

#### Why is this case important?

Prior to this case, it was common for contracting authorities to provide relatively little prior information to bidders about the applicable evaluation criteria and weightings, and to seek to develop the criteria and weightings during the subsequent stages of the public procurement process. This is particularly true in complex and large scale projects, especially under the competitive dialogue procedure.

This case makes it clear that, if a contracting authority fails to disclose any fact relating to the evaluation criteria which, had it been known at the time, could have affected the preparation of bidders' tenders, the authority would be in breach of the public procurement regulations and would be creating grounds for a procurement challenge.

As a matter of overriding principle, a contracting authority must disclose all the elements that it takes into account in identifying the most economically advantageous tender. For this reason, it must disclose the evaluation criteria and weightings that it intends to use in their entirety to the bidders.

This will require a change in approach for many contracting authorities which have, in the past, only disclosed a handful of top-level evaluation criteria (e.g., quality, price, transition, security issues) and their high-level weightings (or even, in some cases, only an order of priority of the various criteria). In the future, authorities will be required to disclose much more information about sub-criteria, and to do so at an early stage.

The issue for an authority is where to stop: e.g., does the requirement extend right down to the questions used by individual evaluators to populate the scoring table? The main question unanswered by the Court judgement is: when does a factor or scoring question cease to be an “award criteria” (which would need to be disclosed) and become merely a method of scoring (which would not be required to be disclosed)?

Bidders will see this case as ensuring more transparency in procurement processes - and additional grounds for challenge if they lose. Authorities are likely to view the decision as diminishing their flexibility and requiring them to accelerate the process of setting (and freezing) all aspects of the evaluation model.

The case also shows that an aggrieved bidder does not have to suffer actual loss in order to bring claims against a contracting authority. All that an aggrieved bidder has to show is the loss of a significant chance of obtaining the contract. In this case, the procurement concerned the award of a series of frameworks, with no guarantee of work under the awarded framework. But the Court held that the fact that the bidder was merely tendering for a framework contract does not preclude an aggrieved bidder from bringing a claim.

### What happened in this case?

In March 2007, the authority, LBN, published an OJEU notice for framework contracts for the procurement, management and maintenance of leased properties. As is commonplace, the framework contracts were to be awarded to the “most economically advantageous” tender.

LI, a property management company, was one of the bidders that submitted a tender in response to the OJEU notice. The Invitation to Tender provided to bidders stated, amongst other things, that the criteria to be used in evaluating tenders comprised three elements:

- “Compliance with Specification”, to be evaluated by assessing the quality of the solution proposed by the bidder to address five aspects of the specification, which in total had a 50% score allocation;
- ‘Pricing’, which had a 40% score allocation; and
- “Suitability of Premises, Staffing and Working Conditions”, which had a 10% score allocation.

No further details regarding the evaluation criteria were provided to the bidders, and LI duly submitted its tender to LBN. In November 2007, the authority informed LI that its tender was not successful.

Dissatisfied, LI sought explanation and information from LBN, and it transpired that:

- the weightings attached to each of the five specific aspects of the “Compliance with Specification” criterion were not equal and varied from 5% to 17% of the total score allocation;
- the overall criterion of “Compliance with Specification” in fact had 28 sub-criteria, each carrying its own proportion of the score; and
- in assessing each of such sub-criteria, LBN awarded 3 out of a maximum of 5 points to tenders which fully complied with its specification, and gave the maximum 5 points only to tenders which exceeded its specification.

LI subsequently brought a court action against LBN in November 2007 on the basis that, among other things, LBN failed to give sufficient information to bidders about the basis on which it would evaluate the tenders.

The Court pointed out that under both the Regulations and EU law, potential bidders had to be made aware of all the features to be taken into account by the contracting authority in identifying the most economically advantageous tender, as well as the relative importance of such features.

The Court held that the five specific aspects of “Compliance with Specification” and the 28 sub-criteria, as well as the marking scheme were matters which ought to have been disclosed to the bidders in the ITT, not just because of the requirement for transparency but also because to hold otherwise would have the alarming consequence of allowing a contracting authority to adjust the evaluation criteria and weighting however it liked, thus leaving the bidders without any remedy.

Such a consequence was clearly not acceptable because the division of award criteria into sub-criteria, and the allocation of weightings to the sub-criteria, resulted in a variation of the award criteria disclosed in the OJEU notice and procurement documents. In effect, the authority had introduced new features which, had they been disclosed, could have affected the preparation of bidders’ tenders.

Having found that LBN failed to comply with the requirement for transparency, the Court then went on to

consider whether or not the bidder had to show that it had suffered actual loss in order to make a claim. The Court had little difficulty in concluding that all that an aggrieved bidder had to show was that it suffered “the loss of a significant chance of obtaining the contract” as a result of the contracting authority’s failure to comply with the requirements of the Regulations.