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UK Public Procurement Law Digest: Successfully Setting Aside UK Procurement Contract Awards

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Ever since UK law was changed to permit courts to set aside improperly awarded public contracts, there has been a series of unsuccessful attempts to invoke the new remedy. Successful set-aside applications have been rare enough that, when one does finally come along, it's worth examining to see if it provides pointers for future claimants.

This edition of the MoFo *UK Public Procurement Law Digest* explains the approach adopted by the courts in a series of cases in Northern Ireland, where the contracting authorities were required to set aside contract awards because of irregularities in the procurement process.

We have previously conferred an unofficial award for "Services to Procurement Law"¹ on the Legal Services Commission for triggering a whole series of challenges due to its handling of various online procurement processes. The Northern Ireland High Court becomes our second recipient of this award following its handling of a spate of cases involving applications for set aside of contracts awarded by various departments of the Northern Ireland government.

This edition of the MoFo *UK Public Procurement Law Digest* looks at the following cases in which the Northern Ireland High Court granted the aggrieved bidders' applications to set aside: *Clinton v. Northern Ireland Department for Employment and Learning* and the parallel case (arising out of the same contract award procedure) *First4Skills v. Department for Employment and Learning*; *Easycoach v Department for Regional Development*; and *Resource (NI) v Northern Ireland Courts Service*.

THE CONTEXT OF THE SET-ASIDE REMEDY

The Public Contracts Regulations 2006 ("PCR") require a "standstill period" between the announcement of an award decision and signature of the contract. If an aggrieved bidder launches proceedings to challenge a procurement procedure during the standstill period, an automatic suspension applies (Regulation 47G(1)) and the authority must not enter into a contract until it has applied to a court to lift the suspension.

Under Regulation 47H(1)(a), a court may make an interim order to lift the automatic suspension under Regulation 47G(1). In considering whether to make such an order, the court must consider whether, if Regulation 47G(1) were not applicable (*i.e.*, if there had been no automatic suspension), it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract. Only if the court considers that it would not be appropriate to make such an interim order may it make an order to lift the automatic suspension.

If the court declines to lift the automatic suspension, the typical next step in the process is a consideration of (a) whether there has been a breach of the procurement regulations by the authority and, if so, (b) what the remedy should be. Regulation 47I(2) provides that a court may do one or more of the following:

¹ See our [November 2011 Update: "Caveat Vendor" – e-tendering Systems and the Problem of Genuine Mistakes](#).

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- order the setting aside of the decision or action concerned; *[emphasis added]*
- order the contracting authority to amend any document; and/or
- award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

LESSONS

The details of these cases are set out below for readers interested in the facts, background and basis for the courts' conclusions. But first we highlight the lessons that these cases may hold for contracting authorities and for other aggrieved bidders who trigger automatic suspensions in the hope of setting aside public contract awards.

The decision under Regulation 47H whether or not to lift an automatic suspension involves a balance of various factors, including the wider prejudice involved in continuing the block on the procurement. By contrast, the decision under Regulation 47I involves no such balance. In the *Clinton* and *Easycorch* cases in particular, the court made a simple step from concluding that the authority was in the wrong to awarding the set-aside remedy.

The *Resource (NI)* case provides much more insight into the court's decision-making process as to whether set-aside is an appropriate remedy. The issue facing the court in that case was whether set-aside is a divisible remedy: *i.e.*, does the whole procurement process need to be set aside or can the court make the authority go back and fix the problem without re-doing the whole procurement? The ruling was that set-aside is an all-or-nothing remedy, in effect.

In reaching this conclusion, the court actually did something that neither the authority nor the aggrieved bidder actually wanted. That is, it made the authority start over again rather than simply insert the aggrieved bidder as the winner or allow merely a re-mark of the wrongly marked elements of the bids.

Maybe the real lesson of these cases is: be careful what you wish for!

THE CLINTON CASE AND THE FIRST4SKILLS CASE

Both *Clinton v. Northern Ireland Department for Employment and Learning* and *First4Skills v. Department for Employment and Learning* arose out of a procurement exercise started in November 2010 by the Department for Employment and Learning ("DEL") in relation to the provision of publicly funded training and apprenticeship programmes in Northern Ireland.

Clinton and First4Skills submitted tenders but were told that they had not made it through the first round of evaluation. Both acted quickly and initiated legal proceedings claiming that DEL had not complied with the PCR. Crucially, Clinton claimed the set-aside remedy provided under the PCR² and asked the court to set aside the procurement process and force DEL to start again.

The initiation of proceedings by these aggrieved bidders triggered the mandatory suspension requirement imposed by Regulation 47G(1) that precluded DEL from executing any of the contracts in question. DEL applied for an order pursuant to Regulation 47H lifting this automatic prohibition but the court refused and moved on to consider the central claim from Clinton: that the errors in DEL's procedure justified setting aside the entire procurement process.

The *Clinton* and *First4Skills* cases therefore helpfully illustrate two points: the reasons why a court may refuse to lift an automatic suspension, and the rationale for siding with a claimant in an application for the remedy of set-aside.

² For an overview of the regime introduced by the New Remedies Directive and its UK implementation measures, namely the amendments to the Utilities Contracts Regulations 2006 and the Public Contracts Regulations 2006, see our [January 2010 Update: New Public Procurement Remedies in the UK](#).

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Approach to Automatic Suspension

We have previously examined the way in which UK courts have dealt with applications by contracting authorities to remove the automatic mandatory suspension that applies to a public procurement process when a challenge is made by an aggrieved bidder.³

The first hurdle for the court to get over in this situation was the fact that two separate disappointed bidders had each initiated legal proceedings. Clinton began proceedings on 4 April 2011 and First4Skills did so on 27 May 2011. DEL separately applied to have the Regulation 47G(1) automatic suspension lifted and the court gave judgment (without explanation) on the *Clinton* case on 27 June 2011. The hearing of DEL's application in the *First4Skills* case came the following day, 28 June 2011.

Having already dismissed DEL's application to have the mandatory suspension lifted in the *Clinton* case, the court felt that its hands were tied also in the *First4Skills* case. It felt that it would be plainly inappropriate - and, indeed, illogical - to make an order in the second application which conflicted with its order in the first application. Additionally, it said that applications relating to the mandatory suspension and set-aside are not specific or particular to individual aggrieved bidders. They are directed to the issue of awarding a contract which ought to be impersonal and not related to the challenging party or its identity. So, where more than one aggrieved bidder begins a legal challenge, if a court decides to dismiss a contracting authority's application for an interim order under Regulation 47H lifting the mandatory suspension, that prohibits the execution of a contract with any party and makes redundant any further application brought in the context of different proceedings.

Having dismissed DEL's application in the *First4Skills* case, the court went on to examine the merits of DEL's application because of the importance of the need to give reasons and guidance to the parties. Consistent with previous cases, the court applied the principles in *American Cyanamid v. Ethicon*, which require consideration of whether there is a serious issue to be tried and then whether the balance of convenience lies in favour of granting or refusing the interim relief. The court took into account particularly (but not exhaustively) the adequacy of damages as a remedy; the availability of a cross-undertaking in damages by the claimant; and the possibility of irremediable prejudice to third parties. The court agreed that the correct approach in principle was that applied in the *Exel Europe* case.⁴

In the *First4Skills* case, the court concluded that it was a correct application of the *American Cyanamid* principles not to lift the automatic mandatory suspension. It reached this conclusion even though the claimant itself admitted an error in the submission of its tender because it had failed to complete and submit a spreadsheet detailing all the programmes for which it was tendering, including details of its past history for these types of services. DEL assessed that First4Skills had failed to satisfy one of the selection criteria and, on the basis of this error, rejected the bid.

First4Skills argued that the required information did not form part of the overall evaluation process - and that this was both indicated in the tender documents and had been separately communicated by DEL's representatives. First4Skills also argued that DEL had acted disproportionately in rejecting its tender for failure to comply with this selection criterion. It said that the correct approach would have been for DEL to have sought clarification about the omission of the relevant spreadsheet. Further, it claimed that DEL had breached the principle of equal treatment and non-discrimination because, for other bidders, DEL had followed a clarification process in circumstances where there was missing information.

While noting that there was evidential difficulty in reconciling the parties' respective positions or in finding an appropriate explanation of some of the statements in the tender documents (which stated "please note that this information will not

³ See our [January 2011 Update: Removing Mandatory Suspensions](#).

⁴ See our [January 2011 Update: Removing Mandatory Suspensions](#).

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form part of the selection or award process”⁵), the court concluded that there was enough merit in some of First4Skills’ arguments to warrant the conclusion there was a serious issue to be tried.

In relation to the balance of convenience, the court felt that this lay with the aggrieved bidder. Notwithstanding the fact that DEL raised arguments around the benefits of the new contractual arrangements, the requirements of legal certainty and the limitation of any contract extension, the court relied on the fact that the proceedings were likely to reach a full judgment prior to the expiry of the current existing contract. Also, the bidder had provided a cross-undertaking in damages (*i.e.*, a promise to pay any costs and damages that may have been incurred if the application had been wrongfully granted).

Approach to Set-Aside

Having dismissed DEL’s application to have the automatic suspension lifted, the court process then moved on to a full hearing of the claimants’ applications to have the whole procurement process set aside. Of the two cases, the *Clinton* case came to court first. The court found that DEL had misinterpreted a key criterion which constituted a manifest error and had also incorrectly decided not to request the bidders to provide certain other missing information. This, the court decided, was grounds for setting aside the whole procurement process.

In the *Clinton* case, the issue centred around parts of the instructions to tender (ITT) which explained that the evaluation of tenders would be divided into two separate stages, the first of which involved assessment against seven selection criteria and the second of which involved specified award criteria.

Clinton’s tender was assessed by DEL’s evaluators as having failed to satisfy the first of the seven selection criteria - *i.e.*, demonstration of necessary experience to deliver high-quality tender programmes in the identified professional and technical areas. Clinton was told that it had not provided enough evidence to demonstrate that it had the necessary experience. In particular, it had failed to provide data about its achievements, success rate or outcomes of its previous work.

Clinton claimed that DEL had actually applied an undisclosed or, alternatively, an ambiguous selection criterion which amounted to a breach of the principle of equality of treatment and transparency. In addition, it alleged that DEL had sought clarification from 13 other bidders but not Clinton. In doing so, DEL acted in breach of its duty of equal treatment or the rules governing the procurement. The court’s judgment focused on these two separate areas.

Use of Undisclosed or Ambiguous Selection Criteria

The first selection criterion defined in the ITT covered demonstrating the necessary experience to deliver. Clinton said that this did not require it to present the type of information which DEL said was missing from its bid. As a result, it said that DEL had used an undisclosed selection criterion (*i.e.*, a requirement to provide statistics and data supporting its performance and quality). It also claimed that this criterion was framed in ambiguous terms, especially regarding the use of the word “outcomes”.

The court said that it was clear from all the cases that criteria must be clearly defined and presented in such a way that all reasonably well-informed and normally diligent tenderers would be able to interpret them in the same way.

The court rejected Clinton’s first claim that there was an undisclosed selection criterion because it felt that no aspect of the relevant selection criterion had been concealed from the bidders. The real issue was whether the selection criterion was susceptible to a uniform interpretation and whether this was actually the interpretation applied by DEL.

⁵ The court observed that it was unhelpful for DEL to have included this note in the tender documents and that, in the future, an authority should consider whether to incorporate such statements in procurement documents because they generate undesirable confusion.

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The main issue was the meaning of the word “outcomes”. DEL contended that this has an obvious and broadly recognised meaning. But the court noted that there were several possible meanings of the word and none of these were precisely equivalent. Ultimately, the question was one of degree and the court had to assess whether the meaning of this particular selection criterion was objectively sufficiently clear and open to the same interpretation by all reasonably well-informed and normal tenderers.

The court concluded that it was not and that the phrasing of this criterion gave rise to an unacceptable degree of doubt and uncertainty. On that basis, the court concluded that DEL had misinterpreted it and so committed an error of law which rendered DEL’s decision invalid. The court also noted that DEL had made inconsistent and misleading statements about the extent to which reliance on data in external reports would satisfy the criterion, and these statements simply made the situation worse for DEL.

Inequality and Requests for Clarification

DEL admitted having asked 13 other tenderers (but not Clinton) to provide further information and clarification as part of the first stage of the selection process. These clarifications mainly related to qualifications held by some of the proposed trainers. Clinton claimed that, as a result, it had been treated unequally and that DEL was therefore in breach of the PCR. DEL alleged that the various instances in which it sought clarification were not comparable to Clinton’s situation in that Clinton had failed to provide essential information in its tender.

The court referred to previous case law on the issue of whether a contracting authority should seek clarification of tenders. For example, in *Tideland Signal*, where there was a clear case of ambiguity in the tender information, the contracting authority could be subject to a duty to allow clarification of a tender where it was possible to do so. In more recent cases (see the Legal Services Commission chain of cases⁶), it was held that the authority is not required to allow a tenderer to correct errors in its bid.

However, the court also noted that every contracting authority is under a duty of equality of treatment and that the rules of procurements must be applied consistently and fairly between all applicants. In this case, DEL had been wrong not to request additional information from Clinton. In particular:

1. Under the rules of this procurement, the selection panel did have a discretionary power to seek further information from tenderers, and this was expressly set out but not expressly limited by reference to whether that discretionary power related to issues such as ambiguity, inconsistency or incomplete data. However, in contravention of what had been expressly stated in the ITT, DEL’s selection panel took the approach that it would not seek any further information from bidders in the absence of some perceived ambiguity or lack of clarity in the tender. The court concluded that this self-imposed limitation by the selection panel contravened DEL’s own rules for the procurement.
2. In relation to Clinton, the selection panel considered that the tenderer had not failed to provide information but had provided insufficient information. In these circumstances, the panel had a discretion, under the rules of the procurement, to request Clinton to provide further information but did not do so (erroneously) because it did not believe that it was able to do so. This was held to be an error of law, and to have requested further information would not have entailed a breach of the duty of equality of treatment.
3. The court did not accept DEL’s argument that Clinton was in a different position to the tenderers from whom it did request further information because both scenarios related to information which had a bearing on the quality, credentials and expertise of the bidder.

⁶ See our [November 2011 Update: “Caveat Vendor” – e-tendering Systems and the Problem of Genuine Mistakes](#).

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Implications of the *Clinton Case*

The first part of the court's decision emphasises how important it is for authorities to ensure that their tender documents clearly set out selection criteria and explain what those selection criteria mean. If an authority expects a tender to include evidence to demonstrate compliance with the selection criteria, this should be fully and clearly explained.

The second part of the judgment may have been different had the court had the benefit of a recent European Court of Justice case which held that there is no requirement under national law that authorities must seek clarification of bids before rejecting them if the basis of rejection is imprecision or failure to meet technical requirements. Despite this, authorities may exercise discretion to seek correction or amplification of details of a tender where appropriate, particularly where it is clear that they require more clarification or to correct obvious material errors. In exercising this discretion, a contracting authority must treat all the tenderers equally and fairly.

THE RESOURCE (NI) CASE

The *Resource (NI)* case stemmed from a competition begun by the Northern Ireland Court Service in relation to the award of a contract for security services at courthouses in Northern Ireland. The procurement was begun in December 2010 on the basis of the restricted procedure. The award criteria were based on the most economic advantageous tender with four specified award criteria, namely: security (25%); services (15%); methodology (25%); and cost (35%). Each of these had various associated sub-criteria.

The Court Service initially decided to award the contract to G4S over the incumbent, Resource (NI). The published scoring was very close with only 1.1% between the two leading bidders.

As happened in all the other cases of this type, Resource (NI) issued proceedings which had the immediate effect of imposing the Regulation 47G mandatory suspension on the proposed contract award. The Court Service then applied for an order under Regulation 47H terminating the suspension. As in the *First4Skills* case, the court refused that application on the basis that Resource (NI) had raised serious questions to be tried.

The main issue in the case related to the requirements in the tender documents around the collection and deposit of cash held in each courthouse. Both G4S and Resource (NI) said they would comply with those requirements. However, G4S also added a variant solution, which was felt to be more secure and ultimately preferable to the authority. The issue was whether the evaluation panel for the Court Service gave undue weight to the variant G4S cash collection bid. Resource (NI) alleged that, in taking into account this variant bid, the Court Service had considered irrelevant material and departed from the advertised award criteria.

At the trial, the Court Service certainly didn't help itself and the court criticised the consistency and clarity of the evidence provided by witnesses for the Court Service. The court found that the evaluation panel had failed to disregard entirely (as it should have done) information outside the evaluation criteria or information requested. It also took into account further information provided by G4S which should have been considered irrelevant. In particular, the evaluation panel made a serious mistake in giving credit to G4S for particular aspects of its proposal which were irrelevant to the named award criteria.

Awarding Set-Aside

But the most interesting aspects of the court decision related to the decision as to whether set-aside was an appropriate remedy and, if so, how set-aside should be awarded.

In particular, having decided that Resource (NI) had succeeded on the merits of its case, the court had to make a decision as to whether the set-aside remedy meant that the contract award should be completely rendered ineffective or whether

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the court could make a declaration that the contract should have been awarded to Resource (NI). Slightly surprisingly, the Court Service (presumably wanting to avoid a complete re-compete) argued for the second of these remedies.

For both policy reasons and also issues of detail, the court concluded that the right thing to do was to set aside the contract completely. In particular, it concluded it could not be certain that, even though the margins were very tight, had there not been this error in the contract award process, Resource (NI) would have been awarded the contract. The court was not in a position to speculate on what the conclusion was and what the conclusions of the evaluation panel would have been if the error had not occurred. As a result, as a matter of detail the court considered that the award of the contract directly to Resource (NI) was inappropriate.

By contrast, the court did conclude that an order setting aside the overall contract award was appropriate. This was also consistent with the remedy implemented by the PCR. Regulation 47 should be viewed as a whole and the contract award is not divisible. Where a court upholds a challenge, the right course of action is to exercise the discretion to set aside but only to do so in its entirety. There is nothing in European or UK legislation to suggest the contract award decision may be set aside in part only leaving the “good bits” intact. Either the contract award decision is lawful or it’s not, and no other alternative exists.

The aggrieved bidder, Resource (NI), went further and argued that, in awarding set-aside, the court should make an order simply that there be a new evaluation panel and that the new evaluation panel only needs to re-evaluate and re-mark the disputed portion of the tenders and nothing else. Again, the court considered that this challenge to the basic indivisibility of contract award procedures (and the set-aside remedy) is not supported by either the PCR or the underlying European directive, both of which anticipate an order setting aside the whole of the contract award decision.

THE *EASYCOACH* CASE

The *Easycoach* case arose out of a procurement run by the Department for Regional Development (DRD). This related to a selection of providers for pre-bookable transport services for people with disabilities in four areas in Northern Ireland. Easycoach submitted a tender but was told on 11 April 2011 that its tender had not been successful and that the contracts were to be awarded elsewhere. Easycoach brought an action in the High Court which triggered the mandatory automatic suspension; the court rejected an application by DRD for the automatic suspension to be lifted.

Easycoach claimed that aspects of the DRD selection criteria lacked objectivity and transparency, and it also challenged the way in which the DRD applied the selection criteria, claiming that the two successful bidders did not, in fact, satisfy the selection criteria.

The court provided a useful summary of how an authority should approach procurement processes. The obligation is to comply with the provisions of the PCR but also to comply with any enforceable EU obligation in respect of a public contract. There are various general principles that should apply:

- the authority must comply with the principles of equal treatment, non-discrimination, mutual recognition, proportionality and transparency;
- all tenderers must be reasonably informed of the criteria to be applied in identifying the most economically advantageous tender;
- notified criteria should enable tenders to be compared and assessed objectively;
- there is a distinction between selection criteria and award criteria in a procurement process. Selection criteria relate to the credentials, experience and track record of the bidder in order to ascertain whether it satisfies the required standards of economic and financial standing and technical ability. By contrast, the contract award criteria apply to the tender itself to determine which bid delivers the most economically advantageous bid; and

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- a bidder's experience and relevant projects, its manpower and equipment and its ability to complete a project by a specified deadline and permissible criteria only if confined to the selection of bidders rather than the award of the contract.

In the *Easycoach* case, the court concluded that the DRD's selection criteria were unlawful because they lacked objectivity and transparency. However, Easycoach could not demonstrate any resulting loss or damage. In addition, the DRD application of the selection criteria was unlawful as it breached the principle of transparency. The DRD was also guilty of manifest error in concluding that at least one of the winning bidders satisfied the mandatory criteria relating to the possession of a licence.

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