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## UK Public Procurement Law Digest: Evaluation and Discretion

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### Court rules on the flexibility that public authorities are required to give to bidders who do not comply with the rules

Under UK and EU procurement rules, if a bidder submits a tender that doesn't fully comply with the awarding authority's bid instructions, does the awarding authority have any discretion to admit that flawed tender? A recent decision by the High Court in England indicates that an authority does have such discretion, although it is not a discretion that the contracting authority is required to exercise, particularly where the cause of the non-compliance lies with the bidder. Authorities are within their rights to use even minor instances of technical non-compliance by bidders to reject otherwise valid tenders.

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### What is the case?

The case is *J B Leadbitter & Co Ltd v Devon County Council [2009] EWHC 930*, a decision made by the English High Court in respect of a claim brought by a building contractor, whose tender was rejected by the contracting authority on the basis that it was not properly submitted in accordance with the contracting authority's express instructions. The court held that the contract authority was within its rights to reject the incorrect tender.

### Why is this case important?

The basic rules of the EU and UK public procurement regime require that a contracting authority must act in accordance with the principles of transparency, equal treatment, and non-discrimination. This means that a contracting authority has to apply its criteria for decision making strictly and equally to all bidders and, if it makes any exception, the contracting authority would be

expected to grant the same exception equally to all bidders.

This case shows that these well-recognised rules are further augmented by the requirement that the contracting authority must act proportionately in making its procurement decisions. The proportionality principle manifests itself in a discretion to overlook some types of breach by bidders of the rules of individual procurements. So, a contracting authority may, in some circumstances, exercise its discretion to allow bids to stand even if they are technically non-compliant, e.g., by accepting a tender that is submitted after the prescribed deadline.

However, a bidder should not expect that a contracting authority is always obliged to exercise its discretion in respect of a non-compliant tender, particularly where a bidder has only itself to blame for the non-compliance. Authorities can stick tightly to the rules – and bidders must beware of any failure on their part to adhere strictly to those rules.

This case clearly shows that a contracting authority is not required to exercise any discretion it may have in such circumstances, as the requirement to act proportionally cannot override the requirement to treat all bidders equally in a non-discriminatory fashion and to act transparently. Authorities can, if they choose, continue to use apparently minor, technical non-compliance by bidders to reject tenders.

### **What happened in this case?**

In July 2008, Devon County Council (“Devon”) published a contract notice in the *Official Journal of the European Union*, inviting expressions of interest to tender for a four-year framework agreement under which construction projects could be procured by various public bodies in the South West of England. The framework was envisaged to have 12 participating contractors.

J B Leadbitter & Co Ltd (“Leadbitter”) was one of the 25 contractors who expressed an interest in participating, and was duly invited to tender. The Invitation to Tender (“ITT”), which was issued in November 2008, included a number of express instructions:

- tenders had to include a minimum of four completed case studies;
- each tender, complete with any attachments, had to be submitted electronically by uploading them to the specified online portal;
- bidders had only one opportunity to complete the submission of their tenders, and the onus was on each bidder to ensure that all documents were correctly uploaded (the ITT, as well as the covering letter that accompanied it, made it clear that an incomplete set of documents would render a tender invalid);
- the deadline for the submission of the tender was noon on 16 January 2009 (which was subsequently extended to 3 p.m. for all bidders);
- if a material and genuine error was discovered during the evaluation, the relevant bidder was to be given the opportunity to confirm or correct the error in its tender; and
- if absolutely necessary, limited supplementary information (excluding any main element of the tender, such as the case studies) could be submitted in a prescribed manner prior to the deadline.

On 16 January 2009, Leadbitter submitted its tender around noon but, shortly before the revised 3 p.m. deadline, it realised that it had forgotten (due to an error on its part) to include the case studies in its tender. Unable to submit the missing case studies electronically, Leadbitter emailed the case studies to Devon, acknowledging that it was not in compliance with the ITT instructions, but nevertheless asking Devon to allow the case studies to be taken into account.

Devon refused to accede to this request, noting that if it did not enforce the requirements set out in the ITT, it would lay itself open to claims that it was not being fair and transparent. Leadbitter subsequently issued proceedings against Devon alleging, amongst other things, that there was a duty on Devon to act proportionately in making its procurement decision and that Devon acted disproportionately by refusing to waive the strict requirement for compliance with the ITT instructions and refusing to accept its case studies.

Devon sought to argue that there was no such duty because, whilst the EU Directive which underpins the UK procurement regime imposes an express duty of equal treatment, non-discrimination, and transparency on contracting authorities, the same Directive did not impose an express obligation on contracting authorities to act proportionately.

The court referred to a series of cases on this issue, and noted that any decision that a contracting authority makes in its procurement process is indeed subject to the principle of proportionality, as noted in a recital to the Directive, despite the absence of express reference to it in the operative terms of the Directive and the regulations implementing it in the UK.

The court then concluded that, since the strict requirements relating to the submission of tenders in this particular case applied equally to all bidders and that the requirements were clearly and well understood by Leadbitter itself, Devon was within its right to reject Leadbitter's tender because "*Fairness to all tenderers, as well as equal treatment and transparency, required that these key features should be observed*". Thus, if an authority is minded to exercise some discretion to act proportionately and overlook a bidder's technical non-compliance, it must do so equally, fairly, and transparently to all bidders.

The court accepted that "*There may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender*", but took the view that even if such a discretion existed, "*there is no requirement to do so, particularly where, as here, it results from a fault on the part of the tenderer*".

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