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# UK Public Procurement Law Digest: Framework Agreements

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**Court rules on evaluation criteria and limitation periods in respect of framework agreement procurements.**

A recent decision by the High Court in Northern Ireland highlights two interesting issues relevant to framework agreements. Firstly, in setting the evaluation criteria for a framework agreement procurement, a contracting authority may not rely solely on non-economic evaluation criteria. Secondly, in the event of a procurement challenge, the limitation period for bringing a claim does not always start at the point when the relevant flaw in a contracting authority's decision is first disclosed to the bidders.

**What is the case?**

The case is *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 2) [2008] NIQB 105*, a decision made by the Northern Irish High Court in respect of a claim brought by a consortium of building contractors, who unsuccessfully tendered for a framework agreement relating to a series of construction projects that the Department of Education for Northern Ireland ("DoE") sought to implement as part of the Northern Ireland Schools Modernisation Programme ("NISMP") over a two-year period at a cost of £550 – 600 million.

**Why is this case important?**

This case clarifies the degree of completeness required of the evaluation criteria adopted when an authority seeks to award a framework agreement. Specifically, the Court's decision makes it clear that a contracting authority which seeks to award a framework agreement to the bidder submitting the most economically advantageous tender has to ensure that its evaluation criteria include some assessment of the price or cost of the work to be undertaken, or services to be performed. Thus, while price is not a mandatory element of the "most economically advantageous tender" criterion, and while it is open to a contracting authority to adopt a series of predominantly non-economic evaluation criteria, price or cost must be a part of the evaluation in some form.

A contracting authority that does not require framework bidders to provide any price/cost information and instead relies solely on non-economical evaluation criteria such as fee percentage or qualitative assessment will run the risk of rendering its procurement process unlawful.

This case also indicates that, for the purposes of the time limit for bringing proceedings against contracting authorities, where the flawed decision (*e.g.*, a decision to adopt incorrect evaluation criteria) was capable of being remedied by the contracting authority prior to the submission of the final tender, the clock does not start until the contracting authority actually implements its decisions (*e.g.*, the flawed evaluation criteria are actually applied in selecting the successful bidders).

The contracting authority in this case had argued that more than three months had elapsed since the claimant's cause of action arose and, thus, under the procurement regulations its claim was time-barred and the Court ought not to extend the time limit for complaint. The Court quickly identified public policy reasons in exercising its discretion to extend the time limit, particularly in respect of large-scale public procurement projects that have a significant implication for the public in general.

**What happened in this case?**

In March 2007, DoE published an OJEU notice, advertising its intention to award framework agreements in respect of a series of construction projects relating to NISMP. The OJEU notice, among other things, stated that the framework agreement would last for two years, and be awarded to up to eight participants, and that the estimated total value of various construction projects to be awarded under the framework agreement was £550 – 650 million.

The ITT documents were issued in June 2007 and the deadline for the submission of tenders was in early August 2007. DoE provided information in response to requests for clarification made by the bidders at various stages of the procurement process. The selection of successful bidders was to be made on the basis of the most economically advantageous tenders, and the evaluation criteria adopted by DoE consisted of 80% qualitative criteria, and 20% commercial criteria. Crucially, the assessment of commercial criteria was to be based on various fee percentages and did not require the bidders to submit any specific costing information.

Henry Bros (Magherafelt) Limited, which had formed a consortium (the "Consortium") together with three other building contractors, duly prepared and submitted a tender. However, the Consortium's tender was rejected by DoE in October 2007. A month later, the Consortium issued proceedings against DoE alleging, among other things, that DoE acted in breach of the procurement rules by failing to require the bidders to submit a price, or to produce representative costing examples or historic examples of pricing.

Before the Court, the Consortium argued that the assessment of the economic advantages of the different tenders was not possible without an analysis of the comparative price or cost of each tender, due to the very meaning of the words "economically advantageous". On the other hand, DoE argued, among other things, that:

- as the contracting authority, it had a wide discretion to choose the criteria to be applied and that there was no need for each of the assessment criteria it adopted to be economic in nature;
- in assessing which tender was the most economically advantageous, it was not necessary for a contracting authority to include any evaluation criteria relating to price because, in the construction industry, the basic cost of doing the work should not vary greatly from one contractor to another, due to the fact that different contractors would be sourcing their labour and materials from the same market, *i.e*., Contractor A will pay the same for a cubic metre of concrete or a quantity of bricks as Contractor B; and
- the Consortium's claim was time-barred. Specifically, DoE argued that any alleged breach of procurement rules by DoE would have occurred, at the latest, in June 2007 which was the time when the relevant information regarding the evaluation criteria was disclosed to the bidders in the ITT documents. Therefore, DoE argued that the Consortium's claim, which was formally asserted in November 2007, was not made "*within 3 months from the date when grounds for the bringing of the proceedings first arose…*" (Regulation 47(7)(b) of Public Contracts Regulations "PCR")

The Court disagreed with DoE on these points, and concluded as follows:

***Financial Evaluation Criteria***
While nothing in the PCR restricts the type of evaluation criteria that a contracting authority can choose, and a contracting authority does indeed have a wide discretion in choosing the evaluation criteria, it is still not open to a contracting authority completely to omit criteria relating to price/cost for the purposes of assessing the most economically advantageous tender for framework agreements. This is because "*unless the cost or price of the relevant goods or service* [is] *fixed or not in dispute, it would be very difficult to reach any objective determination of what was or was not economically advantageous without some reasonably reliable indication of price or cost in relation to which other non-price advantages might be taken into account*".

In the opinion of the Court, a fee percentage could be part of valid evaluation criteria, but it could not be used on its own to determine the actual of cost of any individual project without the addition of further information such as rates and costs of materials because, depending on the circumstances, different contractors might be in a position to provide discounts and more advantageous prices, and also because not all contractors were equally efficient – in other words, capital costs would be a relevant element determining the most economically advantageous tender.

Accordingly, where the bidders were only required to submit such additional information at the secondary competition (*i.e*., competition among the successful bidders for specific contract(s) to be awarded under the framework agreement), the omission of requirements for such additional information at the primary competition stage rendered the primary competition (*i.e*., competition among bidders for inclusion in the framework agreement) unlawful.

***Time Limit for Claims***
In the particular circumstances of this case, while there was a flaw in the evaluation criteria that DoE adopted and disclosed to the bidders, the actual breach of the PCR by DoE did not take place until DoE actually applied the flawed evaluation criteria to the submitted tenders, because, until that point, "*It was open to the Department to amend or otherwise modify the criteria and the manner in which they were to be applied at any stage prior to the impugned decision, a right that was specifically reserved* [in the information previously disclosed to the bidders, as well as the instructions given to the bidders who submitted their tender.]".

In the opinion of the Court, this case differed from a situation where a crucial part of the aggrieved bidder's claim was based on the contracting authority's failure to disclose the evaluation criteria before the tenders were submitted (*e.g.*, in the ITT documentation). In such case, it could legitimately be argued that a claim ought to be time-barred, but this was not so in this particular case.

The Court also took the view that, even if the Consortium's claim was time-barred, the Court was still entitled to exercise its discretion to extend the time limit under Regulation 47(7)(b) of PCR, because there was good reason for doing so. In so concluding, the Court noted that:

- due to its very nature and scale of the NISMP, it was "*a matter of considerable importance and public interest*"that any concerns about the legality of the tendering process for the NISMP was dealt with at the earliest opportunity;
- because the tendering procedures adopted by DoE in this case may well have been, or was about to be, used by the government in respect of other public projects, it was important that "*any potential defects are timeously remedies*"; and
- the merits of the parties' arguments were fully, exhaustively, and competently argued over a number of days by the parties, and "*it would be somewhat regrettable if the matter were to be ultimately resolved at this stage on the basis of a limitation issue*".

Having decided the substantive issues in the Consortium's favour, the Court went on to consider the remedies and held that the framework agreement had to be set aside. Readers interested in this aspect of the case are directed to the judgment in *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 3 Remedies) [2008] NIQB 153*, which is discussed in a previous MoFo Legal Update (see Sourcing Update, January 15, 2008).

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