



Construction, Engineering
and Infrastructure

Tendering: legal rights and obligations when considering tender submissions

----- or -----

***'Love my tender?' The risk of non-reciprocation
remains, but do submitted tenders need to be
considered fairly?***

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Overview...

- Submitting a tender starts a contractual relationship, but on what terms?
- Do those terms include a duty on the procuring party to behave fairly?
- Courts will support an Authority's exercise of discretion, but how should this flexibility be exercised whilst remaining fair?
- Suggestions to help the procurement process stay afloat



Introduction: Setting the scene

- New infrastructure projects for Hong Kong
- Sophisticated procurement processes
- Competition for success is increasingly fierce
- What do bidding companies want? Perhaps...
 - to be treated fairly and even-handedly
 - to be judged independently, impartially
 - opportunity to rebut unfair assessments



The tension in tendering

- **Bidders** seek:
 - Consistency in decision making
 - Equal treatment of bids of equal merit
 - Transparency of awards
- **Public Authorities** seek:
 - Lowest price, or best value for money over the lifespan of the project?
 - Flexibility to specify to new trends / techniques
 - Social and Environmental public agenda
 - A defence against trouble-makers?



Possible grounds for objection (1)

- (International procuring rules)
- (Hong Kong procurement rules)
- Contractual rights and obligations
 - Express
 - Implied



Possible grounds for objection (2)...

'Invitations to treat', or 'process contracts'?

- ***Hughes Aircraft Systems International (1997)***

recognised the "process contract":

- Offer
- Acceptance
- Consideration
- Intention to create legal relationship



- Although the contract terms will change:

Breach of a 'Request For Tender' = Breach of Contract



Possible grounds for objection (3)...

The tender criteria

- Value for money
- Most economically advantageous tender
 - experience
 - price and profitability
 - period for completion
 - technical merit
 - manpower and equipment
 - etc...



2008 cases – Objections to bid criteria

- EMM G **Lianakis** AE and Others v Municipality of Alexandroupolis
- Letting International Ltd v London Borough of Newham

A contracting authority cannot apply weighting rules or sub-criteria that it has not previously brought to the tenderers' attention.



Likelihood of an objection?

What's at stake?

- Significant financial returns and high bid costs
- Temptation to challenge procedural integrity
 - Damages for breach of contract
 - Injunction to prevent award of main contract
 - Other commercial negotiated remedy
 - Manipulation of the won contract, after the award



Non-Conforming bids (Case 1):

China Harbour Engineering v The Secretary for Justice

- Rival bid *seemed* non-compliant with the requirements of the Request for Tender.

- Contrast:

"Failure to price the tender in accordance with the above condition may invalidate the tender",

with:

"A tenderer in breach of this clause shall have its tenders disqualified"

- The Court supported the award.



China Harbour Engineering v The Secretary for Justice

- Discretion supported by the courts, if the contract allows this.
- But mandatory rules setting out how tenders are to be evaluated must be complied with.



- 'Fairness' was **not** a relevant consideration.



Non-Conforming bids (Case 2):

Double N Earthmovers v City of Edmonton



- Equipment & operators for landfill refuse removal
- Express term of process contract set cut-off date for machinery: 1980

"Bidders are advised that all the instructions... must be strictly complied with and failure to do so... may invalidate the bid in question."

- Apparent breach of process contract terms
 - Non-compliance?
 - Unfairness?



Double N Earthmovers v City of Edmonton

Held:

- Winning bid *deemed* to have complied with the tender conditions.
- No obligation to investigate further, endorsing the Court of Appeal view that:
“ The best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information.”



The minority view



- Non-compliance of fundamental term of the tender conditions.

"Although in some business contexts parties might decide to turn a blind eye to contractual inaccuracies and ambiguities, the tendering process is different...fairness and integrity are.. paramount"

- A breach of minimum level of care expected of the public authority.
- Unfair behavior = damage to tender integrity

"Approaching the tendering process in this manner encourages precisely the sort of duplicity seen in the present appeal."



What is at stake?

- Courts support the discretion of public authorities who are letting tenders
- Neither court decision turned on the issue of fairness, or addressed the issue of integrity.
- What practical concept of 'fairness' could be included in future tendering procedures?



Judicial Review (an aside)



- Not a question of 'administrative law' and possible judicial review.
- (An act may be 'ultra vires' where it evidences:
 - illegality,
 - irrationality, or
 - procedural impropriety).
- JJ Richards & Sons v. Bowen Shire Council (2008)



'Good faith and with fair dealing'

- Recognised in Australia, New Zealand, Northern Ireland
- Growing trend in other jurisdictions
- *Pratt Contractors Ltd v Transit New Zealand*
- For panel composition, both **positive** and **negative** experience are relevant qualifications



Practical application of fairness...

- *Gerald Martin Scott v Belfast Education Library Board*
 - the nature and application of the *procedures* specified in the process contract;
 - the assessment of the tenders according to the stated bid *criteria*; and
 - the application of the tenders in a *uniform manner* and as *intended* by the tender documents



Technical Dialogue



- Advantages / Disadvantages?
 - additional information or preparation time
 - closer relations developed with the procuring team
 - influence over the tender criteria to more closely align them with the bidder's own strengths
- *Fabricom SA v Belgium (2005)*



Technical Dialogue (2)

- Use technical dialogue, but fairness demands:
 - organising extra meetings
 - universal release of all relevant information;
 - exclude tarnished employees / set firewalls;
 - use one non-tendering party as consultant.
- Is the tender process handcuffed? Is **innovation** hindered?





The shadow at the window...

- Cynical ploys are not imaginary and commercial nuisance (or worse) by unsuccessful bidders is a disturbing phenomena
 - Griffin Energy (2006)
 - Telstra Communications (2007)
 - **Varec SA v Belgium (2008)**
- The challenge for public authorities: apply fairness to find the optimum balance of sufficient and efficient competition



Conclusion



Additional rules for fairer engagement (1)

1. Identify the tender materials carefully: do **internal procedures** conform with the process contract?
2. Recognise transparency and certainty, as well as flexibility and discretion
3. Identify the 'mandatory requirements' of any bid submission clearly, and obey / enforce accordingly
4. Consider how to act in **good faith** and with **fair dealing**: use discretion as last resort?



Additional rules for fairer engagement (2)

5. Consider engaging a 'probity advisor / auditor' to give objective expert advice
6. Select assessment panels for their experience, both positive and negative
7. Consider parallel bid techniques, to encourage openly non-conforming ideas
8. In any challenge to the award, protect the confidentiality of other participants



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L A W Y E R S

