

Impact of High Court Decision on DRD's unlawful rejection of Abnormally Low Tenderer



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On 21 June 2016, Mr Justice Colton ruled that the Department for Regional Development (“DRD”) were in breach of Public Contract Regulations 2006 by rejecting a tenderer’s bid for a design and construct roads contract. The basis of his decision revolved around DRD’s failure to comply with proper procedures when dealing with a possible abnormally low tender (“ALT”). The contract was for the design and construction of the A8 dual carriageway between Belfast and Larne. This contract had an estimated value of £100million.

The excluded tenderers, FP McCann and Balfour Beatty entered into a joint venture to tender for the works (“BBMC”). During the tender evaluation process it was deemed that BBMC’s bid was an ALT. BBMC argued that they were the most commercially viable option, as they had the lowest priced bid, and as such they had been unfairly rejected. BBMC claimed the decision was unlawful and therefore sought damages for the loss caused as a result of their exclusion.

In making his decision Mr Justice Colton stated that the principles of the procurement Regulations, those being:

- equal treatment between tenderers;
- the objective nature of these assessments;
- the transparency of how these processes were run; and
- the proportionality for deciding to exclude tenderers,

were not satisfied by DRD.

The tender process was ran in accordance the Public Contracts Regulations 2006 (PCR 2006). Regulation 30 of the PCR 2006 has now been superseded by the Regulation 69 of the PCR 2015, which came into force on 26 February 2015, and is now applied to all contracts in the UK and Northern Ireland procured after this date. Regulation 69 PCR 2015 requires more substantive and robust responses to be provided to tenderers who appear to be abnormally low in relation to works, supplies or services

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The parts of PCR 2006 that related to BBMC's exclusion (for being a potential ALT) are Regulations 30(6) and 30(7). These state that if a tenderer's bid appears to be abnormally low, then the Contracting Authority may reject it, only after it has taken a number of steps. These steps include:

- requesting in writing that the bid be explained in relation to the parts that contribute to it being abnormally low (6(a));
- the CA must take into account the evidence provided in the tenderer's response (6(b)); and
- the CA must subsequently verify the offer with the tenderer themselves (6(c)).

DRD argued that they had sent several tender clarifications during the process attempting to clarify the price and position of BBMC, however, Mr Justice Colton stated that not only was this not sufficient, but that there were several matters that were of grave concern in the administration of the process. In summary, DRD did not follow the proper procedures set out above.

In brief, the breaches of procedure that DRD carried out are as follows:

1. BBMC were not given the opportunity to explain matters as required by 30(6)(a);
2. DRD failed to verify the parts of the offer that were abnormally low under (30(6)(c)); and
3. matters external to the recommendation to exclude contributed to the actual decision to reject the bid from BBMC.

Mr Justice Colton ruled that on the evidence provided by BBMC, that although a potential risk of a tenderer putting in an unrealistic bid existed in such a high risk project, it was ultimately DRD's failure to follow a proper procedure that led to his decision to award damages for breach of the Regulations and refusal to award the contract to the most commercially viable tenderer.

Mr Justice Colton adjourned the case to allow assessments and timeframes for the payments to be made in due course, however he stated that DRD's breach "*should be marked by a meaningful award to reflect the loss of opportunity to the plaintiff to be awarded a significant and potentially lucrative contract*", Putting these figures in context, and keeping in mind this contract was worth upwards of £100million; an estimated potential profit margin of, for example 10%, may lead to DRD paying out upwards of £10million.



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Conclusions

It is extremely disappointing that this decision has come about, as the problem of ALTs has existed for some time, and will likely now become worse. The real problem that will arise out of this decision is an overly prescriptive and risk adverse policy that Contracting Authorities will now take, even more so than occurs already. This will lead to procurement processes taking longer and likely lead to increased costs, as well as an encouragement for unsuccessful tenderers to bring a challenge.

The ultimate reasoning behind Mr Justice Colton's decision was that DRD did not follow proper procedures and guidelines set out in the Regulations. If they had done so, and complied with Regulations 30(6) and 30(7), this problem would not have arisen in the manner manifested.

Lessons to learn for Contracting Authorities is that you must have a robust and fair system in place, not just for the identification of abnormally low tenders, but for the evaluation and reasoning for the exclusion of such. As stated above the procedure and process for dealing with abnormally low tenders is now found in Regulation 69 PCR 2015. These however should be followed as guidelines, not straightjackets to increase the administrative burden and cost impact of procurement process.

For more information on abnormally low tenders and the impact of this decision, as well as the running of compliant processes and exclusions of ALTs please get in contact with Quigg Golden or contact Edward.Quigg@QuiggGolden.com.



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