Re-scoring tenders in public procurements
Woods Building Services v Milton Keynes Council

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In this article, the recent case of *Woods Building Services v Milton Keynes Council [2015] EWHC 2011 (TCC)* is looked at and the implications it has for contracting authorities and tenderers alike.

At the end of 2014, Milton Keynes Council ("*the Council")* sought to award a £8m, four year framework agreement to a single-supplier for asbestos removal. The incumbent supplier of these services was Woods Building Services ("*Woods*"); however, they lost out to European Asbestos Services ("*EAS*"). At paragraph [3], Coulson J quite succinctly described the dispute as "*really a claim about the specific scores awarded to EAS and Woods*" during the tender evaluation process.

Woods' claim was in three parts, namely, there had been a breach of the duty of quality, a breach of transparency and there had been manifest errors on the part of the Council in marking tenders. In deciding the case, Coulson J elected to focus on the "*main thrust of the allegations*" – as he put it – which was manifest error. It was also noted during the trial and in the judgement that it has been quite some time since the Court has been asked to work through the responses to a tender process in the way the trial judges did in *Lion Apparel Systems Ltd v Firebuy Ltd [2007]* EWHC 2179 (Ch) and *Lettings International Ltd v London Borough of Newham* [2007] EWCA Civ 1522.

Of the 12 questions comprising tenderers' quality submissions considered by the judge, he found that the Council had erred in a manifest way in eight of the questions. An example of this was Question 1, which asked tenderers to provide a method statement setting out their proposals to meet the requirements of the service information. Part of that service information included reinstatement works which, on the evidence, was in the region of £3.2m. In spite of the fact that they did not address reinstatement works at all in their answer, EAS scored 10 out of 10. As such, Coulson J adjusted their score to zero.

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This case is a big wake up call for contracting authorities. It has been the prevailing opinion for many years now that the Courts are extremely reluctant to interfere with the opinion of a contracting authority in respect of awarding marks for quality submissions. Whilst this case does not change the law, it is a timely reminder to contracting authorities that the Courts will intervene when necessary.

The apparent root cause of the Council's difficulties were that they did not have adequate procedures or guidelines for carrying out tender assessments. For example, no conflict of interest checks were undertaken (which, on the facts of this case, should definitely have occurred), there was no mechanism for recording the scores and comments of the assessment panel and, critically, they did not have well drafted indicators (or sub-criteria) for awarding marks.

There are points to take from this for tenderers as well. At paragraph [40] of the Judgement Coulson J stated that, in his view, "*an informed reader would think that EAS answers were almost studiedly vague, strong in aspiration and management-speak, light on detail.*". The judge then went on to highlight Question 5 (Health & Safety) and Question 9 (Communication Procedures) as examples from EAS' tender that suffered from these mischiefs.

Whilst the Judge's comments were aimed at the Council – in terms of how they should not have awarded EAS such high scores – they should serve as a reminder to tenderers for public sector contracts that they should be wary of submitting 'off-the-shelf' responses. For those of us who are regularly involved in the assessment of public tender quality submissions, the criticisms levelled at EAS by the judge are all too familiar. In short, contracting authorities should not and cannot award high marks for these sorts of responses.

For further information, please see the contact details above.