Public Sector Procurement – Reasons for Decisions

RPS Consulting Engineers Limited v Kildare County Council

[2016] IEHC 113 (15 February 2016)

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Mr Justice Humphreys opens his judgment in the above case by asking rhetorically:

> *"When a public authority awards a contract, it is required by Irish and EU law to give unsuccessful tenderers the reasons for its decision. But what level of reasons is required?"*

The purpose of this article is to succinctly set out the findings of Mr Justice Humphreys in response to this very important question.

In order to understand the judgment handed down it is useful to understand a little of the background and circumstances before the Court;

In brief summary; Kildare County Council (*the "Council")* ran an above threshold procurement competition seeking engineering consultancy services. RPS Consulting Engineers Limited (*"RPS*") competed, and was informed by the Council that they were unsuccessful.

The reasons provided by the Council to RPS in their standstill letter were along the lines of:

- In response to criterion A1 the reasons provided were; *"your response to this criterion was of a good standard. However, compared to the successful tenderer, it lacks sufficient specific details on new studies and reports that would be required going forward";* and

- In response to criterion A2 the reasons provided were; *"your response to this criterion was of a very good standard however, the successful tenderer provided more relevant and specific experience/lessons learned in recent public works contracts".*

The responses provided by the Council continued in this vague and generic form. The same or similar stock reasons were provided to each of the losing tenderers. This approach and this type of generality will come as no surprise to anyone familiar with the briefings provided by contracting authorities at award stage.

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On receipt of the standstill letter RPS wrote to the Council stating that they did not understand how such substantial quality scores were lost and that the comments provided did not enable them to determine the relevant advantages of the preferred bidder. RPS challenged the overall transparency of the Council's feedback and requested more detailed information.

The Council responded with more generic statements such as that the tenders were *"assessed and scored appropriately on a comparative basis".* In the rounds of correspondence which followed the Council again failed to provide any meaningful detail or information of substance. In short the Council did not add anything to the little information they had already provided.

Despite the numerous legal arguments and information before the Court leading to a 47 page judgment, the crux of the matter was, as Mr Justice Humphreys stated himself at paragraph 29, *"there is essentially one basic point in the case, namely whether the Council provided sufficient reasons for its Decision".*

So, did they?

The framework of European Law includes a two stage process for feedback to tenderers. Initial information must be provided automatically without request; this is commonly known as the contract award letter and signals the start of the standstill period. However, there is also an entitlement in the part of candidates to request to receipt of more detailed information.

When looking at the level of detail of the reasons required to be provided by a contracting authority the Judge made the following observation:

> *"It is clear that "bespoke" reasons are required because it is a comparison between each individual tender and the ultimate winner that is at issue. The uniform and generic nature of the three notification letters in this case illustrates a fundamental failure to address this issue."*

So, what level or how bespoke must the reasons provided by contracting authorities be? Mr Justice Humphreys findings are as follows:

- contracting authorities must give reasons as to the relevant characteristics and advantages of the winning tender. This involves comparison between the winning tenderer and the particular unsuccessful tender, i.e. the reasons need to be tailored to the tender being rejected;

- In order to set out the characteristics and relative advantages of the successful tender, the contracting authority must at least mention the matters which should have been included in the applicant's tender or the matters contained in the successful tender. The statement of reasons must therefore be sufficiently detailed to explain how the winning tender was advantageous by reference to particular examples or facts supporting a general assertion of relative advantage.

- Where an unsuccessful tenderer's price was more competitive than the winning bid, and thus the qualitative criteria was the determining factor, there is a heightened obligation to give detailed reasons.

The above now acts as a guide to the type and level of information which contracting authorities must provide in the feedback letters to tenderers. Not only does the judgment raise the level of detail and extent of information to be supplied from the standard practice, but Mr Justice Humphreys also appears to extend the obligations for contracting authorities.

The giving of proper reasons as a matter of automatic routine, does not do away with the requirement to respond lawfully to any request for additional reasons. Mr Justice Humphreys makes the analogy by comparing this situation with that of a public body circumventing its duties under the Freedom of Information Act 2014 by publishing all records that it believed were open to disclosure and then declining to respond to any FOI request made thereafter.

Justice Humphreys states that the EU Directive envisages a dialogue between the unsuccessful tender and the awarding authority, whether this stretches what the EU intend to do or not is a moot point but the law handed down in this decision certainly goes a lot further than what was previously the accepted common practice.

It is not clear from the judgment what additional information is required to be provided when a request is made, especially where contracting authorities are of the opinion that they have already disclosed all relevant information in a standstill letter. However, to focus on Justice Humphreys' expectation that a dialogue is expected may be a useful starting point for contracting authorities. It is also clear that a rehash of the reasons provided within the standstill letter will not suffice.

This judgment is something of a game changer. As this is a Republic of Ireland case it will be binding as precedent in that jurisdiction only. However, it will also be persuasive within the United Kingdom and Northern Ireland. In all of these jurisdictions contracting authorities would often try to play it safe by providing generic reasons, as there was a general nervousness and feeling that the more detail a contracting authority provided the more they were leaving themselves open to challenge. More information was effectively seen as providing further ammunition which could be used to challenge them. However whilst this case remains good law contracting authorities, certainly in the Republic of Ireland, must commit to the marking process entirely. Providing generic reasons will no longer be enough as this case pushes the contracting authorities' role closer to that of providing a constructive bespoke critique of each bid.