There's a Process for excluding low Bids – use it properly or don't do it! Another successful Challenge against Award of a substantial Government Project

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Introduction

Mr Justice Colton, sitting in the High Court in Belfast, concluded last week that the Department for Regional Development was in breach of the Public Contracts Regulations 2006 in respect of the award of a contract to design and construct the A8 dual carriageway between Belfast and Larne. In short, he found that the Defendant's decision to treat the tender submitted by the Plaintiff, FP McCann Ltd (and its JV partner Balfour Beatty), as an abnormally low tender was flawed, though not necessarily manifestly unreasonable. He held that an award of damages on the basis of loss of a chance was however the appropriate remedy for the breaches of Regulation 30 and has invited the parties to make further submissions as to quantum.

The facts in brief

In 2009, FP McCann Limited as part of a joint venture with Balfour Beatty (referred to by the judge as "BBMC") submitted a tender for the contract to design and construct the A8 dual carriageway. The Defendant, through the Roads Service, was responsible for the public procurement of the contract. There were two phases to the completion of the work in the A8 contract. For Phase I, the successful bidder was to be the consultant who designed the new road and progressed it through to a public inquiry. The consultant under Phase 1 would then become the engineering and construction contractor under Phase II subject to a number of condition precedents which included the agreement of a target cost for Phase II. The contract in this case had an estimated value of between £80m and £100m and was to be awarded on the basis of the most economically advantageous tender.

The Instruction to Tenderers (ITT) detailed an evaluation procedure which included a commercial submission accounting for 20% of the weighting. The tender did not seek rates for the totality of the work, which would only be known after Phase I, but sought rates on the following indicative areas (selected on the basis that they be would likely to show the most significant variation in tendered price): core management team; drainage works, earth works, pavements; structures; and fee.

After a review of the tenders received, the Roads Service issued a clarification request to BBMC which stated that a number of the rates submitted by it (in relation to drainage, earth works, pavements and structures) raised a concern and may be abnormally low. BBMC replied to this request with extensive information. There followed a second clarification request seeking further clarification again relating to rates in respect of drainage, earth works, pavements and structures. Following BBMC's response the tenders were then evaluated by a Commercial Evaluation Panel ("CEP"), appointed by the Defendant, which produced a report and recommendations. The report concluded that the BBMC's bid was abnormally low in a number of specific respects and that there was a risk that BBMC and Roads Service would not be able to agree a target price under the contract and that the project would not therefore proceed to Phase II.

It was also clear from the report that the BBMC bid was the lowest price under the commercial submission in the tender and, were it not to have been assessed as abnormally low, it would have been awarded the contract. Apparently on the basis only of the documents put before the Roads Service the decision was made to award the contract to the Lagan Ferrovial Costan Consortium during a meeting of the Roads Service Board at which no member of the CEP was present.

The plaintiff contended that BBMC ought to have been awarded the contract and the decision not to do so was unlawful. The company sought damages for the loss and damage it claimed it had suffered as a result of that refusal.

The applicable law

The central question was whether the Defendant was in breach of Regulation 30(6) of the 2006 Regulations which at the time set out the procedure for rejecting bids considered to be abnormally low. There was little dispute before the Court as to the applicable law underlying the approach to that question which was predicated on the principles of fairness, equality of treatment, objectivity, transparency and proportionality. The court undertook a review of the case law relating to the role and standard of the court's review in relation to manifest error of assessment (namely *BY Developments v Covent Garden* [2012] EWHC 2546, *Amey v Scottish Ministers* [2012] CSOH 181, and *Lion Apparel Systems v Firebuy* [2007] EWHC 2179) which together describe the role of the court is a limited one and not one that involves a comprehensive review of the tender evaluation process or a substitution of its own view as to the merits or otherwise of the rival bids. The role of the court is to supervise the way in which the process has been carried out and to review whether proper procedures and basic principles underlying the procurement rules have been respected. The standard of review to be carried out by the court is to ensure that the principles for public procurement have been complied with, that the

facts relied upon by the authority are correct and that there is no manifest error of assessment or misuse of power. Colton J also observed that no European or domestic decision provides a single definition of "abnormally low tender" but refers to various concepts such as reliability, viability and genuineness and he appeared to take guidance from Lord Hodge in Amey that Article 30 is directed to assessing whether the bid is one that is likely to provide the contracting authority with the services which it seeks.

The judge's conclusions

Colton J concluded that that having considered all the evidence he had a number of concerns about the tender process in this case. He categorised his concerns as follows:

(1) Matters which were expressly excluded by the Defendant as contributing to the recommendation in fact did or may well have contributed to the actual decision taken by the defendant to reject the plaintiff's bid.

No member of the CEP was present when the Board reached its decision on 16 December 2009 and the judge concluded that the decision must have been formed on the basis by the CEP papers produced at the meeting. A consideration of these papers suggested that the low rates tendered for the core management team, the fee and drainage were likely to have contributed to the CEP's recommendation that the bid was abnormally low, and hence the Board's decision, notwithstanding the fact that the Defendant claimed in evidence that these matters were discounted as reasons for the bid being abnormally low. That they were matters which did inform the ultimate decision was also supported by the Defendant's "debrief note" prepared for the debrief meeting with the Plaintiff.

(2) BBMC were not given the opportunity to explain matters which ultimately contributed to the decision to reject the tender: under Regulation 30(6)(a) an authority must request in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low before it can come to any decision that a tender is abnormally low.

The judge concluded that the tender clarification requests focused on the areas of drainage, earthworks, pavements and structures but no clarification was sought in respect of the fee and core management team prices which he found had probably contributed to the decision to reject the tender. Mr Justice Colton concluded that this constituted a clear breach of the requirements of the Regulations. He also considered under this heading that concerns the Defendant held in relation to risks arising from the Plaintiff's involvement in another tender process (for the A5 motorway) which may have affected their decision in this tender were not raised with BBMC.

(3) The Department failed to comply with its obligation to verify the offer or parts of the offer which were allegedly abnormally low: an express requirement of Regulation 30(6)(c).

Mr Justice Colton said it was clear from the evidence that the primary concern of the defendant was whether or not it could agree a target cost with the Plaintiff. The defendant claimed that if the prices were abnormally low or unreliable, there was a real risk that they simply could not form the basis of a credible agreement. The judge said that: "Put simply or crudely, this type of contract is potentially open to the risk of a tenderer putting in an unrealistic bid to ensure it wins the contract and after the completion of Phase I seeks to negotiate prices upwards". He accepted that it was clear that a key part of the Department's thinking was that based on the rates provided by BBMC they would not actually agree a target cost. This concern however was not made clear to BBMC in spite of the fact that an internal document sought to forecast the likely target cost based on 3 different scenarios. Colton J concluded that in terms of what is required under the Regulations for verification at the very least includes a requirement that the economic operator be told of the authority's concerns and an element of engagement between the authority and the operator whereby the authority explains the basis and reasons for its decision. Proper compliance with the Regulations would have given BBMC the opportunity to submit further information or evidence if it wished. He considered in these circumstances that there had been a breach of Regulation 30(6)(c).

(4) Other concerns. Mr Justice Colton also had concerns about the way in which the matter was "dramatically" presented to the Board which he said clearly gave rise to an immediate concern about the reliability of the tendered figures. Of greater concern was the issue of bitumen prices quoted by BBMC which the judge said played a role in the defendant's determination that the plaintiff's tender was abnormally low. The CEP's commercial assessment report described BBMC's rate for the supply of bitumen as being "significantly lower than the current market rate", stated that "the only way of securing these rates is through a hedge fund arrangement" and advised that "this is a high risk procurement strategy with no guarantee of success". The judge accepted evidence, however, that the rate quoted by the plaintiff was indeed a sustainable rate. This, he concluded undermined the robustness of the efforts made by the Defendant to validate the Plaintiff's tender and assess the clarification responses. Mr Justice Colton said this confirmed his view that there were significant flaws in the process adopted in assessing the plaintiff's tender and that the defendant's may have taken a different decision had they been aware of the true position in relation to bitumen rates:

"These concerns lead me to the view that there has been a clear breach of duty by the defendant in respect of its consideration of the BBMC bid and specifically a breach of Regulation 30. I consider that if these matters had been

properly dealt with there was a significant chance that the decision in this case would have been different."

In spite of that conclusion however, Colton J accepted that there remained concerns about the rates tendered in respect of earthworks, pavements and structures and although he was not well placed to assess matters of commercial judgment, he was left with the view that there were real and legitimate concerns about whether the rates were in fact reliable and were capable of sustaining a conclusion that those parts of the bid were abnormally low. He considered it was open to the Defendant, properly advised, to come to the view that the whole offer was in effect abnormally low: he did not therefore find that the defendant was wrong or guilty of manifest error of assessment in this regard.

Mr Justice Colton concluded his findings as follows:

(i) He found that the defendant was in breach of Regulation 30 of the Public Contracts Regulations 2006 and was guilty of a breach of duty to the plaintiff;

(ii) There was a significant chance that the Defendant may have taken a different decision were it not for those breaches;

(iii) He did not conclude that BBMC would necessarily have been awarded the contract as he took the view that many of the concerns raised by the CEP in relation to the tender could have supported a conclusion that the bid was abnormally low;

(iv) On the basis that it was not open to him to set aside the award of the contract and remit the matter to the Defendant, an award of damages was appropriate;

(v) The loss to the Plaintiff is in effect a loss of chance to obtain the contract in accordance with Chaplin v Hicks principles;

(vi) He would give the parties the opportunity to make further submissions in relation to how such damages should be assessed but remarked "the defendant's breach of duty 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".

Comment

This case is what now seems to be a rare victory for the claimant. It does not however seem to take the case law much further in relation to manifest error of assessment. Indeed, in spite of the fact that the existing case law was cited in the judgment, no part of it rests on any finding of such an error. There are significant differences between the Regulation 30 provisions at the heart of this claim and the provisions on abnormally low bids now contained in Regulation 69 the Public Contracts Regulations 2015. This case does however remain extremely relevant: it reinforces the investigative rigour with which verification, clarification, consultation and duties of fairness must be approached in dealing with abnormally low bids and that each and every concern held by the contracting authority must be properly aired and discussed with the bidders before any formal decision can be taken to reject a bid on that basis. Furthermore, if it proceeds to the next stage of quantification of damage it may well be one of the few cases to assist practitioners, contracting authorities and bidders alike as to the issue of quantification damages in these cases in which the court must necessarily speculate as to what would have happened if it were not for the breach.

Michael Bowsher QC of Monckton Chambers led David Scoffield QC of the NI Bar Library for the Plaintiff, FP McCann Ltd.

The Comment made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

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