What does 'fail' mean anyway?

MLS (Overseas) Limited v The Secretary of State for Defence

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Summary

Just before Christmas, the High Court (Mrs Justice O'Farrell) delivered judgment in *MLS (Overseas) Limited v The Secretary of State for Defence* [2017] EWHC 3389 (TCC). There had been some anticipation that, as the first post-*Energy Solutions* [1] case in which allegations of manifest error formed a central part of the argument, the judgment might shed some light on what approach a court would take to the higher degree of scrutiny arguably indicated by *Energy Solutions*. In the end, however, not much could be gleaned from the court's judgment in this respect. The more interesting findings concerned transparency and the implications of any vagueness in an ITT's description of the evaluation process. The MoD's ITT had failed to spell out the consequence of failing a certain pass/fail criterion, which the court found ultimately invalidated the rejection of MLS' tender on that basis. In that respect, the judgment joins a line of cases highlighting to contracting authorities the pitfalls of a lack of clarity in an ITT. For bidders, however, the message is perhaps less clear. The court rejected an argument that because the ITT itself had not been challenged (and a challenge would now have been out of time) it was not open to MLS to challenge the award on the basis of an ambiguity in the ITT. This seems to at least leave room for the question whether it is always best to challenge an ITT promptly, or whether in some cases it may well be opportune to retain some vagueness as a source of a potential future challenge to the award decision.

Bacground

MLS, as an unsuccessful tenderer, brought a challenge against a procurement decision by the MoD in respect of support services for the Royal Navy, including its new aircraft carrier, the Queen Elizabeth. MLS's tender had been commercially compliant, offered the lowest price and was awarded the highest score in the technical evaluation. However, it received a 'fail' in respect of its response to a question on how it would ensure a safe working culture throughout its supply chain. As a result of that 'fail' (the only one), MLS's tender was deemed non-compliant and rejected in favour of the next highest scoring tender.

[1] *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC)

MLS's case was that from the tender documentation it was not sufficiently clear what the consequence would be of a 'fail' in respect of the particular question on safety culture, and that consequently the MoD was not entitled to reject MLS's tender on the basis of a single 'fail' score. MLS argued that (1) the MoD had acted unlawfully in breach of its obligations of transparency and equal treatment; (2) the automatic rejection of the tender was a manifest error in light of the content of the tender and the published scoring criteria; and (3) where the MoD had a discretion to reject the tender by reason of the 'fail' score it failed to exercise such discretion lawfully.

The MoD's case was that (1) it was open to it to find that MLS's tender had failed in respect to the particular question on safety culture (and therefore that there was no manifest error); (2) while not expressly spelled out (due to an administrative error as it transpires), it would have been apparent to a reasonably well-informed and normally diligent ('RWIND') tenderer that a 'fail' score for the relevant question would (automatically) or at least could (by discretion) lead to a rejection of the tender; (3) the MoD's rejection of the tender therefore was an option open to it in law and not irrational or disproportionate.

The judgment

After setting out the context of the claim in some detail, the judgement deals relatively swiftly with the three substantive issues: transparency and equality of treatment, manifest error, and exercise of discretion. It finds the decision unlawful due to a lack of transparency in that it would not have been clear to a RWIND tenderer that a 'fail' on the particular criterion in question would or could lead to a rejection of the tender. No criticism on the other hand could be made of the scoring of the relevant criterion as 'fail', or of the MoD's exercise of discretion.

Transparency

The ITT stated that the contract would be awarded to the economically most advantageous tender that was deemed to be both commercially and technically compliant, and that the MoD reserved the right to disqualify any non-compliant tender. The ITT set out how a set of five technical questions would be scored numerically, and that failure to achieve a certain score on these questions would lead to disqualification. By contrast, for the sixth question – the safety question central to this case – the ITT only stated that it would be assessed on a pass/fail basis with no further explanation of what the consequence of a 'fail' score would be.

The judgment concisely sets out the relevant legal framework, primarily by reference to the relevant regulations requiring the weighting and importance of

criteria to be identified [2] and *SIAC v Mayo* [3] for the principle that award criteria must be formulated in such a way that all RWIND bidders could understand them in the same way.

The judgment concludes that in the current case, with the consequence of a 'fail' of the safety question not spelled out, it was not possible for RWIND tenderers to understand the weighting or importance of that criterion or that it could or would lead to a rejection of a tender. The criterion therefore became arbitrary or not sufficiently clear, and its application was unlawful in breach of the MoD's obligations of transparency and equal treatment.

The Judge was not persuaded by the MoD's argument that it should have been clear to a RWIND tenderer that 'fail' without further explanation meant just that and at least could lead to the tender being rejected. This is of some practical relevance, as ITTs can have a tendency (whether inadvertently or intentionally) to not always be explicit about the extent to which any pass/fail criteria taken on their own can justify the rejection of a tender. The judgment therefore serves as a useful reminder to contracting authorities (in line with many other cases) of the need for clarity in ITTs, and more so to spell out even matters that to the drafter at the time may perhaps seem reasonably obvious. Clearly contracting authorities are running a risk of their award decisions being set aside if they try to maintain 'flexibility' for themselves by leaving a degree of uncertainty in an ITT as to the consequence of a fail score, failure to cross a minimum score threshold, or non compliance with a requirement of the competition. Such an authority cannot consider itself to be safe simply because no challenge has been brought within 30 days of the ITT being issued.

Bidders equally may want to scrutinise ITTs with this in mind, so as to avoid later challenges to a successful bid. However, the message to bidders appears slightly less clear. The MoD had argued that because the ITT itself had not been challenged as unclear, and a challenge to the ITT would now have been out of time, it was not open to MLS to now challenge the award by reference to vagueness in the ITT. The court rejected this argument, finding that MLS's challenge was not a challenge to the ITT through the backdoor, but was pleaded as a challenge to the decision to reject the tender on the basis of the fail score, and ultimately amounted to the question whether this was a course legally open to the MoD on the basis of the ITT as it stood. This seems to leave at least some room for the question whether it is always best to challenge any vagueness in an ITT promptly, or whether in some cases it may be possible to leave it unchallenged and thereby preserve a potential ground for a subsequent challenge to the award decision. The answer may depend in part on whether the

[2] Regulations 17 and 31 of the Defence and Security Public Contracts Regulations 2011

[3] *SIAC Construction Ltd v County Council of the County of Mayo* (Case C-19/00) [2001] ECR I-7725

respective bidder sees the relevant criterion as a potential area of weakness for itself (in which case it might choose to wait and see what the outcome of the competition is) or strength (in which case it might be better advised to challenge any vagueness promptly so as to guard against future challenge by an unsuccessful bidder).

Manifest error

On Manifest error, MLS argued that the MoD was wrong in any event to score its answer to the safety question as a 'fail', given that its response had addressed each of the stated requirements in the scoring guidance and the MoD should have sought clarification if it considered that evidence was missing.

Given the extensive treatment manifest error received in *Energy Solutions* (above), it is perhaps surprising that the judgment in this case needed just one paragraph to summarise the relevant case law, framing *Energy Solutions* very much as one case in an established line (with *Lion Apparel Systems v Firebuy* [4] and *Woods Building Services v Milton Keynes* [5]), standing mostly for the proposition that an evaluative judgment was not immune from a finding of manifest error.

However, such compact treatment may owe much to the fact that the court on the facts of this case did not seem to have much difficulty to conclude that no manifest error had been made. We may have to wait for another day, or rather case, to see what (if any) change Energy Solutions will make to the court's approach to manifest error.

In the current case, the MoD argued that MLS had failed to provide an adequate explanation or evidence in response to the relevant question, and that it was not incumbent on the MoD to seek further clarification beyond two emailed requests it made, and in fact that there were clear limits from an equality of treatment point of view as to how far such enquiries could go. The court agreed with this assessment and found that no criticism could be made of the evaluation process, and that, further, this was not a case of mere clarification or obvious, material error were further clarification would have been appropriate (mirroring the wording in *SAG ELV Slovensko* [6]).

Exercise of discretion

The question of a potential exercise of discretion by the MoD (if the rejection on the basis of the 'fail' was a discretionary rather than mandatory one) does

[4] *Lion Apparel Systems v Firebuy* [2007] EWHC 2179 (Ch.)

[5] *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC)

[6] *SAG ELV Slovensko* (Case C-599/10) [2012] ECR I-10873

not arise once the court has found that a disqualification was in any event unlawful given the vagueness of the relevant criterion in the ITT. The judgment nevertheless finds that the MoD in weighing both the answer to the safety question and other characteristics of MLS's and the next best tender exercised genuine discretion and would not have acted irrationally or disproportionately in rejecting MLS's tender on the basis of these considerations.

Philip Moser QC and Daisy Mackersie acted for MLS (Overseas) Limited.

Alan Bates and Michael Armitage acted for the Secretary of State for Defence.

The comments 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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