Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=216b678a-52f6-4498-bfec-78c0d36d2528

MORRISON | FOERSTER

Legal Updates & News

Bulletins

UK Public Procurement Law Digest: Disclosure in Proceedings Under the UK Public Procurement Rules

September 2009
by Alistair Maughan, Masayuki Negishi

Court gives guidance on scope of disclosure in proceedings brought under the Public Contracts Regulations 2006

Disputes about public contract award procedures in the UK are becoming more common. If a dispute arises, a contracting authority may be required to disclose to the challenging bidder a very wide range of documents about how bids were treated or evaluated and how the procurement was conducted, and these documents might include information in competing bids that other bidders might regard as commercially sensitive. A Court in the UK has now confirmed the limited scope of public interest immunity in relation to such disclosure requirements.

Related Practices:

- Government Contracts
- Sourcing
- Technology Transactions

What is the case?

The case is *Amaryllis Limited v. HM Treasury (No. 2) [2009] EWHC 1666 (TCC)*, a decision by the English High Court in respect of an application for disclosure and inspection of documents made in a claim brought by a furniture supplier against HM Treasury for an alleged breach of the public procurement rules. The Court ordered HM Treasury to disclose various documents.

Why is this case important?

This judgment is the second in a series of judgments delivered by the High Court in respect of a claim for an alleged breach of the Public Contracts Regulations 2006 ("**PCR**").[1] This particular judgment clarifies and gives guidance on the extent to which documents relating to a contracting authority's decision-making in a procurement process should be disclosed, and how the principle of public interest immunity applies in respect of such disclosure.

For contracting authorities, this case serves as an important reminder that:

- If a dispute does arise about a contract award procedure, the authority may be required to disclose a very broad range of documents relating to the internal decision-making process, and contracting authorities should never assume that public interest immunity will automatically shield their internal documents from disclosure.
- If public interest immunity is to be asserted, it must be claimed at the earliest opportunity and the decision to do so must be made by an appropriately senior official of the contracting authority.

For any bidder on a public contract, this case serves an important reminder that, if a dispute arises from a claim by

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=216b678a-52f6-4498-bfec-78c0d36d2528

a competing bidder concerning a perceived irregularity in the process, a very broad range of document and information that any bidder supplies to the contracting authority in the course of the procurement process could be potentially discoverable. Bidders should not assume that commercially-sensitive information disclosed to the contracting authority will automatically benefit from confidentiality in the context of a legal dispute.[2]

For both contracting authorities and bidders, these issues are particularly important to bear in mind, in light of the increased scrutiny to which the internal processes and procedures of contracting authorities will be subjected under the new public procurement remedies regime, which is due to be implemented in the UK by 20 December 2009.[3]

What happened in this case?

In November 2007, OGCbuyingsolutions ("**OGCbs**" – a part of HM Treasury)[4] published a contract notice in the *Official Journal of the European Union*, inviting expressions of interest to tender for a framework agreement for the supply, delivery, and installation of furniture and associated services. The framework agreement was divided into multiple lots, and interested parties were required to submit a completed pre-qualification questionnaire ("**PQQ**").

Amaryllis Limited ("**Amaryllis**"), a furniture supplier with a track record of supplying furniture to the UK public sector, including major government departments, duly completed and submitted its PQQ in January 2008 but, in March 2008, OGCbs notified Amaryllis that it was unsuccessful in respect of two lots, including the most valuable lot.

Dissatisfied with the lack of explanation provided by OGCbs as to why it was unsuccessful for those two lots, Amaryllis brought proceedings against OGCbs in June 2008 complaining that OGCbs had breached the core legal principles of transparency and equal treatment by, among other things, failing to indicate how the PQQ would be marked, and by failing to inform the bidders of the relative importance of the questions/topics in the PQQ.

Faced with a claim in excess of £11 million, OGCbs unsuccessfully sought to have Amaryllis' claim struck out.[5] Subsequently, the trial on liability was scheduled to commence in July 2009 but, at the last minute, a dispute regarding the adequacy of the disclosure made by OGCbs arose and Amaryllis made an application to the Court under Civil Procedure Rules ("**CPR**") Rule 31.12, seeking an order that OGCbs disclose various documents relating to the procurement and the evaluation of the PQQ. OGCbs countered by making an application under CPR Rule 31.19 for permission "*to withhold disclosure of a document on the ground that disclosure would damage the public interest*".

In general under CPR, a party to a litigation case is required to disclose only those documents "*on which he relies*" and those documents which "*adversely affect his own case*", "*adversely affect another party's case*", or "*support another party's case*".[6] Additionally, under CPR, any order for disclosure a court makes must always be proportionate.[7] With these principles in mind, the Court first considered whether or not the various categories of documents sought by Amaryllis were in fact relevant and *prima facie* subject to an order for disclosure.

The notable categories of documents sought by Amaryllis included the following:[8]

- **Notes of the meetings that OGCbs held with various bidders prior to the commencement of the PQQ process**

These documents, to the extent that they dealt with issues which related to the evaluation criteria, were relevant and had to be disclosed, subject to the question of public interest immunity and confidentiality.

- **Correspondence between OGCbs and stakeholders (*i.e.*, other government departments and agencies who were prospective purchasers of the furniture to be procured by OGCbs) as such correspondence related to the development of the PQQ**

The request for such documents had to fail because such documents were simply not relevant to the issue in the case and, even if they had some marginal relevance, it would have been disproportionate to order OGCbs to locate them and disclose them.

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=216b678a-52f6-4498-bfec-78c0d36d2528

- **Amaryllis' PQQ response as marked by OGCbs**

Amaryllis' PQQ response was previously disclosed by OGCbs in redacted form. However, there was no doubt that the marked version of the Amaryllis' PQQ response was highly relevant and had to be disclosed without redaction.

- **The other bidders' PQQ responses**

Subject to the question of public interest immunity and confidentiality, the other bidders' PQQ responses were "*plainly*" something that had to be disclosed. In so concluding, the Court took note of the fact that "*in the majority of procurement disputes arising out of the treatment or evaluation one company's tender, comparisons with at least some aspects of the tenders of other third party companies are almost inevitable*".

- **Notes prepared by OGCbs' personnel relating to Amaryllis' PQQ response**

Since these notes may well provide some insight into how Amaryllis' PQQ response was evaluated, they were clearly relevant to the issue of fair and transparent evaluation and had to be disclosed.

- **Notes prepared by OGCbs' personnel relating to the other bidders' PQQ responses**

These documents are not relevant and "*even if they had some peripheral relevance, it would not be proportionate, particularly in view of the lateness of this application, to require the Defendant to disclose them*".

- **OGCbs' PQQ evaluation report dealing with the PQQ responses received from all bidders and the scoresheet summarising the results of that report, including the attachments**

The report and the scoresheet were "beyond doubt" highly relevant documents that should be disclosed subject to the question of public interest immunity and confidentiality. The position was no different in respect of the three attachments to the PQQ evaluation report, namely the marking and weighting criteria spreadsheet, the evaluation results spreadsheet, and the project plan and timescales. These documents all had to be disclosed without redaction.

- **"Documents relating to the decision-making process"**

The Court was not prepared to make any order in respect of this category of documents, which were very similar in nature to the other documents which *prima facie* had to be disclosed, as well as those documents relating to the development of the PQQ OGCbs consented to disclosure.[9] In any event, this category was too broad and would impose a disproportionate burden on OGCbs to investigate whether any further documents caught by these wide words have not already been disclosed in other categories.

- **Documents relating to re-consideration of weightings prior to the PQQ being finalised, and the draft versions of the PQQ marking scheme**

This request arose from a reference to possible re-evaluation of a particular question and the associated weighting and percentage which was made in an e-mail sent by OGCbs to some of the stakeholders. In light of the fact that the underlying e-mail was sent before the finalised version of the PQQ was made available, the Court ruled hat this category of document did not have to be disclosed. In so concluding, the Court noted that: "*It does not seem to me that it is relevant to know precisely how percentages and weightings were calibrated in advance of the PQQ; what matters are the percentages and weightings that were actually applied to the Claimant's tender and to the tenders of the other suppliers who completed the PQQ*".

By the same token, the Court held that the request for earlier draft versions of the PQQ marking scheme was not relevant to the issues and did not have to be disclosed.

Once the questions of relevance and proportionality were addressed, the Court went on to consider the issue of public interest immunity and confidentiality. The Court reviewed the relevant authorities on this issue, including

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=216b678a-52f6-4498-bfec-78c0d36d2528

Science Research Council v. Naase [1980] AC 1028, *R v. Chief Constable of West Midlands Police ex parte Wiley [1995] 1 AC 274*, and *Case C-450/06 Varec SA v. Etat Belge*.

The Court also took particular notice of the fact that, where an objection to disclosure of documents is to be made before trial on the grounds of public interest immunity pursuant to CPR Rule 31.19, the decision to object must be taken by the Minister or, in certain circumstances, the permanent secretary in charge of the Department in question.[10]

Thus, on the question of public interest immunity and confidentiality, the Court concluded as follows:

- **The public interest immunity could not be claimed in respect of the internal documents relating to OGCbs' decision-making process, and they had to be disclosed to the extent that they were relevant.**

In reaching this conclusion, the Court placed much emphasis on the fact that OGCbs failed to comply with the procedure set out in CPR Rule 31.19 until the very last minute, and that there was no evidence that any senior official of OGCbs or HM Treasury has even considered the issue of public interest immunity, or evidence that the requisite process for decision-making was complied with or even contemplated. The Court also noted that no proper justification for the application of public interest immunity was put forward by HM Treasury.

According to the Court, "*in any case involving Regulation 4, the way in which the evaluating body has gone about the exercise will be central to the issue of whether the process was conducted in a fair and transparent way. In those circumstances, it would be a truly exceptional case where there was some form of public interest in keeping secret any aspect of that internal evaluation process*".[11]

- **All documents relating to third parties that were relevant had to be disclosed, and any concerns as to confidentiality could be addressed adequately through redactions and substitutions**

The Court accepted that at least some of the documents sought by Amaryllis contained information furnished by Amaryllis' competitors which might be regarded as commercially sensitive. Given that a comparison between competing bidders' PQQ responses was inevitable in this case, the question for the Court was one of balance between, on one hand, the need for transparency, and, on the other hand, the need to protect sensitive commercial information.

Here, the Court observed that:

  - given the fact that the PQQs themselves contained "*very little information that could possibly regarded as commercially sensitive*"[12] and given that the procurement in question did not involve any sensitive subject-matter such as defence technology (*i.e.*, this was not the sort of sensitive procurement which was an issue in *Case C-450/06 Varec SA v. Etat Belge*),[13] it was unlikely that HM Treasury had possession of information concerning the other bidders which was of a particularly sensitive or confidential nature; and

  - the PQQ itself made very clear to each bidder that the information each bidder submitted in response to the PQ may be subject to disclosure in response to a request made under the Freedom of Information Act 2000, and specifically instructed each bidder to identify any commercially-sensitive information the bidder includes in the PQQ response and to explain what harm may result from the disclosure of such information. Yet, there was no evidence that any of the other bidders said in their PQQ response that any of the information they furnished was confidential, nor was there any evidence that the bidders complied with such instruction.

Accordingly, the Court concluded that any concerns as to confidentiality of the other bidders' information could be adequately addressed by appropriate redactions and substitutions.[14]

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=216b678a-52f6-4498-bfec-78c0d36d2528

For a copy of Morrison & Foerster's consolidated digest of recent cases and decisions affecting UK public procurement law, please click here.

Footnotes

[1] The first judgment, which reinforces and clarifies a number of important principles relating to the 3-month limitation period that applies to claims against contracting authorities brought under the PCR, was previously discussed in our Sourcing Update, 17 June 2009.

[2] The status of commercially-sensitive information generally under Freedom of Information law was discussed in our previous Sourcing Update, 24 February 2009.

[3] For further details on the new remedies regime, see Sourcing Update, 7 May 2009.

[4] OGCbs (now renamed Buying Solutions) is an executive agency of the Office of Government Commerce in Her Majesty's Treasury, which procures goods and services on behalf of a large pool of public sector bodies in the UK, with the aim to maximise the value for money obtained by public sector bodies in the UK.

[5] See Sourcing Update, 17 June 2009.

[6] See CPR Rule 31.6.

[7] See CPR Rules 1.1(b) and 31.3(2); also see Practice Direction 31PD.2 and 31PD.4.2.

[8] Disclosure of other types documents was also sought in the application made by Amaryllis but they are not discussed because they either: (a) ceased to be an issue when OGCbs consented to their disclosure (such documents included those documents that detailed the development of PQQ, OGCbs' internal business case for the procurement, and the development of the contract notice, as well as the questions regarding the PQQ raised by the bidders and OGCbs answers to these questions); or (b) relate to particular sets of facts that are not of general importance or interest for the purposes of this discussion.

[9] See point (a) in note 8 above.

[10] See paras 43-44 of the judgment; also see the "White Book" on Civil Procedure, 2009 Edition, Volume 1, p808 at para 31.1.3.33.

[11] See para 56 of the judgement. Also see para 55 of the judgment, where the Court noted that it was "*incontestably wrong in principle for the Defendant to confirm, on the one hand, that they are committed to open government and compliance with Regulation 4(3) of the Public Contracts Regulations 2006, and then to assert, on the other, apparently without proper consideration, that it would cause real damage to the public interest if the public knew how* [OGCbs] *had approached and performed this important procurement task*".

[12] In the Court's opinion, "*the highest that it can be put is that there is some information there about turnover and other business activities which may be sensitive*"; see para 59 of the judgement.

[13] In *Case C-450/06 Varec SA v. État belge*, a bidder who failed to win the contract to provide track links for tanks sought disclosure from the Belgian government of certain sensitive technical documents provided by the winning bidder in order to challenge the Belgian government's decision. The ECJ concluded that parties to a procurement dispute were *not* entitled to "*unlimited and absolute access to all of the information relating to the award procedure*", because the right to access information held by contracting authority had to be balanced against the right of other bidders to protect their confidential information and business secrets (see paras 50-55 of the judgment of ECJ). OGCbs unsuccessfully sought to argue that this ECJ decision was authority for the proposition that confidentiality itself may give rise to public interest immunity.

[14] It is to be noted that one of the specific orders the Court gave was to replace the identity of the individual

Document hosted at JDSUPRA
http://www.jdsupra.com/post/documentViewer.aspx?fid=216b678a-52f6-4498-bfec-78c0d36d2528

bidders in the various documents with an anonymous designation.

© 1996-2008 Morrison & Foerster LLP. All rights reserved.