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UK Public Procurement Law Digest: Framework Agreements

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Court gives guidance on legal remedies available in respect of improperly awarded framework agreements

Two recent decisions made by the High Court in Northern Ireland demonstrates that, under certain circumstances, the remedy that a Court can grant to an aggrieved bidder may go beyond the award of mere damages and could include the setting aside of an already-awarded framework agreement.

What are the cases?

The cases are:

- *McLaughlin and Harvey Limited v Department of Finance and Personnel (No. 3) [2008] NIQB 122*, one of the series of decisions made by the Northern Irish High Court in respect of a claim brought by McLaughlin & Harvey Limited ("M&H"), a construction company that unsuccessfully tendered for a framework agreement relating to a series of construction projects that the Northern Irish Department of Finance and Personnel ("DFP") sought to implement over a four-year period at a cost of £500-800 million.

- *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 3 Remedies) [2008] NIQB 153*, one of the series of decisions made by the Northern Irish High Court in respect of a claim brought by a consortium of building contractors, who unsuccessfully tendered for a framework agreement relating to a series of construction projects which the Department of Education for Northern Ireland sought to implement over a two-year period at a cost of £550-600 million.

Why are these cases important?

Until now, most contracting authorities have assumed that the potential remedies to which they are exposed if they breach procurement law are either:

- damages and/or an injunction preventing the contract award going ahead – if the complaint is made *before* the contract has been signed; or
- damages only – if the complaint is made *after* the contract has been signed.

Once past the point of contract signature, authorities tend to breathe a sigh of relief and assume that they are immune from the risk of a Court order overturning the contract award, shielded by the language of the procurement regulations which, on the face of it, prevent the setting aside of contracts that have already been signed.

However, the Courts in these cases took the position that, if there has been a breach of procurement law, a Court is, in fact, within its rights to set aside a framework agreement that a contracting authority improperly enters into with one or more suppliers. In one of the cases, the Court did so despite the fact that specific contracts had been entered into under the framework agreement.

This means that there is now an even greater incentive for contracting authorities to ensure that as much transparency as possible is built into the procurement process, to avoid the costly and time-consuming

consequence of having to re-run a tendering process. It also creates a ray of hope for bidders on framework procurements that, if they perceive that they have been disadvantaged by a procedural error, there may be an effective remedy available to them after all.

However, an aggrieved bidder that successfully challenges a contracting authority's decision should not expect to be automatically awarded a place on the framework that it failed to win in the first place. The Court in both of these two cases concluded that the right remedy was to cancel the entire framework arrangement, thus forcing the authority to re-run the entire process. In the *Henry Bros (Magherafelt) Ltd* case, this was despite the fact that a number of specific contracts had already been entered into pursuant to the framework agreement. At a practical level, what an aggrieved bidder in this situation really wants is more likely that it should be added to the list of contactors on the framework list. Even if an unlawful award is successfully challenged, an aggrieved bidder may not derive much from its victory, particularly where the gap between it and the successful bidder(s) was more than marginal.

For authorities, one consequence of this case is that if there has been a genuine procedural error, and therefore a meaningful risk that the entire framework procurement could be overturned by a Court, it may be easier just to accede to a bidder's complaints and let all affected bidders through on to the framework list, rather than run the risk of having the entire framework cancelled.

What happened in these cases?

McLaughlin and Harvey Limited v Department of Finance and Personnel (No. 3)
In the *McLaughlin and Harvey Limited* case, DFP published an OJEU notice in March 2007, advertising its intention to award framework agreements in respect of a series of construction projects. M&H duly submitted its tender in October 2007, but it was unsuccessful and was notified accordingly by DFP in December 2007. M&H issued proceedings against DFP alleging, among other things, that DFP acted in breach of the procurement rules by failing to disclose the marking methodology, which constituted secret evaluation criteria, and the weightings associated with such secret evaluation criteria.

As noted in our previous Legal Update (see Sourcing Update, December 4, 2008), in conducting public procurement process, a contracting authority is required to disclose the evaluation criteria and sub-criteria that it intends to use as fully as possible in advance to the bidders. Having reviewed the relevant case laws (including the judgments of the European Court of Justice in *ATI ETC Case C-331/04* and *Lianakis Case C-532/06*), the Court held that DFP acted in breach of the procurement rules by failing to disclose 39 sub-criteria and their associated weightings in advance to the bidders.[1]

The Court then went on to consider the two remedies requested by M&H: namely, a declaration ordering DFP to add M&H to the list of preferred contractors under the framework agreement, and/or the setting aside of DFP's decision to award the framework agreement to five of M&H's competitors.

DFP contested M&H's requests primarily on the basis that the law did not empower the Court to grant any remedy other than damages, by relying on the Public Contracts Regulations 2006 ("PCR"), which implements in the UK the relevant EU Directives (including both Directive 2004/18/EC, the "Services Directive", and Directive 89/665/EEC, the "Remedies Directive"), and provides that "*the Court does not have power to order any remedy other than an award of damages … if the contract in relation to which the breach occurred has been entered into.*" (Regulation 47(9) of PCR)

Having reviewed the Directive and PCR, the Court decided that:

- under the Remedies Directive, all EU member states were required to make provisions in their national law a means to set aside unlawfully taken decisions and/or award damages, and the PCR specifically enabled a Court to "*order the setting aside of* [unlawfully made decision, or unlawfully taken action,] *or order the contracting authority to amend any document*" and/or "*award damages*"; and

- both the Services Directive and the PCR defined a framework agreement as something that established the terms on which one or more contracting authorities would award multiple contracts to one or more suppliers, and specifically differentiated the treatment of "framework agreement" from that of "public contracts".

The Court acknowledged that Regulation 47(9) of PCR qualified the extent to which the Court was entitled to set aside DFP's decision, but concluded that Regulation 47(9) did not prevent the setting aside of an already concluded framework agreement because the phrase "*the contract in relation to which the breach occurred has been entered into*" used in Regulation 47(9) referred to "public contract", as defined in PCR and including any

specific contract entered into pursuant to a framework agreement, but *not* to "framework agreement" itself, because of the way in which PCR distinguished the two.

In so concluding, the Court said that: ""*For the court to set aside a contract which may be partly or wholly performed would be contrary to principle and inappropriate. But the position is completely different with regard to a Framework Agreement. That consists of the pre-selection of certain economic operators who will be allowed to bid, without competition from parties outside the Framework Agreement, for specific contracts during the life time of the Framework Agreement.*"

However, the Court also noted that:

- acceding to M&H's request to add M&H to the list of successful bidders who were included in the framework agreement "*would have the effect of diluting the work for all five of the current parties under the Framework Agreement*", thereby introducing "*some element of unfairness to the best of the tenderers*"; and
- damages was "*manifestly an inferior remedy*" because:
    - it would take too long for the Court to make a reasonable estimate of the loss suffered by M&H (which needed to reflect the profits the successful bidders would have enjoyed under the framework agreement); and
    - it was clearly not in the public's interest, as paying the successful bidder(s) for the work it actually undertakes and then paying a percentage of profits such bidder(s) makes was "*in the most literal sense of the word a waste of money*", particularly in light of the overall value of the construction projects (some £800 million).

Therefore, on the particular facts of this case, the Court held that M&H's second preferred remedy, *i.e.*, the setting aside of DFP's decision to award the framework contract to five of M&H's competitors, which would lead to a re-run of the competition for the framework agreement (which in turn would be performed in a fairer and more transparent way, as indicated by the Court) was the fairer, more desirable and the appropriate remedy to be granted to M&H.

Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 3 Remedies)

In the *Henry Bros (Magherafelt) Ltd* case, the Court was concerned with a slightly different set of substantive issues, which will be the subject of a separate Morrison & Foerster Legal Update. But in respect of remedies, the Court followed exactly the same approach it took in the *McLaughlin and Harvey Limited* case in concluding that the flawed award of the framework agreement had to be set aside.

One notable aspect of the *Henry Bros (Magherafelt) Ltd* case is the fact that a number of specific contracts had already been awarded under the framework agreement. In respect of those specific contracts, the Court acknowledged that the claimant consortium could only claim damages, but otherwise the Court had no hesitation in holding that a re-run of the competition for the framework agreement was the appropriate remedy to be granted to the consortium of building contractors, commenting that "*in the case of framework agreements stricto sensu the restriction imposed by Article 47(9) has the potential to be much more damaging particularly to the public in whose interest the community principles of transparency, equality, non-discrimination and open competition are to be observed.*"

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

Footnotes

[1] Readers interested in this aspect of the case are directed to the judgment in *McLaughlin and Harvey Limited v Department of Finance and Personnel (No. 2) [2008] NIQB 91*, where the Northern Irish High Court took an approach very similar to the approach taken by the English High Court in *Letting International Limited v London Borough of Newham [2008] EWHC 1583*, which is discussed in our previous Legal Update (see Sourcing Update, December 4, 2008).