HIGH COURT REASSESSES TENDER SCORES UPON FINDING MANIFEST ERRORS IN TENDER EVALUATION

In Woods Building Services v Milton Keynes Council [2015] EWHC 2011 (TCC), the Court held that a disappointed bidder should have outscored the winning bidder in a public procurement exercise.

1. Key points
   - There is a broad equivalence between “manifest error” and Wednesbury unreasonableness. Manifest error is about the centrality or materiality of the error in question and the mere fact that the error might not be immediately apparent to the layman does not necessarily imply that the error is not manifest.
   - The evaluation of tenders is a matter of judgment or assessment in respect of which the council does have a margin of appreciation. However, there is no scope for any margin of appreciation in respect of the obligations of transparency and equal treatment.
   - The absence of contemporaneous notes recording clear reasons for a particular score had led to a lack of clarity and certainty in the defendant authority’s case.

2. Background
   The claimant, Woods Building Services ("Woods") (the incumbent provider of asbestos removal services to Milton Keynes Council) challenged the decision of the Council to award an £8 million, 4 year framework agreement for asbestos removal to a competitor, European Asbestos Services ("EAS").

   The Council’s tender evaluation was weighted 60/40 in favour of price over quality. Woods had submitted the cheapest bid, but lost out to EAS due to a significant difference in the scores awarded for quality. Woods issued proceedings alleging breach of the Public Contracts Regulations 2006 on the basis that there was a lack of transparency in the tender evaluation process, a failure to treat the tenderers equally
3. The court's decision

General observations on the tender process

Mr Justice Coulson pointed out four particular aspects of the Council's tender process that were unsatisfactory, although they were not, taken together or separately, sufficient in themselves to constitute a material breach of the Public Contracts Regulations:

i. In the first instance the tenders were evaluated by two council employees, one of whom was an ex-employee of the claimant and still had an ongoing working relationship with them. The Judge’s view was that he should not have been involved in the process at all.

ii. The significant difference in the scores awarded to Woods and EAS for quality was surprising, as Woods' answers were highly detailed and manifested commitment whereas EAS' answers were light on detail and heavily laden with management-speak.

iii. Following the completion of the first evaluation, another employee of the Council had been asked to reassess the tenders. Instead of evaluating the tenders afresh the second evaluator took the existing results as his benchmark and proposed certain revisions. This raised a concern that the Council's approach had been coloured by the assumption that Woods' tender was inferior.

iv. The notes recorded by the evaluators of the tenders were unsatisfactory, as they were very brief and unhelpful conclusions which often merely paraphrased the evaluation criteria.

The principles applicable to the tender evaluation

Mr Justice Coulson reiterated the law regarding the principles of transparency and equal treatment, and in what circumstances a manifest error will be demonstrated:

i. Transparency
The contracting authority must ensure that award criteria are drawn up in a clear, precise and unequivocal manner, such that ‘all reasonably informed tenderers exercising care can understand their exact significance and interpret them in the same way’. A failure on the part of the contracting authority to comply with the criteria is a breach of the duty of transparency.

ii. Equal treatment
A contracting authority is obligated to treat all parties in the same way and consequently must adopt the same approach to similar bids unless there is an objective rationale for a difference in approach.

iii. No margin of appreciation for transparency and equal treatment obligations
Following Lion Apparel Systems v Firebuy Ltd [2007] EWHC 2179 (Ch) ("Lion Apparel") there is no 'margin of appreciation' in respect of the contracting authority's transparency and equal treatment obligations.

iv. Manifest error
Following Lion Apparel, the evaluation of tenders is a matter of judgment or assessment and a contracting authority would have a margin of appreciation in this regard. Therefore the Court could disturb the authority's decision only if there was a manifest error.

The Court held that 'manifest' error was broadly equivalent to Wednesbury unreasonableness. Whether an error was a manifest error would depend on its materiality and not on whether it would be apparent to a layman.
Review of the scores awarded
Mr Justice Coulson reassessed the marks awarded to Woods' tender and EAS' tender respectively for their answers to the 12 questions relating to quality, examining whether there were manifest errors which exceeded the margin of appreciation and also whether the Council had breached its transparency and equal treatment obligations.

The Court found that on four questions, EAS' score should have been zero as the answers had not addressed significant aspects of the Council's requirements, were objectively unacceptable or there was otherwise a manifest error. On two further questions, EAS' marks were reduced on the basis of breaches of the duties of transparency and equality (although the Judge said if necessary he would also have found manifest errors in respect of these scores); and on two other questions Woods' scores were increased due to breaches of the duties of transparency and equality.

The Court's conclusion
EAS' total score in respect of quality was reduced by 40 marks and Woods' total score was increased by 6. It was evident that this would have a material impact on the results of the tender process (i.e. Woods would have outscored EAS and there should have been a different outcome to the tender process). The Judge said that he would hear submissions on the relief sought by Woods.

4. Comment
This case goes to emphasise that when a tender evaluation process is challenged, the Court will closely examine the evaluative process step by step, testing for manifest errors and also for compliance with the contracting authority's transparency and fairness obligations. In such situations the reasons recorded by the contracting authority for its conclusions will play an important role in establishing the rationale for the results of the evaluation. The case further demonstrates that where considered appropriate the Court is willing to adjust the scores awarded so as to determine what the outcome should have been had the tender evaluation process been conducted properly in accordance with the contracting authority's obligations.