

FEATURE



Avoiding the pitfalls

Jeremy Sharman examines some of the issues that a disappointed bidder may face after bidding for a public contract, and some of the pitfalls to avoid should it wish to challenge the award.

Bidding for public contracts is a time-consuming and expensive process, and whether a bid is successful or not can have a profound effect on a supplier's fortunes. It is vital, therefore, that the evaluation process carried out by the contracting authority is objective and transparent, and that every bidder is treated equally and given

a fair opportunity to succeed with its bid. Often a disappointed bidder will have no reason to complain but there may be occasions when it does.

Equality and transparency

The principles of equality of treatment and transparency are at the heart of European

Union law and current UK Regulations governing the procurement by public authorities of supplies, works and services above certain thresholds (now contained in the Public Contracts Regulations 2006 – there are separate rules concerning procurements in the utilities sector). The Regulations

impose an obligation on public authorities to treat bidders equally and to act in a transparent way. These duties are expressly stated to be owed to contractors, suppliers or service providers.

In the event that the Regulations are breached, a disappointed bidder may apply to the courts to suspend the procurement procedure, set aside the decision of the contracting authority or award damages.

Challenging an unfavourable decision – identifying the problem

There is a risk that in any major procurement exercise the required levels of fairness and objectivity may be absent in the evaluation of tenders, or that the procurement itself may be defective: for example, the award criteria contained in the Invitation to Tender may be unclear or irrelevant to the subject matter of the contract; or the weighting attached to particular criteria may have a discriminatory effect.

In such a situation, an unsuccessful bidder may wish to challenge the decision of the contracting authority to exclude it from the award process. What is often not appreciated, however, are the hurdles that a bidder will have to overcome for a challenge to be successful: in particular, timing will be crucial to the success or failure of any challenge.

One of the first issues for an unsuccessful bidder to determine is the precise nature of its complaint. There may be aspects of the procurement itself that the bidder wants to challenge: for example, it believes that the award criteria contained in the tender document or contract notice are irrelevant or discriminatory. Alternatively, the bidder's complaint may relate to the way in which its tender has been evaluated. Identifying the nature of the complaint is a crucial issue in determining the date from which the time period for making the challenge will begin to run.

Time limits for complaints

The time limits for taking legal action are very short. If a court challenge is to be made, then it must be made 'promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose...'

In the legal proceedings initiated by Jobsin Co UK plc (Jobsin) against the NHS, which concerned the development and management of an online recruitment process, the complaint concerned the classification of services for tender (the Invitation to Tender had wrongly classified these services). The Court of Appeal held that the Regulations were breached as soon as the tender document was issued. This meant that the three-month time limit for taking legal action began to run from the date of issue of the tender document, not from the date that the disappointed bidder was informed that its bid was unsuccessful. Consequently, Jobsin no longer had the right to complain because the time limit had already passed.

Extending the time limits

Although the Court has power under the Regulations to extend the three-month time period in which bidders can make a challenge, this power is likely to be exercised sparingly. In the Jobsin case, the Court of Appeal refused to extend the time limit on the basis that all the facts relevant to the complaint were known at the time the tender document was issued: ignorance of the legal significance of these facts was considered to be no defence in law. In order for the Court to grant an extension of time, the bidder must be able to demonstrate that there are good grounds for doing so; for example, the concealment of facts by the contracting authority relevant to a challenge.

A harsh result?

The decision in the Jobsin case can, therefore, operate very harshly against those prospective suppliers who may be contemplating a challenge in the event that their bids are unsuccessful. The judgment means that if there are grounds that give rise to a challenge, it may have to be made before the bidder knows whether or not it has been successful in its bid. Not surprisingly, few prospective suppliers will want to incur the costs of making a challenge, and risk falling out with the contracting authority, before they know whether they have been successful or otherwise. However, a failure to take

procurement itself but rather to the way in which the prospective supplier's tender proposal has been evaluated. The principle of equal treatment requires that tenders be considered on an objective and transparent basis. If the marking is carried out on a subjective basis, and/or without proper regard to the award criteria, then this will provide grounds for a challenge. In such circumstances, the time period for making a challenge will run from the date the result of the evaluation is communicated to the supplier.

The standstill period

Another important factor to be considered by a

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action at an early stage may be fatal to a later claim.

The counter-argument is that the Regulations specify a short limitation period for very good policy reasons, namely that it is in the public interest that any challenge concerning the tender process of a public contract be made promptly so as to cause as little disruption and delay as possible. Certainly, the Court of Appeal in the Jobsin case thought it unreasonable that a bidder should sit on its rights and await the result of the bidding process on the basis that if it was successful it would remain quiet, but if otherwise would start proceedings. As the judge giving the judgment of the court said: *"I do not believe that a tenderer who deliberately delays proceedings in an attempt to have his cake and eat it has good reason for an extension of time if the outcome of the process is not to his liking."*

An unfair evaluation

It may be, however, that the complaint does not relate to the substance of the

disappointed bidder is the stage the procurement process has reached. In many procurements there will be an initial evaluation of bids following which only selected bidders will proceed to a final evaluation. Depending on the timetable, a disappointed bidder failing to make the first cut is likely to have more time to challenge the decision if the final contract award is still some way off. This is because once the contracting authority has taken its decision to award the contract, there is a mandatory standstill period of ten days under the Regulations (often referred to as the 'Alcatel' period) during which the contracting authority is not able to enter into the contract or conclude the framework agreement.

The purpose of this standstill period is to allow disappointed suppliers to ask for further information and, if appropriate, to challenge the decision. Once the standstill period has expired, and the contract has been entered into, the only remedy available to a disappointed supplier >

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▷ under the Regulations is the award of damages.

In addition to applicable time limits, another trap for the unwary is the requirement that, before any court proceedings can be commenced, the supplier must inform the contracting authority of the nature of the breach of duty that it relies on and of its intention to bring proceedings. A failure to serve such a notice will act as a bar to the supplier bringing proceedings under the Regulations.

Seeking information

Depending on the nature of the complaint, it may well be essential to obtain further information from the contracting authority before a decision can properly be taken as to whether or not a challenge is worth pursuing.

Although the Regulations oblige the contracting authority to supply bidders with certain information,

information, the time limit for responding to an FOI Act request is 20 working days, which is unlikely to be of assistance to a bidder (although, in practice, many contracting authorities will respond more promptly).

If the request for information is made during the standstill period there may be very little time to evaluate it properly before the standstill period expires. As a result, a bidder may have to decide whether or not to launch proceedings for an injunction to restrain the award of the contract, following a swift review of what may be incomplete information; alternatively, it may let the standstill period lapse, leaving it with the sole option of making a damages claim. A claim in damages is likely to be a very poor substitute for an injunction, not least because damages may be very difficult to quantify and prove.

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including the relevant scores, once a decision to award the contract has been made a disappointed bidder may also request further information regarding the successful tender. The time limits for requesting and providing this information under the Regulations are tight, which is not surprising given the short timeframe of the standstill period. The information that may be requested concerns 'the characteristics and relative advantages' of the successful bidder. It is, therefore, unusual to combine a request for information under the Regulations with a request for information under the Freedom of Information Act 2000 (the 'FOI Act'). Although a request for information under the FOI Act enables a bidder to seek more detailed


In summary, a bidder that believes itself to have been treated unfairly in a public procurement will need to move very quickly. If the complaint relates to the way in which the tender has been evaluated, the first step will usually be to obtain further information from the contracting authority, including documents relevant to the evaluation process. It may be possible, following a review of these, to persuade the contracting authority to reappraise the tender and readmit the bidder to the process. If the contracting authority refuses to reverse its decision, then the bidder will be faced with a stark choice; either to pursue the matter through the courts or to let it drop. Indeed, if the bidder's complaint relates to defects in the procurement itself, the bidder may already

be out of time before the contracting authority informs the bidding parties of its award.

The European Commission

One other possible avenue of redress that needs to be considered is a complaint to the European Commission. Anyone can lodge a complaint with the Commission against a Member State about any practice which they consider incompatible with EU law. The complainant in a public procurement exercise therefore, does not have to be an unsuccessful bidder but could be, for example, a supplier that has decided not to participate in the tender but is nonetheless upset by the threshold requirements which it believes to be discriminatory and hence in breach of EU law.

It is questionable, however, whether there is much commercial value to be gained by making a complaint to the Commission. This is because even if the Commission decides to launch an infringement procedure, on the basis that there may have been an infringement of EU law, it is likely that such a process will take at least a year to complete – considerably longer if the matter goes to the European Court of Justice. Moreover, it is only the national courts which can grant injunctions and award damages. Any victory in Europe, therefore, is only likely to be a pyrrhic one at best.

Finally, it should be noted that on 21 June 2007, the European Parliament approved the new Remedies Directive. If this Directive is adopted by the Council, which is likely to be some time in early autumn, then it will come into force 24 months from adoption. While the new Directive includes a number of provisions which are already contained in the Regulations, it also includes a number of new provisions which will affect suppliers' rights. 



Jeremy Sharman

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In summary...

- The principles of equality of treatment and transparency are at the heart of European Union law and current UK Regulations governing the procurement by public authorities of supplies, works and services above certain thresholds
- It is in the public interest that any challenges concerning the tender process of a public contract be made promptly so as to cause as little disruption and delay as possible
- If a court challenge is to be made, then it must be made 'promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose...'

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