



LEGAL BRIEFING

Aquatron Marine t/a Aquatron Breathing Air Systems v Strathclyde Fire Board

Lord Carloway [2007] CSOH

The Facts

In March 2004, the defendant, who operates the Strathclyde Fire Brigade, issued an invitation to tender for certain services associated with its breathing apparatus equipment, under the Public Services Contract Regulations 1993 which has now been superseded.

The Office Journal of the European Communities specified the criteria for the award of the tender as the economically most advantageous tender complying with technical specifications. The quality of the service to be provided was not included, nor was the technical merit of the tender. As part of the evaluation process, the defendants prepared a “Tender Evaluation/Award Criteria Form” under which only three criteria were to be used in any comparative evaluation. These were price (50%), quality (25%) and technical merit (25%).

Tenders were received from the claimant and two others. The defendant excluded the claimant’s tender from the tendering process at the first stage on the basis that it was inadequately accredited; lacked qualified staff to carry out the contract; and lacked evidence proving the claimant’s quality standards. The claimant challenged the decision.

The Issues

The first issue to be dealt with by the court was to identify the legal tests that apply when a tenderer challenges a contracting authority’s decision not to award him a contract. The second issue was to determine what, if any, losses flowed as a result of the claimant’s exclusion prior to the evaluation stage.

The Decision

It was held that compliance requires the equal treatment of tenderers, which means that both the process and the evaluation must be transparent and objective.

Regulation 21 stated that a contracting authority could only award a contract on the basis of the “lowest price” or the “most economically advantageous” tender. This carried with it the implication that the considerations which will govern the award will be economic ones. Regulations 8 and 16 made it clear that any technical specifications and any requirement to produce information must be stated in the contract documents. Therefore, a tenderer cannot be excluded by reason of some unspecified technical defect or because of the failure to provide information not expressly called for. At the evaluation stage, the criteria applied must be those published and not either hidden criteria or ones created later during the tendering process.

While a contracting authority has a wide discretion in its evaluation of the commercial benefits or drawbacks of any tenders received, it is not vested with any discretion to avoid compliance with the Regulations or to award a contract on the basis of considerations not mentioned in the documentation required by

the Regulations.

The court held that the exclusion of the claimant from the tendering process at the first stage of determining the specification amounted to a breach of Regulations.

The Evaluation Sub-Committee did not possess the requisite expertise to process the tenders from a technical viewpoint, did not have sufficient experience to carry out the task of evaluation and did not have adequate understanding of what was required of the defenders in terms of the Regulations.

In determining what would have happened had the evaluation taken place in accordance with the Regulations, the court concluded that the claimant would have been awarded the contract. The financial effect of not being awarded the contract was that while the claimant did not suffer a downturn in annual profit, it would have made considerably more profit had it been awarded this contract.

In assessing damages, the starting point was to assess the income generated by the contract, plus the extra work likely to be commissioned under it and then to consider the loss of profit. The claimant was awarded £122,149.20 against their tender price of £222,300.00.

Comment

The case identifies many issues that evaluation teams need to keep in mind in relation to evaluation and the procurement process. It is essential that members of the evaluation panel have the relevant expertise, knowledge and experience to carry out the evaluation. During the procurement process you should follow the process strictly as described in the tender documents and criteria published in the notice.

***Birgit Blacklaws
March 2008***
