



LEGAL BRIEFING

(1) Croft House Care Ltd (2) Orchard Home Care Ltd and (3) Kelly Park Caring Agency v Durham County Council [2010] EWHC 909 (TCC), Mr Justice Ramsey

The Facts

These proceedings arose out of a public procurement process commenced in October 2008 by Durham County Council ("the Council") for the award of a number of contracts for the provision of domestic care services. The Council initially informed the Claimants of their success in February 2009. However, following a challenge by another tenderer, the Council re-ran the procurement process. In July 2009, the Claimants were notified of the revised results: they were less successful. The Claimants then commenced proceedings, alleging a breach of the Public Contracts Regulations 2006.

At the first case management conference, the Council sought directions as to disclosure and inspection of certain documents. These documents included material provided by other tenderers. The Council claimed that disclosing these documents would compromise their legitimate commercial and public interests and, in particular, its ability to re-run the procurement process. The Council stated that if it was ordered to disclose all of these documents without appropriate confidentiality provisions, there was a danger that it would be left in a position where it could not design and run a successful procurement exercise for these services in the future.

Further, the Council claimed that the disclosure of some material would also compromise the confidentiality of the other tenderers who had participated in the procurement process. Additionally, if the Claimants were to be shown the interview panel's notes for all tenderers and their method statements, they would have information about their competitors which would give them a further advantage.

The Issues

The Council identified two categories of confidential documents:

- (i) Material provided by third parties, including other tenderers over which the Council considered that confidentiality might properly be asserted; and
- (ii) General material, the disclosure of which would prejudice the Council's ability to re-run a procurement for domiciliary care services.

The question before Mr Justice Ramsey was which of these categories of documents, if any, should the Claimants be allowed to inspect.

The Decision

With respect to the first category of documents, the Judge referred to the decision of the House of Lords in *Science Research Council v Nasse* (1980) which stated that the ultimate test is whether disclosure and inspection is necessary for disposing fairly of the proceedings. This test is reflected in the current court procedure rules. Though a document may contain confidential information, that is not, in itself, a reason for not providing such documents on disclosure and inspection. This principle requires a balancing of the rights of third parties to confidentiality against the necessity for the documents to be provided for the purpose of a fair trial.

Accordingly, Mr Justice Ramsey found that without disclosure of this material to the Claimants, they would not be able to properly put forward their case. He therefore ordered that the Claimants be permitted to see such documents.

With respect to the second category, Mr Justice Ramsey did accept that there may be potential problems in re-running the procurement process; however, did not believe that this would be insurmountable and that there would be some practical way of carrying out a fair procurement process. He concluded that the need in this case under CPR Part 31 for documents to be disclosed in order to have a fair hearing was dominant in the balancing exercise which he had to perform.

The Judge did consider that a safeguard was necessary to limit the access by the Claimants to the documents so that they only had the access necessary to enable them to read them and give instructions. He therefore ordered that the individual directors or personnel of Claimants be permitted to read specific documents (which he then went on to list) on the basis that they were read in the presence of their solicitor and they were not to be provided with copies or make notes other than notes which are provided to their solicitors. Additionally, the parties were to agree a procedure by which redactions would be made.

Comment

As claims by aggrieved tenderers become more frequent, the question of what documents must be disclosed (and in what way) by the contracting authority will become an increasingly important one. Mr Justice Ramsey's guidance will therefore be of use to all concerned. Here, he stressed that a Judge must balance the rights of a third party with the need for a fair trial. However from the courts' point of view, the need for an effective review of the procurement process was the dominant factor in any balancing act that needed to be carried out.

Here, there was a provision for tenderers to designate any commercially sensitive information provided in their bids as "Not for disclosure to third parties". This is something that the Judge did take into account. Tenderers should therefore ensure all instructions are complied with in their submissions if they are concerned with confidentiality.

Stacy Sinclair
July 2010