



LEGAL BRIEFING

Letting International Ltd v Newham London Borough Council

[2008] EWHC 1583 (QB), Mr Justice Silber

The Facts

On 15 March 2007, the London Borough of Newham (“Newham”) advertised its intention to enter into framework contracts for the procurement, maintenance and management of private sector leased properties. The tender evaluation criteria stated that the contracts would be awarded on the basis of the most economically advantageous tender, and the evaluation would be based on the detailed written response, pricing and site visits. The evaluation criteria were weighted as follows: specification (50%), price (40%) and the suitability of premises, staffing and working conditions (10%).

Letting International Ltd, a property management company, expressed an interest in tendering. They subsequently received an Invitation to Tender and duly issued their submission well before the closing date. When they failed to become a successful tenderer, Letting International Ltd sought details from Newham as to how the tenders had been marked. It emerged that, in the assessment of compliance with the specification, the proportions attributed to the subject matter of the Method Statements were not equal but varied between 5% and 17%. These weightings had been established after the tender document had been published, but before any tenders had been received.

Letting International Ltd also learned that the overall criteria of compliance with the specification had been broken down into 28 sub-criteria, each with their own weightings. These weightings had not been previously disclosed to the tenderers. Finally, when evaluating the sub criteria, full compliance with the specification received three marks out of five, while the next highest mark was reserved for tenders which not merely met, but actually exceeded, the specification.

Consequently, in November of 2007, Letting International Ltd obtained an interim injunction, upheld by the Court of Appeal, which restrained Newham from entering into any contract or framework agreement pursuant to the above tender arrangements.

The Issues

- (i) Did Newham act without the requisite degree of transparency as required by the EC requirements and, if not, can a claim be made by an unsuccessful tenderer?
- (ii) Did Newham, the contracting authority, apply its chosen criteria correctly?

The Decision

Mr Justice Silber held that Newham had failed to act with the requisite degree of transparency required under Regulation 30 of the Public Contracts Regulations 2006. It had failed to sufficiently disclose the contract award criteria and weightings in advance by not setting out the detailed criteria and sub-criteria against which it actually marked the tenders. It had also failed to disclose the way in which those factors were weighted relative to each other.

The Judge held, applying *Ati Eac Srl E Viaggi di Maio Snc v Actv Venezia Spa* and *Emm G Lianakis AE v Alexandroupolis*, that the requirement of transparency meant that all criteria used to enable a contracting party to determine the successful tenderer must be disclosed. Accordingly, the weightings here should have been disclosed.

The obligation to disclose award criteria, weightings and sub-criteria was not dependent on whether non-disclosure would have had a material impact on the preparation of tenders, and it was unnecessary to show it had suffered actual loss. If Lettings International Ltd had been informed, first of the weight attached to each item in the method statements and second that to obtain full marks it had to exceed the specification, then it would have had a “significant chance” of being both a successful tenderer and then successfully obtaining some work under the framework agreement. That was enough to justify bringing its claim for breach of the transparency provisions.

Comment

Following on from the recent 2008 decision of *Lianakis AE v Alexandroupolis*, this case is again a further reminder from the courts that tenderers must be placed on an equal footing throughout the tender process. Local authorities and public bodies should be mindful that the tendering process must be transparent. This is especially the case if particular selection criteria are to be used. All tenderers must be made aware of the criteria, and equally important, the significance behind the individual criterion used.

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