

Court delivers judgment in action taken by EU Commission against Ireland

The Court of Justice of the European Union (CJEU) last week (18 November 2010) handed down an interesting judgment in an action taken by the European Commission alleging that Ireland had breached its obligations in relation to the procurement of **non-priority services**, i.e. services listed in Annex IIB to the Procurement Directive, such as health security and legal services.

The CJEU decided that Ireland did not breach the principles of equal treatment and transparency by determining the weightings to be applied to the award criteria after the submission of tenders. However the modification of the weightings after an initial review of the tenders amounted to a breach of the principles of equal treatment and transparency. This judgment is interesting as it provides further clarification as to the extent of the application of the general Treaty principles to the award of contracts that either fall outside the Procurement Directive (such as service concessions or low value contracts) or which are subject to only some of the procedural rules (such as non-priority services contracts).

Facts

In May 2006, the Department of Justice released a call for tenders for the provision of interpretation and translation services. The award criteria were set out in the Official Journal of the European Union (OJEU) notice, but were not weighted or listed in any particular order of importance. After tenders were submitted but not opened, the evaluation team attributed weightings to the award criteria. On the day of evaluation, the evaluation team decided to adjust the weightings attributed to each criterion. An unsuccessful tenderer complained to the Commission and the Commission referred the matter to the CJEU.

Judgment

The CJEU noted firstly that non-priority services are only subject to certain of the provisions of the Procurement Directive, namely the rules on technical specifications and the requirement to prepare a contract award notice. However, if such contracts have a cross border interest, the Treaty principles of equal treatment, non-discrimination and the duty of transparency must also be observed. The CJEU noted that the present contract had a cross border interest as the contract notice was published in the OJEU and that three tenderers were established in other member states.

First complaint

The Commission had argued that the contracting authority's failure to have determined the weightings to be applied to the criteria until after submission of tenders breached the principles of equal treatment and transparency. The CJEU dismissed this complaint.

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The CJEU stated that the rules in Article 53 of the Procurement Directive requiring contracting authorities to inform tenderers in advance of the weightings assigned to award criteria are not a direct consequence of the fact that contracting authorities are required to comply with the principles of equal treatment and the duty of transparency. Ireland did not infringe the principle of equal treatment nor the obligation of transparency by attributing weightings to the award criteria that were not disclosed to the tenderers before the closing date for submission of tenders. The award criteria were not designed in such a way as to result in any different treatment of the tenderers by reference to their location.

Interestingly, the CJEU noted that, had the relative weighting of the award criteria been communicated to tenderers in advance, this would not have had a significant effect on the preparation of their tenders. Further, it commented that the assignment of the weightings did not constitute an alteration of the criteria (which is a surprising finding, given that one of the weightings assigned was 0%).

Second complaint

The Commission also complained that, by modifying the weightings attributed to the award criteria after an initial review of the tenders, Ireland was in breach of the principles of equal treatment and transparency. The CJEU upheld this complaint. It held that if the award criteria are altered subsequent to a review by members of the evaluation committee, the criteria on the basis of which the initial review was carried out would effectively be altered and this is inconsistent with the principles of equal treatment and transparency.

Interestingly, Ireland had sought to rely on the argument that no tenderer suffered damage as the outcome of the tender would have been the same in any event. However, the court noted that it was unnecessary to demonstrate that the alteration of the relative weighting discriminated against any of the tenderers. It was sufficient that it could not be ruled out that, at the time the alteration was made, it might have had such an effect.

New court rules adopted for procurement challenges

New court rules have been adopted which set out the procedures to be followed by tenderers when challenging above-threshold procurement decisions of public sector bodies. These new courts rules are contained in Order 84A of the Rules of the Superior Courts and were brought into effect by S.I. No. 420 of 2010 on 8 September 2010. The new Court Rules supplement the Remedies Regulations adopted in March 2010 and they clarify the procedural aspects of procurement challenges, covering, for example, the format of the documents to be used and the rules on service of those documents.

As regards the time limits for procurement challenges, the Courts Rules cross-refer to the time periods set out in the Remedies Regulations and make it clear that the 30-day limitation period in the Remedies Regulations is not absolute. The High Court is given discretion to extend the 30-day period where it considers that there is good reason to do so.

Emerging clarity in relation to the provision of reasons when debriefing unsuccessful bidders

The Remedies Regulations (*the European Communities (Public Authorities' Contracts/Award of Contracts by Utility Undertakings) (Review Procedures) Regulations 2010*), which implement the Remedies Directive (Directive 2007/66), aim to improve the effectiveness of public procurement review procedures. From a practical perspective, one of the most important aspects of the Remedies Regulations is the nature and extent of the obligation imposed on contracting authorities to debrief candidates and tenderers.



Under the terms of the Remedies Directive, the communication of the award decision to any tenderer or candidate concerned must be accompanied by a summary of the reasons required pursuant to Article 41(2) of the EU Procurement Directive (Directive 2004/18), namely the reasons for the rejection of any application or tender and, in the case of any tenderer who has made an admissible tender, the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement. The Irish Remedies Regulations indicate that this information “may” be provided by setting out (i) the score obtained by the unsuccessful tenderer concerned, and (ii) the score obtained by the successful tenderer in respect of each criterion assessed by the contracting authority. However, it has been questioned whether, in all cases, the provision of the relative scores provides the unsuccessful tenderer with “sufficient information to seek effective review” as required by the Remedies Directive.

Recent guidance published by the Department of Finance in the context of the Capital Works Management Framework has thrown light on this question. The template debriefing letters published by the Department for use in the debriefing of candidates and tenderers in public works projects are accompanied by guidance which recognises that the mere provision of scores will not always be sufficient to meet legal requirements. The guidance states: “*There may be occasions when ‘a summary of the reasons’, provided by setting out the marks awarded to the unsuccessful tenderer and successful tenderer, is not sufficient, and a more detailed narrative has to be provided It is important that sufficient information is given to the disappointed participant so that it is placed in a position to decide whether or not it can, or should, seek to review the award*”.¹


Such guidance is consistent with recent cases of the European courts which emphasise the extent to which the full understanding of the reasons for appointment of a bidder must be provided (*Evropaiki Dynamiki v EC* T-300/07, T-387/08, T-63/06). In these cases, Evropaiki Dynamiki (European Dynamics) challenged three separate tender processes run by EU bodies (the European Commission and the European Monitoring Centre for Drugs and Drug Addiction) in which it had been unsuccessful.

¹ See for example, the Employer’s Instructions accompanying model form 1.2(a) available from www.constructionprocurement.gov.ie


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The General Court dismissed two of the appeals in their entirety, finding that the statement of reasons was adequate and that there had been no manifest errors of assessment in the evaluation of the applicant's tenders. However, it upheld one of the appeals, holding that the European Commission had failed to fulfil its obligations to provide an adequate statement of reasons for its decision. In its debriefing, the Commission had issued a letter to European Dynamics setting out the scores given to its tender and the scores given to the successful tenderer. However, there was no comment on the successful tenderer's bid and the court found that this was not sufficient to allow European Dynamics to understand the characteristics and relative advantages of the successful tender and so to defend its rights.



Furthermore the court emphasised that, in circumstances where the successful bidder tendered a higher price than European Dynamics, it is particularly important for the contracting authority to provide the unsuccessful tenderer with full and proper information concerning the evaluation of the individual award criteria.



Whilst these judgments concern the rules existing prior to the coming into effect of the new Remedies Directive nonetheless the court's views are relevant as regards the extent of the information that should be provided to unsuccessful tenderers in order to understand the “*characteristics and relative advantages*” of the successful bid.

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