

Judicial Communications Office

Monday 26 September 2011

COURT OF APPEAL DISMISSES APPEAL BY DEPARTMENT OF FINANCE AND PERSONNEL

Summary of Judgment

The Court of Appeal today dismissed an appeal by the Department of Finance and Personnel against a decision to set aside a Framework Agreement. McLaughlin & Harvey had failed to obtain a place on the Framework Agreement and this meant that they were not able to tender for major government construction contracts.

On 15 March 2007, DFP published a contract notice in the Official Journal of the European Union inviting tenders for the inclusion in a Framework Agreement relating to various construction contracts which it hoped to implement over the coming 4 year period. The contracts would include urban regeneration, further education, arts and sports development projects with a total value of £500 - £800 million. The Framework Agreement was to comprise 5 contractors from whom one would be selected by means of secondary competition as the need arose to lead teams to undertake projects.

DFP issued the tender documents on 24 April 2007. The "Instructions to Tenderers" stated that tenders would be evaluated on a quality submission (accounting for 70%) and a price submission (accounting for 30%). The quality submission element of the bids was to be assessed by a Quality Assessment Team comprised of three experts who would evaluate the tenders. The assessment team prepared guidance sheets to be used in their evaluations. These sheets set out 39 sub-criteria and 186 items and included a weighting that each would be marked against.

McLaughlin & Harvey submitted tender documents on 5 October 2007. On 17 December 2007 the company was informed that it had been unsuccessful in its bid to be placed on the Framework Agreement. A debriefing took place with DFP on 10 January 2008. McLaughlin & Harvey claimed that it was only at this meeting that they became aware of the guidance documents used by the assessment team. The company subsequently launched proceedings claiming that DFP was in breach of its duty of transparency by failing to disclose the 39 topics and the weightings attached to them in the assessment process. Mr Justice Deeny, the trial judge, found that DFP was in breach of its duty and ordered that the Framework Agreement be set aside.

DFP appealed against this decision on the grounds that the trial judge erred in finding that it failed to disclose the topics and their weighting. It also argued that the legislation barred the judge from ordering the Framework Document to be set aside.

The Lord Chief Justice, delivering the judgment of the Court, said that the issue in the appeal was whether the process for the selection of the persons to enter the Framework

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Agreement was in contravention of the principles of transparency and equal treatment contained in the legislation. He said that in order to determine that issue it was necessary to:

- Consider whether the 39 topics in the evaluation document were sub-criteria or sub-headings in accordance with the legislation and case law;
- If so, consider whether they were sufficiently brought to the attention of the tenderers so as to satisfy the requirements of transparency; and
- If so, whether the application of those sub-criteria would have altered the criteria for the award of the contract; contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; or were adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.

The Court of Appeal agreed with the trial judge in considering that the 39 topics were sub-criteria. The Court also agreed that these were matters to which the attention of tenderers should have been drawn. The trial judge had concluded that the sub-criteria were reasonably predictable and consistent with the published criteria but that there was a failure to provide details of the weightings of the sub-criteria.

The Lord Chief Justice said there was no material to suggest that the weightings attached to the sub-criteria altered the criteria set out in the contract documents or contract notice. Nor was there anything to suggest that the weightings were likely to give rise to discrimination against any of the tenderers. The Court of Appeal disagreed with the trial judge's conclusion that the weightings ought to have been disclosed as they were not predictable. The Lord Chief Justice said that the relevant case law does not require of itself the disclosure of the weighting of sub-criteria. He said that there needed to be evidential material to show that if the weightings had been known in advance it could have affected the preparation of the tenders.

The Lord Chief Justice noted that this issue was discussed during the initial hearing. He said that McLaughlin & Harvey told the court that the contract documents were electronically locked so as to prevent any answers in excess of 6,000 words to each question. The company had exceeded this in its first draft and had to delete material. This meant that this was not taken into account in the evaluation and the answer was marked down because of lack of detail. McLaughlin & Harvey maintained that this detail would have been provided if the criteria and weighting had been known.

The Lord Chief Justice said that the Court had carefully considered the relatively limited material available to it which sought to undermine the finding of the trial judge. It concluded that there was no sufficient basis to interfere with the trial judge's finding and his decision to set aside the Framework Agreement. The Court dismissed the appeal.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

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ENDS

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