



Public Procurement case law update

Costs awarded against a non-party
in procurement proceedings

Bombardier Transportation UK Limited -v- Merseytravel [2018] EWHC 41 (TCC)

A recent UK decision in the Technology and Construction Court reveals how a winning tenderer who is a non-party in a procurement case can potentially be exposed to liability for costs.

Facts

Merseytravel conducted a procurement process for a major transport contract involving the supply of new trains and associated works and services. Bombardier participated in the process but was ultimately unsuccessful. The winning tenderer was Stadler Bussnang AG. Bombardier challenged.

During the course of proceedings, a confidentiality ring was established and a number of Stadler's tender documents were disclosed into the ring, alongside documents relating to the evaluation

process. Bombardier applied to vary the terms of consent orders which set out which individuals within the confidentiality ring could view which types of information. Merseytravel adopted what was referred to as a "neutral stance" towards Bombardier's application.

Stadler did not formally participate in the hearing but communicated its opposition to the proposed variation through Merseytravel. Stadler's principal objection was that Bombardier's application was a tactic deployed to gain access to, and then misuse, confidential information with the ultimate aim of gaining an improper competitive advantage in future procurement processes. The judge, Mr Justice Coulson, granted Bombardier's application. The judgement is set out in *Bombardier Transportation UK Limited v Merseytravel [2017] EWHC 726 (TCC)*.

Costs of the application

On the issue of the costs of the application, the judge declined to make any costs order against Merseytravel: Merseytravel was neutral in relation to the application and was simply passing on Stadler's concerns. The question was therefore whether Stadler, although *not* a party, should bear any liability for costs.

In relation to the costs incurred by Bombardier, the judge held that Stadler was *prima facie* liable for Bombardier's costs, describing some of Stadler's objections as "unreasonable" and "contrary to the terms of the consent order itself". However, before ruling definitively, he asked Stadler and Bombardier to make written submissions concerning liability for costs which he would consider. His ruling is recorded in the recent decision.

Acknowledging that costs orders against non-parties are to be regarded as exceptional, Mr Justice Coulson pointed out that a key principle to be considered when determining the liability of a non-party for costs was whether the party against whom the order was sought was "the real party" to the litigation. Whilst Merseytravel was "studiedly neutral", it was plain, in the judge's view, that Stadler was the real party: "the opposition to the application came only from Stadler, because the documents in question were their documents...all the court time was taken up because of Stadler's opposition". Accordingly, an order for costs was made against Stadler.

Conclusion

Mr Justice Coulson was clearly wholly unimpressed by Stadler's unsubstantiated allegations that Bombardier, in making the application, was driven by the desire to see and misuse confidential information. Whilst pointing out that an order for costs against a non-party will always turn on the facts of the particular case, he did sound a note of warning

to successful tenderers in procurement cases: "...successful tenderers will need to consider carefully the balance between, on the one hand, the undoubted confidentiality of their tender documents and, on the other, the need for a proper and fair disposition of the unsuccessful tenderer's challenge. In circumstances where confidentiality rings are common (as in this case), a non-party will need **very good evidence** before it suggests that the claimant is seeking the documentation for its own commercial advantage, rather than for the purposes of the litigation" (our emphasis).

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