

When is a fail not a fail?

MLS (Overseas) Ltd v The Secretary of State for Defence



A recent UK procurement case involving the Ministry of Defence provides a salutary lesson for authorities on the consequences of a lack of clarity in procurement documents.

Facts

The Ministry of Defence (MoD) carried out a procurement process for a contract for global port, maritime and other logistical support services for the Royal Navy. The incumbent provider of the services (MLS) took part in the competition but was ultimately unsuccessful, despite having offered the lowest price and being awarded the highest score in the technical evaluation. Its lack of success was due to the fact that it was awarded a “fail” for its response to a question on safety culture within its supply chain (Question 6.3).

MLS challenged the outcome of the competition on the basis that the Invitation to Tender (ITT) did not state, or was ambiguous as to, the consequences of a “fail” score in respect of Question 6.3. It argued that the MoD was not entitled to reject its tender for a single fail score and had, inter alia, acted in breach of its obligations of transparency and equal treatment.

The MoD admitted that as a result of an administrative error, an express statement as to the consequences of a “fail” score for Question 6.3 had been omitted from the ITT but sought to argue that a reasonably well-informed and normally diligent tenderer would have known that the consequence of receiving a “fail” score would be rejection.

The ITT and the evaluation process

The ITT stated that the contract would be awarded to the Most Economically Advantageous Tender. The evaluation process involved an assessment of commercial compliance, a technical evaluation (including a requirement to obtain certain minimum scores) and a financial evaluation. According to the ITT, the contract would be awarded to the tenderer achieving a compliant result on commercial compliance, attaining all of the minimum scores in the technical evaluation and having the highest combined score from the technical and financial evaluation.

Question 6 on “Safety and Quality Management” came within the ambit of the technical evaluation. A technical evaluation table appended to the ITT showed the weightings and scores available for Questions 1 to 5 of the technical evaluation but did not include any reference to Question 6. The ITT stated that a score of lower than “good confidence” for any response to Questions 1 to 5 would result in the rejection of the tender.

In relation to Question 6, which contained three sub-questions, the ITT stated that each sub-question would be evaluated on a pass/fail basis. However, the consequences of receiving a “fail” were not explicitly set out. In the event, the evaluators for Question 6.3 each marked the response provided by MLS as a “fail”, as did the moderator.

The outcome of the competition was communicated in a letter to MLS which referred to a requirement to obtain a pass mark in relation to Question 6 and stated that MLS’s tender would have been successful had it not received a “fail” score for Question 6.3.

The judgement

In her judgement, Mrs Justice O'Farrell focussed largely on the principle of transparency, citing the decision of the UK Supreme Court in *Healthcare at Home Ltd v The Common Services Agency (Scotland)* in which it was held, following *SIAC Construction Ltd v County Council of the County of Mayo*, that award criteria must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.

The judge found that the ITT did not make clear to the reasonable tenderer that a fail score for Question 6.3 would result in rejection. In contrast to other elements of the evaluation process described in the ITT, where scores that would lead to rejection of the tender were spelt out in bold type, there was no clear statement in bold type that a "fail" score for any part of the response to Question 6 would, or could, result in rejection. Consequently, on a proper construction of the ITT, the reasonable tenderer would not understand whether or how a "fail" score against the response to Question 6.3 would, or could, result in rejection of the tender; the MoD had acted in breach of its obligations of transparency and equal treatment in applying criteria that were arbitrary or not sufficiently clear.

Comment

The judgement brings home the consequences of a lack of clarity in tender documents. Whilst it might seem obvious to many that rejection would be the natural consequence of being attributed a "fail" score in a tender competition, the court found in this case that by not including in the ITT an explicit and expressly stated consequence of receiving a "fail", the MoD, in rejecting MLS's tender, had acted in breach of the principles of transparency and equal treatment.

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