



## THE PITFALLS IN SETTING AWARD CRITERIA IN RELATION TO FRAMEWORK AGREEMENTS

A significant number of recent cases have underlined the importance of taking care when setting award criteria. Perhaps the most notable of these concerned questions referred to the European Court of Justice by a Greek court in the case *Lianakis and Others v Dimos Alexandroupolis*. In this case the court, in essence, noted the importance of not mixing up selection criteria with award criteria and also the necessity of fully disclosing, in addition to the award criteria, any sub-criteria and weightings in the contract notice and/or the invitation to tender.

In the UK there have been a number of cases that have dealt with award criteria since the *Lianakis* decision. In relation to framework agreements, two cases from Northern Ireland have caused a significant amount of interest. Both cases involve successful legal challenges by unsuccessful tenderers and should serve as a timely reminder to universities and colleges of the importance of complying with the EC Procurement Rules, as well as of the costly, time-consuming and frankly embarrassing consequences that can flow from non-compliance.

The two Northern Irish cases in question are (1) *McLaughlin and Harvey Ltd v Department of Finance and Personnel* (“*McLaughlin and Harvey*”), and (2) *Henry Brothers (Magherafelt) Ltd & Others v Department of Education for Northern Ireland* (“*Henry Brothers*”). These two significant decisions,

both given in 2008, involved challenges to the setting up of framework agreements in Northern Ireland for construction projects valued in each case at hundreds of millions of pounds. Both cases concerned the award criteria applied. In *McLaughlin and Harvey*, the complaint was that key aspects of the award criteria (the weightings to be allocated to certain sub-criteria) had not been disclosed in advance while in *Henry Brothers*, the suitability of one of the award criteria that had been disclosed was challenged. In both cases, the judge decided in favour of the disgruntled and unsuccessful tenderer.

### **McLaughlin and Harvey - Undisclosed award criteria**

In the first case, various award criteria were specified in the tender documents. A framework of five successful bidders was established. The firm that came sixth was *McLaughlin and Harvey*, which learnt that it had failed to make the grade by just 1%. The firm requested a debrief meeting with the Department of Finance and Personnel (the awarding department), and at that meeting discovered that the tender panel had developed and used a weighting methodology that had not been disclosed in advance to the bidders.

The award criteria that were disclosed were basic, covering only price and quality with some sub-division of quality and weighting of the quality sub-criteria. However, at the tender evaluation stage the panel applied 39

headings, each of which was weighted - it was this aspect of the scoring system that had not been disclosed. The judge found that had the tenderer known what those weightings were there was no doubt that they would have adjusted their tender accordingly. Therefore, the judge was satisfied that the weighting of the 39 sub-criteria amounted to award criteria that should have been disclosed to bidders in advance. The failure to disclose meant that the process of evaluation had not been objective and transparent and had not ensured that all tenderers were on an equal footing. On this basis the judge found that there had been a breach of the public procurement rules.

It is interesting to note that the 39 criteria had been broken down into a further 186 items which were also not disclosed. It was not necessary for the judge to rule on whether these 186 items should also have been disclosed as the finding was already against the defendant on the basis of the 39 criteria and weightings not disclosed. However, the judge did note that it seemed possible that at this very granular level these 186 items would not need to be disclosed. It does appear that the 186 items were points that had to be evidenced rather than award criteria. Whether this approach is correct remains to be seen, and given the clear judgement in the *Lianakis* decision as to disclosure, great care should be taken before deciding not to disclose any aspect of the award criteria and system.

## Henry Brothers - Suitability of award criteria

In Henry Brothers, the challenge was not based on non-disclosure of award criteria, but rather on the appropriateness of the published award criteria. The invitation to tender to be a supplier on the framework stated that the award would be on the basis of the most economically advantageous tenders, as opposed to simply the lowest price, with eight places on the framework. The award criteria for the framework agreement in question were set at 80% qualitative and 20% commercial. The commercial aspect was based solely on fee percentages rather than any other objectively verifiable aspect of price or cost. This was designed to prevent, as the Department saw it, successful firms from bidding low but claiming high to ultimately bring the contract into profit.

The framework was set up on this basis with eight successful companies, however, Henry Brothers was not one of these. Henry Brothers challenged the Department's approach to the commercial assessment.

In essence, the challenge was based on the argument that simply using fee percentages alone could not give any actual indication of the turn-out costs of a particular project. Further, in this case the final price of any actual contract was to be determined only after conclusion of the secondary competition (i.e. the "call-off") among those on the framework and not as part of that competition.

The judge noted that although the term "most economically advantageous tender" certainly allowed a large number of non-price factors to be considered, it did require an element of assessment of price/costs. The judge did not say that fee percentages could never be used for the purposes of

establishing a framework agreement but clearly great care must be taken in doing so. One solution, mentioned in the judgement, is to provide costed examples. However, the judge also noted that fee percentages could be used to establish the framework if, when individual contracts were awarded under the framework during the secondary competitions, prices would be established by competition and not simply negotiated with the winner as in this case.

## Remedies

The remedies open to the court in these situations are also illuminating. In the McLaughlin and Harvey case, the court decided that it had the power to set aside the framework agreement, such that the whole process of setting it up would have to be gone through again. This was despite the fact that the relevant EC Directive states that if a contract had already been entered into, then the court has no power to order any remedy other than damages. The reason the court decided it was not constrained by this provision was because the framework agreement itself was not a "contract" within the meaning of the legislation. The court also concluded that damages would be an inferior remedy for McLaughlin and Harvey, compared with the chance of gaining a place on the framework, which on its previous performance it stood a good chance of securing.

This case shows the important distinction between the public procurement process to set up frameworks and the subsequent processes of awarding contracts under the framework (the "secondary competition" or "call-off"). While the decision to set up a framework may be set aside binding contracts may not be.

In relation to the position of concluded contracts, it is important to note that UK law

will need to be changed this year to reflect the new European Directive on Remedies. This Directive will provide that concluded contracts can be set aside although only following a finding of certain very serious breaches of the public procurement rules.

## Concluding Remarks

Both cases show the importance of taking great care when establishing award criteria. McLaughlin and Harvey underlines the need to ensure a transparent process and for full disclosure of the award criteria, sub-criteria and weightings.

These cases also show that in relation to framework agreements it is important to have a clear distinction between the preliminary stage of awarding the framework agreement and secondary stage of awarding actual contracts under the framework. This distinction needs to be considered both when drafting award criteria and also when considering the implications of a challenge to the process.

**This article contains summaries of complicated issues and should not be relied upon in relation to specific matters. You are advised to take legal action on particular problems and we will be happy to assist.**

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