Client Alert.

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UK Public Procurement Law Digest: Risks of Abandoning Procurements

Court defeat for contracting authority shows the potential risks of aborting a public procurement in favour of a parallel procurement, and highlights issues in the use of a "public sector comparator" model.

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Leeds City Council has lost the first stage of what might be a protracted legal battle over its cancellation of a procurement for the design and construction of a new music and entertainments venue. The Council sought to dispose early parts of the procurement challenge from an aggrieved bidder, but its attempt to do so was rejected. As a result, a question mark now hangs over public bodies which want to cancel a procurement part-way through. An interesting side note to the case is that it potentially calls into doubt the Council's use of a "public sector comparator" to assess affordability and value for money. Since the Council fell at this first hurdle, both of these issues will now proceed to a full court hearing. The eventual result will provide clarification to many contracting authorities.

WHAT IS THE CASE?

The case is ***Montpellier Estates Limited v. Leeds City Council [2010] EWHC 1543 (QB)***, a decision made by the English High Court in an application made by a local authority to strike out and seek summary judgment in respect of parts of a claim brought by a disgruntled property developer who lost out in an aborted large-scale construction project.

WHY IS THIS CASE IMPORTANT?

In the aftermath of the recession, austerity measures are all the rage. The UK government, with its recently announced emergency budget, makes its stance clear: it considers that aggressive cuts to every aspect of public sector spending are necessary in order to reduce the UK's budget deficit. One of the more obvious effects such austerity measures has on public procurements, aside from likely reduction in new procurements, is the cancellation of on-going public procurements.

Traditionally, the general rule has always been that a contracting authority has a very broad discretion to terminate any on-going public procurement process. Whilst this case does not yet fetter this general rule, it nevertheless demonstrates that if a contracting authority is not careful in how it conducts itself, it may not be able to rely on this principle to fend off legal challenges brought by bidders affected by the aborted procurement processes, particularly where the contracting authority aborts a given public procurement in favour of a solution which the contracting authority identifies through a parallel procurement exercise.

The onset of the financial crisis coincided with the trend which saw legal challenges under the Public Contracts Regulations 2006 (the "**PCR**"), and also its utility counterpart, the Utilities Contracts Regulations 2006, becoming

increasingly common. The forthcoming cuts in public sector spending could well prompt more aggrieved bidders, particularly those who rely heavily on public sector businesses, to pursue contracting authorities more aggressively.

Any contracting authority would be well-advised to take as much care in how it terminates any on-going procurement as it does in evaluating bidders and deciding whether or not to award contracts. Likewise, bidders will want to be even more critical in observing how a contracting authority behaves, particularly in respect of large-scale private finance initiative projects which are at risk of being abandoned, and in respect of procurement processes which were commenced on or after 20 December 2009[1].

WHAT HAPPENED IN THIS CASE?

In July 2007, Leeds City Council (the "**Council**") published a contract notice in the *Official Journal of the European Union*, inviting bidders to participate in the procurement process for the development of a new multi-purpose arena facility in the city of Leeds, to be conducted in accordance with the competitive dialogue procedure. Bidders were invited to make proposals based on their own site and/or a site located at Elland Road which was owned by the Council.

Montpellier Estates Limited ("**Montpellier**") is a property development company specialising in major projects involving the regeneration of industrial sites, primarily in north of England. Montpellier owned a site in Leeds known as 'City One', and in a feasibility study conducted on behalf of the Council prior to the publication of the contract notice, the City One site was identified as one of the potentially suitable sites for the proposed development.

Montpellier was concerned that the site at Elland Road had a built-in advantage over any other privately-owned site by virtue of being owned by the Council, and it was reluctant to participate in the procurement. Nevertheless, it was given assurances by the Council that the procurement would be conducted openly and fairly, regardless of the fact that the Elland Road site was one of the competing sites. Accordingly, Montpellier decided to take part in the procurement.

At the outset, things seemed to go well for Montpellier. It successfully passed the pre-qualification questionnaire stage of the competition and was invited in October 2007 to take part in the second stage of the competition, the "invitation to participate in dialogue". It was also invited in February 2008 to take part in the third stage of the competition, the "invitation to continue in dialogue" ("**ITCD**").

However, Montpellier remained concerned about the fairness and openness of the competition and, throughout the procurement process, it repeatedly sought from the Council assurances that Montpellier was not merely being used as a stalking horse for an option involving a publicly-owned site. The Council gave its assurances that that was not the case.

In June 2008, the Council notified all of the bidders for the first time that the assessment at the ITCD stage would involve a comparison with a public sector comparator[2]. Subsequently, in August 2008, the Council asked the remaining bidders to submit their "*best commercial offer*", which was to be evaluated against the "*evolving public sector comparator*".

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1 The new remedies regime, which provides for enhanced remedies in respect of breaches of the PCR, applies to public procurement processes which were initiated on or after 20 December 2009. For further details regarding the new remedies regime, refer to our January 2010 update "New Public Procurement Remedies in the UK"

2 A public sector comparator has been used in many large-scale procurements as a tool to assess affordability: it measures what the project would cost if the procurement or project were to be done in-house by the authority. As such, it is not a device to compare or evaluate bidders against each other; rather it's a way of assessing whether or not a procurement makes sense at all (because if a tender wins but is worse than the public sector comparator, the authority is in theory better off not going ahead).

Against this background, which the judge described as "*somewhat unpromising*", Montpellier submitted its tender in September 2008. In October 2008, the Council notified Montpellier that it was aborting the procurement process. Yet, on the same day, the Council announced that it was going to develop the proposed arena at another site at Claypit Lane, a site which the Council jointly owned with the Leeds Metropolitan University and which was not a site the bidders were originally asked to consider.

Perhaps unsurprisingly, the Council's decision to abandon the procurement and to proceed with the development at a new, alternative site which was not originally within the scope of the project, prompted Montpellier to initiate proceedings against the Council in February 2009, alleging that the Council breached the PCR. The long list of alleged breaches of the PCR by the Council set out in Montpellier's particulars of claim included, amongst others, the following allegations that the Council had:

- introduced a new evaluation criteria not previously indicated in the contract notice or the subsequently issued tender documentations by introducing the public sector comparator as means of evaluation;
- applied a weighting not previously indicated in the contract notice or the subsequently issued tender documentations by requiring Montpellier's tender to be compared against the public sector comparator;
- terminated the procurement without giving Montpellier any opportunity to bring its tender within the Council's previously undisclosed affordability constraints;
- failed to follow the relevant process and procedures by abandoning the procurement and instead opting for a previously undisclosed alternative plan; and
- breached an implied contract that existed between it and Montpellier.

The Council made an application under the Civil Procedure Rules to strike out these specific claims or, in the alternative, to obtain summary judgment in respect of these specific claims.[3] In making this application, the Council essentially argued that the procurement was not terminated as a result of the application of any award criteria (since it was terminated before the final stages of the competitive dialogue procedure was reached) and that the law provided for a very broad discretion for contracting authorities to terminate a public procurement process. The Council emphasised that the PCR and the underlying EU rules only required that award criteria be applied to a decision to award or not to award a contract, and not to a decision to abandon a public procurement process.

Montpellier, on the other hand, argued that strike-out of claims and summary judgments were to be reserved for the most obvious cases and that, in cases such as this, where there are issues that are uncertain or developing, the court should be slow to grant a summary relief of the form sought by the Council. Montpellier emphasised that its criticism of the Council's behaviour is not centred on the fact that the Council had abandoned the procurement but, rather, on the fact that the Council had introduced the public sector comparator which was tantamount to a pass/fail test (as opposed to an assessment against a pre-determined criteria and weighting), and the fact that the Council had been, unbeknownst to the bidders, conducting a "parallel procurement".

[3] Under Rule 3.4 of the Civil Procedure Rules, the court can strike out a statement of case on the ground, amongst others, "*that the statement of case discloses no reasonable grounds for bringing or defending the claim*". Similarly, under Rule 24, the court can potentially give summary judgment against either party to a dispute if: "*(a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.*"

The judge acknowledged that contracting authorities generally have a wide scope of discretion to terminate a public procurement process but, at the same time, took the view that it would be wrong to strike out or grant summary judgment in respect of those specific parts of Montpellier's complaint in the particular circumstance of this case, because Montpellier's complaint "*is not directed solely to the circumstances of termination but… to the parallel process leading to the formulation of Plan B*", which was "*continuing, albeit undisclosed, during the procurement process*". The judge also took the view that it was inappropriate to refuse Montpellier the right to argue that there was an implied contract at this stage in the proceedings.

Accordingly, the application made by the Council was rejected in its entirety by the judge.

This is a judgment which was made only in respect of a limited attempt by the Council to nullify a narrow portion of Montpellier's complaint, and the core issues of the case remain to be resolved at a full trial. Whether or not the matter proceeds to a full trial might well be affected by Montpellier's decision to proceed with its own plan for redevelopment of the City One site[4], but should the matter proceed to a full trial, it could potentially set an important precedent regarding the contracting authority's right to abandon a public procurement process and how future authorities should use a public sector comparator to assess value for money and affordability.

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

[4] It is to be noted that Montpellier applied for a planning permission for 2 million sq. ft. mixed-use development of the City One site in March 2010, and the Council itself is reported to be very pleased with Montpellier's redevelopment plan; see "*Sweet deal for Leeds? A detailed look at Montpellier Estates' City One*" by Nadia Elghamry, 16 March 2010, Estates Gazette (estatesgazette.com).