Client Alert.

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UK Public Procurement Law Digest:
Cost Awards in UK Public Procurement Claims

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Two of the main factors which typically influence a decision by an aggrieved bidder whether or not to raise a bid protest in the UK courts are costs and damage to future reputation. While the reputational stigma in the government market of being seen as a complainant seems set to remain as intangible as ever, there is now guidance from the UK courts as to how the issue of costs will be dealt with if an aggrieved bidder is successful – or, more likely, partly successful – in a procurement claim.

This edition of the MoFo UK Public Procurement Law Digest explains the approach adopted by the court in *Mears v. Leeds County Council*, where the aggrieved bidder was successfully awarded damages for a breach of the procurement regulations but had its costs award scaled down significantly because it had not prevailed on other key claims.

When considered alongside the apparent difficulties faced by bidders in persuading courts to set aside improperly awarded contracts, the costs rules increase the incentive on an aggrieved bidder to focus its case around the claims that it stands the strongest chance of winning. Set-aside claims are increasingly seen as hard to win in UK courts; and defeat in a set-aside claim brings a double-whammy effect of both losing the most effective remedy and downgrading the likely costs award in respect of other, more "winnable" claims. This means that, more than ever, claimants need to be doubly sure of success before going ahead with an application for set-aside.

BACKGROUND

The *Mears v. Leeds County Council* case arose out of a procurement exercise by Leeds City Council ("Leeds") that began in October 2009 in relation to the improvement and refurbishment of social housing in the Leeds area.

Although Mears Limited ("Mears") was originally selected to tender, in July 2010 it was informed that its tender had been unsuccessful and that it would not be taken through to the next stage of the procurement. Mears brought a claim under the Public Contracts Regulations 2006 ("PCR") alleging that Leeds had not acted transparently or treated Mears equally and in a non-discriminatory way.

Mears brought a range of different claims, some of which were ruled, at a High Court hearing in December 2010, to be out-of-time and were therefore struck out. Other claims were deemed to be valid, and eventually, in April 2011, the High Court ruled that Leeds had breached the PCR by failing to disclose weightings contained in an evaluation table and had applied certain award criteria or sub-criteria improperly which could have adversely affected the preparation of Mears' tender to Leeds. The court also found that, had this breach not occurred, there was a real and significant chance that Mears would have been successful in being selected to participate in the next stage of the tender procedure. The court concluded that the appropriate remedy in this case was damages and awarded those damages in Mears' favour.

However, crucially, Mears had also claimed the ineffectiveness remedy provided under the PCR[1] and had asked the court to set aside the procurement process and force Leeds to start again[2]. The court weighed the balance of convenience and concluded that the prejudice in terms of the housing arrangements for a significant number of people (and the consequent delay in the provision of those arrangements) outweighed any impropriety in the procurement process. It therefore refused to grant the remedy of set-aside and told Mears that damages would be a sufficient remedy.

Subsequently, Mears sought an order for costs in its favour. Leeds resisted that claim and, indeed, argued that Mears should, in fact, pay the significant majority of Leeds' own costs.

The bad news for Mears was that even though it proved its case on procurement irregularity and succeeded in getting a damages award, the court reduced the costs award by 65% to take account of the fact that it had also made a claim for set-aside which had been rejected.

Mears' costs were estimated at £145,000 plus VAT; Leeds' costs were higher, at £217,000 plus VAT.

APPROACH TO COSTS

The court provided a very helpful summary of the approach that ought to be taken to costs in English law cases generally but specifically in the procurement context. A number of key principles applied:

1. In litigation where each party has a claim and alleges that a balance is owing in its favour, the party which ends up receiving payment should generally be characterised as the overall "winner" of the action.

2. When a court considers how to exercise its discretion to award costs, the court should take as a starting point the general rule that the successful party is entitled to an order for payment of its costs.

3. The judge also needs to consider what departures are required from that starting point, having regard to all the circumstances of the case.

4. If the parties are successful on different issues, the judge should consider whether to make an issue-based costs order or make a proportionate costs order.

5. In considering the circumstances of the case, judges should have regard to any offers made during the course of proceedings but also to each party's approach to negotiations and the general conduct of litigation (*e.g.*, whether any claims made were futile or not reasonably brought).

Mears claimed that it ought to be seen as the overall "winner" of the case because it had obtained judgement for damages on at least part of its claim, despite a strong defence by Leeds. By contrast, Leeds also claimed that it was the successful party because it had succeeded in striking out some of Mears' claims and the court had refused to grant the set-aside remedy.

[1] For an overview of the regime introduced by the New Remedies Directive and its UK implementation measures, namely the amendments to the Utilities Contracts Regulations 2006 and the Public Contracts Regulations 2006, see our January 2010 Update: New Public Procurement Remedies in the UK.

[2] For an analysis of the difficulties in persuading courts to grant the remedy of set-aside/ineffectiveness, see our August 2011 Update: The Elusiveness of the Remedy of Ineffectiveness.

Overall, the court decided that the right starting point was that Mears was the successful party because it had, in fact, obtained a judgement against the authority for damages to be assessed. It also said that, although Leeds was successful in its defences on some claims (and particularly in relation to the set-aside claim), it was not successful in defending the claim on which Mears eventually succeeded. Accordingly, the court applied the general rule that Mears, as a successful claimant, should have its costs paid by the authority.

The court then went on to discuss the conduct of each party as relevant to the application of this general principle. In this case, the court concluded that there was nothing particularly in the conduct of the parties which would affect its discretion on costs.

Leeds had argued that Mears was unreasonable in pressing ahead with the set-aside claim. The court disagreed. The judge felt that Mears was not unreasonable in pursuing the set-aside remedy – but the fact remained that Mears lost on that part of the claim, which was one on which the parties had spent considerable time and incurred significant costs.

The court also addressed various issues raised by Leeds as to whether Mears had appropriately made a number of claims. The court agreed with Mears that it was not unreasonable for Mears to have raised those claims even though the court may have eventually concluded that the claims were time-barred and may have been weak.

In the key part of its judgement, the court looked at the relative success and failure of the parties on particular issues that arose in the case. Mears had succeeded on one aspect of the claim and failed on others. Accordingly, the court decided that the right approach was to make a proportionate costs order to reflect the extent to which Mears had not been selective in its claims. So, Mears should not recover all of its costs. Considerable time and effort was spent on claims on which Mears was unsuccessful, so the court felt it inequitable that the claimant should recover its costs for dealing with those claims.

However, the court also noted that there was no obvious formula for establishing the percentage of costs payable based on the number of issues, pages of evidence, or paragraphs of submissions or judgements. The decision is, to some extent, impressionistic based upon the judge's knowledge of the case. The court took as a starting point the costs on claims where Mears had been successful together with the so-called "common costs" that Mears had to spend to bring the proceedings.

Eventually, the court concluded that the costs payable to Mears should be discounted by 65% to reflect the significant costs that related to issues on which the authority succeeded whilst still balancing this against the fact that, overall, Mears was properly characterised as the successful party. Accordingly, Mears was granted a costs order for 35% of its costs of the action, assessed on a standard basis.

CONCLUSION

This case reinforces a concern for all aggrieved bidders who may be considering a claim under the PCR. Many aggrieved bidders shy away from formally mounting a claim because of the potential reputational hit they may take in any future bids to government (*i.e.*, the concern at being seen as a "troublemaker" who would bring a claim against a government department). The stigma associated with bringing procurement claims in the UK has still not gone away despite the existence for the past three or more years of a much more liberal procurement remedies regime.

On a more practical and tangible level, costs issues also remain a concern for claimants. There is always a temptation amongst claimants to try as many claims as possible in the hope that one will stick. In particular, since the liberalisation of the remedies regime, the remedy of ineffectiveness (*i.e.*, "set-aside") is particularly appealing as it's seen as something that would correct many of the inequities brought about by an improper procurement process. However, as we have previously reported[3], the barriers to a successful award of set-aside are high and it's a remedy that is relatively rarely granted. As in this case, a court is required to balance the improprieties of the procurement process against the wider impact that an order to recommence the procurement process would have. Generally speaking, authorities have been much more successful in defending claims for set-aside than claimants have been in achieving set-aside.

Against this background, the costs impact is significant. Mears was successful in being awarded damages (which is arguably a much less useful remedy than set-aside anyway) and had its costs reduced by 65% because it wasn't successful in the larger set-aside claim. This is an issue which claimants need to take into account when deciding what claims to raise and, in particular, if there are any concerns to the weakness of particular claims, it is a reminder that claimants need to be very careful to prioritise only the main claims.

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[3] See our August 2011 Update: The Elusiveness of the Remedy of Ineffectiveness.