ADDLESHAW GODDARD

TRANSCRIPTION

WEBINAR SERIES: PROCUREMENT BITES

D, E, F OF PROCUREMENT

Clare Dwyer

Well good morning everyone I am Clare Dwyer, apologies that you can't see my face, slight technical issues. I'm in the Procurement Group at Addleshaw Goddard and I'd like to welcome you on their behalf to the second in the small but beautifully formed procurement bites series. Today we're going to do D, E and F and you will have 30 minutes of digestible procurement law. If you have any questions for us please do use the question function on your dashboard. So first up we have Bill Gilliam who's going to talk to us about Discretion. So recent guidance has been given on the exercise of it by the authority and Bill will tell you all about the very high profile recent rail case he's been involved in. Over to you Bill.

Bill Gilliam

Thanks Clare, good morning everyone. So the "D" that we're starting with today in our alphabet of procurement is "Discretion". We're going to look at two areas of discretion that authorities and utilities often have to tackle. The first being the discretion to set contractual requirements and terms and the second the discretion to exclude or disqualify non-compliant bidders and we'll finish our "Ds" with "Dealing with Discretion" so some tips for utilities and for authorities and bidders on how to address the issue of discretion, so if you like continuing the "D" theme "Diligently Dealing with Discretion" rather than a dog's dinner of a disaster.

So in terms of background we're going to place the two areas, so the discretion to set contract requirements on disqualification on the recent major procurement case of the Rail Franchising Litigation 2019 on which judgement was delivered earlier this year. Addleshaws acted for the successful authority which was The Department for Transport and The Secretary of State for Transport. The procurement related to franchises that were being awarded for the East Midlands, South Eastern and the West Coast Franchises for Rail. In that case one of the major issues was pensions so pensions risk. In the actual ITT it specified that the framework agreement, the draft framework agreement but with part of the competition could not be adjusted or amended by the bidders and if any bidder did so it would be non-compliant and the ITT also expressly stated that any non-compliance could lead to disqualification.

The challenger bidder decided that they weren't prepared to accept the commercial risk of the pensions and accordingly amended the franchise agreement which made it non-compliant. Other bidders accepted the pensions risk and bid compliantly. The Department decided on the basis of the amendments to the franchise agreement that the bid was non-compliant and the bids were therefore excluded and the bidder disqualified. The bidders try to challenge on the basis that firstly they argued in terms of the contract requirements in terms that pensions risk was just too wide and too uncertain. They also tried to challenge on the basis that the authority's discretion to disqualify was too wide and too unlimited, so to go straight to the punchline, the court's judgment in relation to both of those exercises of discretion was that they were within the margin of discretion of the authority and the bidders were wholly unsuccessful.

Just looking at each of those two areas in a little bit more detail. In terms of the discretion to set the contract requirements and the terms the court said there was no restriction on the size of the risk that an authority or utility could seek to impose on the bidders, it was a case for the authority or the utility to

decide within their margin of discretion the level of risk they wanted to place on the bidders versus public funds and in any procurement the bidder then makes a decision as to whether they wish to bid or not.

In relation to the second area so the disqualification discretion, the court found that it wasn't the case as the claimants allege that the discretion was unlimited to disqualify. If there was a non-compliance then in terms of the discretion to disqualify it had to be exercised within the limits of the principles of effectively fairness, transparency, equal treatment and non-discrimination and that was based on how a reasonably well-informed and normally diligent tenderer, a rewind tenderer would have interpreted the ITT and in this case the court said that a rewind tenderer would have understood that the ITT made it clear that any amendments to the framework agreement would be non-compliant and that in all likelihood the authority would exercise its discretion to disqualify.

The court also made the point that because of the nature of the content of the ITT and the framework agreement that because other bidders had bid compliantly that if the authority hadn't disqualified the non-compliant bidders those compliant bidders would have had a right to challenge themselves.

So just on the final point and dealing with the discretion, what are the lessons that should be taken away? For authorities and utilities the key thing is to always act in compliance with those fundamental principles of fairness, equality, non-discrimination and transparency. So as we always say if you're the authority or the utility tell the bidders what you're going to do, do it and tell them what you've done so paper the trail throughout, keep them informed and operate consistently with the ITT.

In relation to the approach that's taken by the bidders, if there is an area of discretion that the authority or a utility has reserved to themselves whether it be in relation to contract requirements and terms or a discretion to exclude or disqualify if you are not sure of that and if you are uncertain as to the scope of that or the nature of it then raise the question, raise the issue at that time. As you will appreciate in relation to procurement time limits are very tight, 30 days from the date when you knew or ought to have known of a breach of the regulations and so waiting and just sort of banking as it were that uncertainty and then trying to challenge later on in all likelihood means you'll be out of time and you may well have put a lot of effort into making a bid which is then being non-compliant and gets disqualified. So thinking about those issues at the beginning and working your way through early pays dividends. Clare, back to you.

Clare Dwyer

Great thank you very much Bill. Now in terms of questions I have one here. How often do you get to see the exercise of discretion challenged by a bidder?

Bill Gilliam

It's quite a common area if an unsuccessful bidder is looking to have a go at the authority or the utility then the exercise of discretion can be a fertile hunting ground in terms of arguments about what a rewind tenderer would have expected and particularly if it's a procurement that is of a high value or of critical business importance to a particular bidder. What I would say is what we often call the "iceberg of procurement challenges" is that the cases that have actually had claims issued and actually get to trial like the rail franchising litigation tend to be the tip of the iceberg, you know 10% maybe or less of procurement challenges or issues that get raised under the sea if you like of the iceberg there is a lot of issues that do get raised when an authority or utility issues a standstill letter where bidders are sort of questioning and testing whether that discretion is being exercised in accordance with the principle. So the key there as I was saying before is if you're the authority or the utility and you tell the bidders what you're going to do, you've done it and then you tell them what you've done that articulation and that evidence trail has been papered, has been laid carefully and that will get rid of those challenges or assuage the concerns of the bidder. If it hasn't been done in the right way by the utility or authority then it is likely those challenges will escalate to that sort of higher tip of the iceberg in terms of proceedings getting issued and potentially going to trial will come out.

Clare Dwyer

Thank you very much Bill. Next up we're going to look at Economic Operators, what is one and why does it matter? So for Economic Operators the "E" of D, E and F I welcome to the screen Andrew Finfer from our Scottish Edinburgh office. Over to you Andrew.

Andrew Finfer

Thank you Clare. Indeed I am based in the Edinburgh office. The law of public procurement in Scotland is slightly different to that in England, for example the concept of regulated procurements and regulated contracts exist and in the Scottish law of Public Procurement they are contracts the estimated value of which is greater than thresholds laid down in some Scottish legislation and those thresholds are lower than in the Public Contracts Scotland Regulation so there is some additional law that applies in Scotland. However for these purposes I'm going to look at the law that is common to both Scotland and England and Wales. So I'm going to speak briefly about Economic Operators, their role in ensuring efficient purchasing, their form and function and the question of whether economic operators need to be active on the market. Public procurement is obviously designed to help contracting authorities to gain the maximum benefit from their scare resources and they can in classic economic theory gain such maximum benefit if they have perfect knowledge of all the works, services and supplies that may meet their needs and the purpose obviously of the advertising provisions in public procurement law is to enable contracting authorities to obtain as much knowledge as possible to inform their purchasing decisions.

So looking at Economic Operators their primary defining characteristic is they offer the execution of works, supply the services or the provision of products to those wanting to buy them. They are the entities that provide the supply side of the particular market on which a contracting authority purchases. In addition, obviously an Economic Operator will be a counterparty to a public contract governed by public procurement law and only Economic Operators can be those counterparties. Finally, if any Economic Operator suffers risk or suffers damage or risk of that loss or damage as a result of the breach of the contracting authority's duty to comply with the law of public procurement it can take action against the contracting authority breaching that duty.

The final point about Economic Operators is they have a standing to sue. Looking at their function as I've mentioned their primary function is to offer or perhaps to wish to offer goods or services on the market in response to a stated demand for goods and services and in doing so they may do so alone or in concert with others and that brings me onto the second defining characteristic. They may take a number of forms from sole traders to a multi-party consortium. Legal form is irrelevant at first, you don't have to have any particular legal form to qualify as an Economic Operator but for practical reasons Economic Operators may be required to adopt a particular legal form by the contracting authority such as a Special Purpose Vehicle.

In circumstances where a single entity wishes to offer goods or services on the market but doesn't have the capability or perhaps the capacity to do so it obviously has the choice to take a lead contractor role and sub-contract some of the obligations that it takes on or it can form a consortium.

Now case law in the question of Economic Operators is rare but the matter did come up, the question for the court being whether an entity was a contracting authority in the case of the *Community R4C Limited v Gloucestershire County Council* and that judgement was given by Judge Russen in the High Court on the 17th July. The question before the court was whether R4C Limited was an Economic Operator that could have pre-qualified for a tender and the Judge stated that the standard of proof to determine whether the entity was an Economic Operator was on the balance of probability. If I can agreement with him rightly how in my view the concept of Economic Operator identified those having an interest in a relevant public contract. Then he went on to say that the definition of Economic Operator required an entity to have some presence on the market. Now if we sit and think about that at the moment that would preclude you entering into a market and offering to supply goods and services if you had never done so before and in my view that's obviously going to stymie one of the principle purposes

of Economic Operators and that is to increase the maximum number of choices that a contracting authority has. It's strange therefore that the Judge started his judgement referring to Recital 14 in the Public Contracts Directive which said that the notion of Economic Operators should be interpreted in a broad manner but then went to cut it down to saying "only those who have been active on the market beforehand", although he didn't define the market, "should be falling in the class of Economic Operators". In his defence perhaps he was alluding the question of what is an Economic Operator with the principle question before the court which was "did this Economic Operator qualify to be somebody who could bring a cause of action against Gloucester County Council?" and that of course was a question that will be determined by the Economic Operator complying with the requirements in the PQQ and it was clear that this Economic Operator didn't. So while the Judge may have suggested that Economic Operators must be active on a market, my contrary view is slightly that if you're capable of acting on the market the fact that you haven't yet acted on a market by offering goods and services or indeed supplying them shouldn't stop you becoming an Economic Operator.

So in summary this is a simple concept and one that should not cause any great consternation. The practical advice is if you are proposing to bid make sure you've got your ducks in a row, your consortium sorted out or your sub-contracting arrangements sorted out before you at least apply to the PQQ, if you fail to do then you're at risk of not going any further in the procurement.

That's all the comments I have to make so back to you Clare, thank you.

Clare Dwyer

Thank you very much Andrew. we have time for just one question. So when you're dealing with a consortium does each member of the consortium have to be an Operator or is it just the consortium itself?

Andrew Finfer

Well that was a question again addressed in the *R4C* case and there the Judge said, referring to the MAA leasing principles and a case called [Conima] that if the consortium qualifies as an Economic Operator than it is not necessary for any member of that consortium to independently qualify as an Economic Operator so in terms of consortia, if you are falling with the definition as a consortium it shouldn't be necessary for the members to do so.

Clare Dwyer

Great, very clear, thank you Andrew. Finally, we shall turn to the ever growing issue of Framework Agreements, so pro's and con's, what to look for, delivered by my colleague, Jack Doukov-Eustice, over to you Jack.

Jack Doukov-Eustice

Thank you very much Clare. I think it would be fair to say that most of you if not all of you will be familiar with what a framework agreement is and how it works so I thought rather than recycling previous training slides about what that is, I'll just spend six minutes setting out some pros and cons of this type of arrangement. I guess the suppliers out there will say that framework agreements are great if you're on them and terrible if you're not. Ill suggest that there are perhaps other contracting methods including sometimes the running of procurements, which would be better suited to many of the situations where we see framework agreements being used. Hopefully in the next few minutes I'm going to offer some perspective and generate some thoughts and conversation around framework agreements.

So firstly the pros. Framework agreements allow for fast procurement I mean it's one of the main attractions, direct awards can be more or less instant, many compositions aren't subject to any prescribed time limits unless they're set out in a framework agreement and timescales only have to be sufficient for framework providers to respond to the request so when your resources are stretched in-house the ability to reduce those timescales in this way and to cut out some of the administrative steps is a big plus.

Frameworks also allow for flexibility so for a single supplier framework for example, a supplier can be asked to supplement its tender and the contract really has to be awarded within limits laid down in the framework agreement so a lot of flexibility can be baked into this process with a bit of creative drafting which is obviously quite a big plus.

Frameworks also allow an authority or utility to build a diversified set of relationships with specific suppliers over a period of time. Its valuable because it allows suppliers to become familiar with you know how its client operates, including what kind of work needs to be done and how that type of work needs to be carried out. That can be a better and more efficient service and suppliers may also be willing to invest time and effort into a framework agreement because it's got a better chance of winning the work compared to competing with every man and his dog in open tenders. So that those are typically the three most important benefits to be seen and being more typical of framework agreements. On the flip side I think they are some downsides that are worth bearing in mind so it's quite prominent and everyone will know framework agreements are time limited so under PCR that's generally 4 years unless justified. For longer than 8 years under the utilities regs. Workarounds are often used to side step this time limit so for example having call off contracts lasting more than the tender framework agreement is a common example. However, I would query whether there are more appropriate contracts and mechanisms which can be used where time limit is an issue. So single supplier framework agreements are a good example. There is not necessarily a need for them to be a framework agreement you could just procure a normal contract and have statements of work or work orders being called off under that as a contract rather than a framework agreement. So it need not be time limited in the same way.

Equally dynamic purchasing systems will allow you to pre-qualify bidders and also qualification systems in UCR. That can allow you to produce timescales for purchasing without having the time limitation that you see with framework agreements, so the point here really is that framework agreements are sometimes used because they're familiar but not necessarily the best mechanism for the requirement in each circumstance.

As to risk and I say accessing third party framework agreements is a very popular way to contracts quickly and easily with identified or preferred suppliers but it can import quite a significant amount of risk into the contracts so I'm yet to read a framework agreement that says "you know this has been procured in compliance with the relevant rules and we're going to indemnify you if you follow our rules and you still get challenged". I mean ordinarily you would get the first part of that sentence but without the second part its really just sales talk and it doesn't really protect you. So I'm also yet to see a public procurement which has been compliantly procured completely, I'm yet to see any procurement really that is perfect so as a risk regarding the process that leads up to the award of the framework you then consider the rules and the framework themselves, again quite often we see interesting takes on the law or things that aren't necessarily in complete compliance, so consider how often you see award criteria from any competitions that are supposed to be based on the criteria that we used for the original procurement of the framework agreement, usually you're presented with a mix of it can be quality and price and sometimes those ranges are anything from zero to 100% you know I have seen that so ultimately that's quite meaningless obviously and isn't strictly in compliance with the rules. So for both authorities and utilities and suppliers on that framework using that framework as a mechanism always comes with the risk of challenge so it should be considered each time a framework is being identified for use and it shouldn't just be assumed that a framework provides and EU compliant route as its often called. More often than not they won't and a let will depend on the entity which has procured that framework in the first place you know some are better than others, some frameworks are better than others, some frameworks will be better than others and I think it's worth considering how much risk is being imported into your procurement decision.

I mentioned that framework agreements allow suppliers to get to know how their client operates which is obviously beneficial but as well as being of benefit this does present the question of how a level playing field can be maintained throughout the life of the framework so as the supplier builds up more and more knowledge through contracts which may well overlap or interrelate could this result in one

central supplier and then a number of certain courses on the framework. You know how can you realise the benefit of building this relationship without inviting challenge from the other participants which is an interesting question, quite a thorny problem and one that's not particularly easily solved but worth bearing in mind.

The fact that a framework agreement is a closed list as well means that you're stuck with who you've got for the term of the framework. The question of which are increasingly relevant given the current situation with Coronavirus, what if a supplier goes bust? What if there is a change in control and the culture and the approach of the supplier changes? You know a promising framework can quite quickly turn into another dusty pile of paperwork that's really of no use to anyone. So by comparison different contracting mechanisms such as dynamic purchasing systems they stay fresh and they stay relevant and they stay current so again its sometimes worth considering what other options there are out there.

Just lastly one of the worst features in my opinion which may be the best feature for some out there is there is a distinct lack of transparency in frameworks there difficult to challenge. There are rules around significant investability which is great but they don't enforce much transparency on the flip side. So for example award notices are required generally, standstill generally doesn't need to be adhered to and the rules for award and amending the contract can be buried in the framework which can make it very, very difficult for anyone outside of that framework to tell if a contract has been awarded properly. So as I said, often these are seen as benefits but it can also lead to some better purchasing decisions.

So in conclusion I think my view is that whilst framework agreements can be quite useful they do come with risk and I think they should probably have a more limited role than they currently do so hopefully what I've said here has just provided food for thought and if you do want my recycled training slides on what a framework agreement is give me a shout and I'm more than happy to provide those.

Back to you Clare to see if we've got any questions.

Clare Dwyer

Thank you very much Jack. I just have one question in here. Are mini competition time limits subject to duties around proportionality of timescales? I think that might be a reference to mini competitions resulting in procurements which are longer than the amount of the original framework.

Jack Doukov-Eustice

So mini competitions generally you will have to have sufficient timescales and you know proportionality will feed into every decision you make so yes there is a requirement to be proportionate but more often than not where authorities or utilities will get to is that the time that is required is less than the various stages of a procurement itself so they're not necessarily innocent but will inevitably be shorter than doing your own procurement. Does that answer the question Clare would you say?

Clare Dwyer

I think so yeah okay. I mean its confirmation there that its subject to proportionality I think that what we're talking here.

Jack Doukov-Eustice

Yeah

Clare Dwyer

Okay, thank you very much Jack. Now in the closing minutes I'd like to mention something that Jack's actually been instrumental in which is our survey on the reform of the Procurement Regulation as we're coming up to a very important deadline at the end of this year. So it's a very quick set of questions, only 7 or 8 of them, it's pretty quick I've done it this morning, yes or no answers with opportunity to give some extra thoughts as well. Asking you at a very high issue what issues you are facing and how you'd like the regulatory regime to change post-Brexit. There's a link on the slides and you should have received a link albeit at some point from us, if not we're going to send it round with hopefully a recording of this

session. We do hope that it starts a conversation about this subject because our idea is that the responses we'll feed into a follow yup report with our views and recommendations and as a response to the Green Paper. The survey is open until the end of September so plenty of time to complete it and you won't find it takes you long.

Finally I'd like to say thank you to all three of our speakers, very interesting topics delivered to time, excellent and a reminder of our next Procurement Bites session which is G, H and I at 11.30 am on the 24th September 2020. We will be issuing invitations as usual. Thank you so much to all of you for giving us your time and for listening to the seminar. Thank you.