Landmark CHAMBERS

Bid evaluation: lessons learnt from *EnergySolutions EU Limited v Nuclear Decommissioning Authority*

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Topics covered

- Overview of the bid process carried out by the NDA
- Lessons learnt from Fraser J's judgment at first instance:
  - Manifest error and the evidence to justify evaluative judgment
  - Note taking and evaluation documentation
  - Role of legal review
  - Use of threshold criteria

The Magnox contract bid process

- NDA: non-departmental public body established under the Energy Act 2004
- Public procurement competition undertaken for award of £14bn contract for the decommissioning of 12 former nuclear sites
- EnergySolutions EU Limited (now called ATK Energy EU Limited) was incumbent parent body organisation for site licence companies operating 10 Magnox sites (2 other sites were research sites)
- Bid process commenced in 2012, using competitive dialogue procedure under the 2006 PCRs

The bid evaluation carried out by the NDA

- After dialogue phase, Invitation to Submit Final Tenders (ITSFT) issued on 2 October 2013, containing Statement of Response Requirements (SORR) and scoring criteria.
- Bids separated into "nodes", which contained specific requirements.
- Team of 3 evaluators comprised of subject matter experts under overall management of NDA's Head of Competition
- One of key nodes was "Key Enablers" – some evaluated purely on threshold (pass/fail basis) (others were scored with percentage weighting applied
- Electronic scoring system used (AWARD system). SMEs expected to input electronically notes on how bids met any particular requirement. Consensus entry then entered by lead SME and then score for that requirement 'closed down'. SMEs not allowed to e-mail each other or keep notes other than on the AWARD system
- 4 bidders. Winning bidder (CFP) scored 86.48%. Energy Solutions's consortium (RSS) scored 85.42%.

Litigation timeline

- Contract award decision: 31 March 2014
- Standstill expired: 14 April 2014
- Contract entered into: 15 April 2014
- Claim filed by Energy Solutions 28 April 2014
- High Court judgment on preliminary issues (Judgment No.1): 23 January 2015, Court of Appeal judgment 15 December 2015 (on whether Francovich test applies to damages claim, and whether damages still available where claim only brought after contract entered into).
- Trial heard between 16 November 2015 and July 2016
- NDA seeks application to strike out claim due to disclosure of witness success agreements (20 July 2016)
- Judgment No. 2 (Liability): 29 July 2016 (Fraser J)
- Settlement reached 27 March 2017 for £100m (£78.5m plus £8.5m costs, Bechtel received £12.5m). Independent Inquiry announced by Greg Clark.
- Supreme Court issues judgment 11 April 2017

Judgment No. 2 (Liability)
[2016] EWHC 1988 (TCC) : key finding

- Fraser J held that CFP should have been disqualified for failing two threshold requirements
- RSS would have won the competition absent several "manifest errors" - RSS should have been scored 91.48%, CFP only 85.56%

(1) Manifest error

- No prohibition upon finding manifest error where evaluative judgment has been applied:

'In my judgment, the NDA's pleaded sentence that "An evaluative judgement of this sort is not capable of constituting a manifest error" is wrong, in so far as it suggests a prohibition upon finding manifest error where an evaluative judgement has been applied. There is no prohibition, but there is a margin of appreciation. Differences of opinion are not sufficient to have the score changed. Absent a manifest error, the court will not interfere" (at [274])

(1) Manifest error and reasons

- Distinction drawn between material relied on for determining liability, and material relied on when assessing causation for a damages claim:

"1. The lawfulness of the decision by the contracting authority to award the contract to a competing tenderer rather than to the Claimant, will be considered by reference to the reasons made available from the contracting authority to the Claimant prior to the issuing of proceedings.

2. In a claim for damages, the court will take proper regard of other reasons relied upon by the contracting authority when considering causation. A finding as to unlawfulness at the first stage will not automatically and of itself entitle the Claimant to damages". (at [296])

(2) Document management

- Document retention:

"*I find it extremely worrying that any public authority or its advisers on procurement could contemplate any policy that would involve the routine destruction of such important documents [i.e an audit trail of the the NDA's collective decision-making]. Public authorities have express obligations of transparency under the Regulations. It is difficult to see how the proposed or intended destruction of contemporaneous documents could ever been consistent with those obligations*" (at [270]).

(2) Document management cont.

- Note-taking and transparency:
  - Important aspects of the evaluation process were "*wholly lacking in transparency…decisions about what to about scoring that could lead to a bidder being disqualified were made "off stage" and consciously so in my judgment*" (at [132])
  - "*the whole approach of the NDA to restricting notes in this way seems to have been designed to minimise the degree of scrutiny to which the SMEs thought processes could be subject, in the event of a challenge. A simple method of ensuring that such notes were retained – for example, by issuing numbered notebooks, and collecting them – would easily have dealt with any difficulties, real or imagined, with potential disclosure*" (at [217]).

(2) Document management cont.

- Importance of maintaining records of dialogue meetings:

"*A summary should not have been too difficult to prepare, and there would not necessarily have been any need to have such a summary formally agreed with each bidder…digital recording devices are widely available and inexpensive. Simply recording what was said would not have been too difficult*" (at [188]).

(3) Role of legal review

- Legal review not a surrogate or proxy for substantive decision-making
- NDA refused disclosure of legal advice from external lawyers
- Claim to privilege upheld and no adverse inferences, but since witnesses referred to legal review as justification, lack of transparency as a result: "*transparent reasoning was therefore not always provided by the NDA for why a particular requirement merited a particular score*' [233].

(4) Use of threshold criteria

- No principle that once disqualification criteria employed they should be construed generously or leniently in favour of the bidder
- Although there is a margin of appreciation to be applied at point of assessment, no separate stage of "reluctance to interfere' if manifest error identified
- Principle of proportionality may in exceptional circumstances provide some scope to depart from rules of a procurement competition, no grounds to re-write SORR or scoring matrix (at [898])

Conclusion

- High Court judgment salutary warning to bid teams about the dangers of overly defensive approach to disclosure and litigation risk
- Further lessons particularly in respect of corporate governance and assurance processes likely to be included in the Holliday report. Terms of reference include: "*the structure of governance and relationship between the NDA and government departments associated with the procurement process*". Also will include review of the "*handling of the challenge*" itself.