Briefing

BURGES SALMON

Procurement

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How much information must an authority give a dissatisfied bidder and when?

When an authority or utility chooses a supplier at the end of a public procurement process, it has all the information on why that supplier was chosen. The losing bidders, however, have none.

Information is power, so how much does the authority want to hand over? How much does it have to? The question almost always arises in connection with any challenge or court proceedings which are then raised.

The courts have given important decisions on it twice in the last few months.

When it comes to demands for and release of information, both authority and potential challenger need to consider a number of key issues. To achieve a successful outcome they should also consider what the other party is thinking.

Document release: A few key considerations

- Claims must be issued either before contract signature (as little as 10 days) or in any event within 30 days of knowing there was a breach. There is little time to decide what to do;
- There is a right to feedback. Losing bidders usually take up this opportunity as a matter of course;
- Detailed information can satisfy a bidder that the award was indeed right (so avoiding the need for a claim) or it can give material for a bidder to develop its claim (so making a claim more likely). The important consideration is the type of information given, not the volume;
- What does it say about the authority's confidence in its process if it tries to withhold information?
- Once a claim is issued there is an automatic stay preventing contract signature - what information needs to be given to overturn or uphold that stay?
- What will the Courts do if an application to force disclosure of information is made
  - before a claim is issued?
  - after issue but before the first court hearing?
- What will eventually have to be revealed anyway during proceedings? Court Proceedings involve a disclosure phase when **all** relevant documentation will have to be provided anyway.
- How can confidential information be protected? Both
  - the parties' own confidential information? and
  - information belonging to other (third party) bidders provided in confidence to the authority during the procurement process.

This is usually achieved by quickly putting in place a confidentiality ring.

What do the courts expect?

In the hectic days after an intention to award is announced, through potential issue of proceedings and a subsequent application by the authority to overturn an automatic stay on signature, both sides will need to review the available documents and information which justifies the award.

The procurement regulations require a summary of the reasons for awarding a contract to a particular economic operator to be given to all bidders as well as the name of the winner, the criteria for the award, and the scores awarded to the bidder and to the winner.

The courts have previously determined that the amount of information required is comparatively limited and need not be formal. In the leading *Alstom v Eurostar* case[1] the information was described as:

[1] Alstom Transport and Eurostar International Limited v Siemens plc [2011] EWHC 1828 (Ch)

continued overleaf

'a clear and relatively short document or statement, in order to lessen commercial uncertainty'.

In addition, the bidder is entitled to ask for and to receive (within 14 days) the reasons why its bid was unsuccessful.

In addition to this basic detail, well advised bidders will often identify specific documents or information they need to confirm whether or not the process was properly conducted. First they will demand such information. If the authority does not provide it, they can go to court.

There are only a limited number of cases where such an application has been made. However, two recent cases have given some steer on what the Courts expect authorities to provide - Roche[2] and Pearson[3]. Both considered (in slightly different circumstances) requests for early disclosure before the normal disclosure stage of court proceedings.

Court guidance - Roche and Pearson

- Dissatisfied bidders are in a difficult position because they don't have the information to be sure why they lost and there is a short timeframe;
- The authority should promptly (before proceedings) provide a challenger with *'the essential information and documentation relating to the evaluation process actually carried out, so that an informed view can be taken of its fairness and legality'*;
- Any request for specific additional disclosure should be narrow and detailed. It should be *that which demonstrates how the evaluation was actually performed, and therefore why the claiming party lost.*
- Other information is unlikely to be fundamental and the court is unlikely to order it be disclosed;
- Evidence showing the strength or weakness of the main case should be provided in the normal process (i.e. not early) and is not necessary in connection with an application to overturn an automatic stay.

Hence authorities should expect to provide some (proportionate) data, particularly to show how evaluation was undertaken. However, challengers must beware of becoming too greedy about asking for more than that.

Where the dividing line falls will be a matter of fact in each case.

Conclusion

Authorities must give potential challengers some information about the evaluation process (on request) and scores. Failure to do so may lead a well advised challenger to apply to court. There are however some boundaries to what will be provided and in the very short timescales involved in such claims all parties must do their best to form a view on the strength of any claim rapidly.

Contacts

Burges Salmon's cross disciplinary Procurement Team includes specialist commercial lawyers, competition lawyers and litigators. It is led by John Houlden.

John Houlden
Partner
+44 (0) 117 902 2796
john.houlden@burges-salmon.com

John is a procurement specialist who has advised high profile clients including in the Nuclear and Transport industries on contentious and non-contentious issues.

Michael Barlow
Partner
+44 (0) 117 902 7708
michael.barlow@burges-salmon.com

Michael is a dispute resolution lawyer specialising, among his wider contentious work, in procurement disputes and judicial review.

Simon Tilling
Senior Associate
+44 (0) 117 902 7794
simon.tilling@burges-salmon.com

Simon is a dispute resolution lawyer working on procurement disputes and judicial review challenges.

[2] Roche Diagnostics ltd v Mid Yorkshire Hospitals NHS Trust [2013] EWHC 933

[3] Pearson Driving Assessments Limited v The Minister for the Cabinet and another. [2013] EWHC 2082