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Traffic Signs case gives contracting authorities another warning signal

The recent judgement in **Traffic Signs and Equipment Ltd v Department for Regional Development** has again highlighted the need for contracting authorities to ensure they act transparently when disclosing evaluation criteria to bidders.

In this case, Traffic Signs and Equipment Ltd challenged on the basis that an allocation of a 40% weighting for the qualitative assessment in this tender represented a lack of objectivity. The predominant basis of TSE's argument was that as bidders were required to obtain a "Sector 9A" accreditation (the recognition of an international standard for road traffic signs) as a base quality standard, a lower weighting should have been attributed to the quality evaluation criteria. They argued that the requirement for all bidders to hold the "Section 9A" standard meant that quality should have been a less decisive factor in the tender process and that it would be difficult for the Department for Regional Development to justify a weighting of 40%.

In addition TSE complained that the 60% (price) and 40% (quality) split was used by DRD as a mechanism to favour another bidder, PWS. E-mail exchanges within DRD (prior to the finalisation of the weightings in April 2010), confirmed that DRD initially did consider a split of 80% (price) and 20% (quality) and that it eventually evolved into the 60%/ 40% split. TSE complained that the change of weightings favoured PWS and the approach taken by DRD was discriminatory towards TSE because it was done for the purposes of assisting PWS to be successful in the tender process. Furthermore, if DRD had adopted weightings for its evaluation criteria similar to those used in previous procurements (generally a price/quality ratio of 80%/20%) TSE would have won five contracts as opposed to the two they were awarded.

The Court was satisfied that the decision to adopt the 40% split was one taken by an individual within DRD and that he did not adopt such a weighting for the purposes of providing an advantage or disadvantage to a particular bidder. However when making its judgement the Court commented that where one criteria has a significant impact on the overall assessment of the bids, a contracting authority must be able to justify the use (and as in this case the weightings) of such a criteria in order to be compliant with the obligations of objectivity and transparency. The Court confirmed that due to the introduction of the Sector 9A accreditation, DRD should have provided an explanation and justification of the 40% quality weighting. As DRD were unable to do so they were found to be in breach of the principles of objectivity and transparency.

Consequences for contracting authorities...

The Court set aside DRD's award decision in relation to three contracts where TSE had suffered, or risked suffering, loss or damage because of the 40% weighting, noting that, if the usual 80%/20% split been applied, TSE would have won these contracts. It should be noted that the Court also made an order under Regulation 47G(2)(b) continuing the suspension of DRD's right to enter into a further 18 contracts until such time as a decision was made on the appeal or the time limit for appeal expired.

Summary

This decision highlights the importance of contracting authorities ensuring that evaluation criteria are not only relevant to the contract but that careful consideration is given to the proportionality of such criteria. Authorities should have solid justifiable reasons for their approach to criteria and weighting, particularly where the approach differs from any usual practices.

Traffic Signs & Equipment Ltd v Department for Regional Development [2011] NIQB (4 February 2011)

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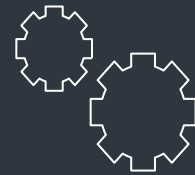
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