GOVERNMENT POLICIES MADE PART OF TENDER PROCESS CONTRACT BY REFERENCE—J&A DEVELOPMENTS V EDINA MANUFACTURER LTD, ARMOURA LTD & ORS [2006] NIQB 85

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A recent case in the Northern Ireland High Court has shown that incorporating public sector policies and guidelines into tender conditions makes them part of the process contract and can lead to unintended consequences where the losing tenderer brings an action. This case also provides clarity around the applicability of the process contract to the private sector, the assessment of damages arising from a breach of a process contract and the liability of third party advisors to a tender process.

THE FACTS

In early 2001 the defendants issued a select tender to builders for the construction of a workshop, offices and associated works in Lisburn. The conditions of tender provided that 'Tendering procedures will be in accordance with the principles of the Code of Procedure for single stage selective tendering 1996'. This is a code of procedure for tendering issued by the National Joint Consultative Committee for building in the UK (which would be similar to the Australian Standards).

The Code stated that it 'deplores any practice which seeks to reduce any tender arbitrarily where the tender has been submitted in free competition and no modification to the specification, quantity or conditions under which the work is to be executed is to be made, or to reduce tenders, other than the lowest, to a figure below the lowest tender'.

The defendants also engaged third party architects to assist in the running of the tender process ('the architects').

Tenders were received from six tenderers and the lowest priced tender was received from the plaintiff. Contrary to the provision of the Code the defendant's instructed the architects to hold a series of meetings with the three lowest priced tenderers, in which they were all invited to reduce their tendered price. The plaintiff refused to lower its price and indeed stated that had they known they were engaging in a process which contained this step they may not have put in a tender. The second lowest priced tenderer, Kylen Construction agreed and, having reduced its price by £25,000, was awarded the contract. J&A's original tender fee was £1,074,982.38 and Kylen's was £1,082,189.00. Therefore after this reduction Kylen became the lowest priced tenderer.

THE PLAINTIFF'S CASE

The plaintiff subsequently brought a claim against the defendants on the basis that the defendants entered into an agreement, the effect of which was that the tendering procedure would conform with the principles of the Code (which were incorporated as terms of the process contract) in consideration of the plaintiff devoting time and expense to preparing a tender for the construction works (the consideration for the process contract).

THE DEFENDANTS' CASE

The defendants argued that a process contract did not exist. They said that the tender was merely an invitation to treat and therefore the plaintiff's case must fail. The defendants argued that if there was a process contract, it was wholly reliant upon the advice of the architect to guide them through the implications of the tender process.

In order to determine these issues, the court had to consider the following questions:

1. Is there a binding process contract between the plaintiff and the defendant?

2. If there is a process contract, does the incorporation of the Code give rise to contractual obligations in relation to the principles and procedures outlined in the Code?

3. If the answer to 1 and 2 above are in the affirmative, what damages (if any) is the plaintiff entitled to?

4. To what extent are the advising architects responsible for the breach of the Code and the resulting damages due to the plaintiff?

APPLICABILITY OF THE PROCESS CONTRACT TO THE PRIVATE SECTOR

Whilst there is no doubt that a process contract is capable of existing in relation to a government tender process its applicability to private sector tenders has yet to be confirmed particularly in Australia, although it is difficult to see why it would not.

The court found in this case that, whilst there may be a statutory distinction between the position of a public body and private entity, the common law does not recognise this distinction. Therefore a process pontract did exist between the parties. The process contract includes the

tender conditions which give rise to legal obligations in relation to how the tender process should be run. The court relied upon the case of *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195.

STATUS OF THE CODE—BINDING CONTRACTUAL OBLIGATION OR MERELY ADVISORY?

Having found that a process contract was capable of existing between the two private sector entities, the judge had to particularly consider whether the reference to the Code and its incorporation made it part of the process contract.

Standard contractual principles provide that a document incorporated by reference in a contract becomes contractually binding by virtue of its incorporation provided that certain elements are satisfied. These are that the non-incorporating party is aware, or has the opportunity to become aware, of the document and its terms and that the document and its terms are sufficiently certain so as to create legally binding obligations.

In this case, the court confirmed that the Code, in isolation, does not itself create legal obligations. However the Code was incorporated into the tender conditions which, by virtue of the process contract, created a legal obligation to comply with, or at a minimum have regard to, its procedures and principles.

Sir McCollum stated that the actions of the defendants in seeking to negotiate with all three tenderers and request them to reduce their price, without a reduction in scope, were a clear breach of the Code.

All levels of government across Australia have tendering and procurement policies and guidelines. This case demonstrates that, although in isolation these documents are not contractually binding, when drafting tender conditions it is important to consider the impact of referring to or incorporating these documents.

ASSESSMENT OF DAMAGES

Once the court had found that a process contract was in existence and that there had been a breach of that process it then turned to the issue of the assessment of damages. The ongoing question in terms of damages for a breach of the process contract is how do traditional notions of assessing contractual damages (for example *Hadley v Baxendale* (1854) 9 Ex 341) fit within the process contract framework. One method of calculating damages is based on loss of profit as a consequence of not winning the tender due to the breach. The difficulty with this is that in order to make such an award there needs to be a clear finding that 'but for' the breach the complainant tenderer would have been successful. This can be very difficult to prove depending on the facts but in this case it was clear.

The court found that the breach of the process contract by the defendants resulted in the plaintiff not winning and the judge awarded the plaintiff loss of profits of £161,247 (discounted by 20% to be £128,998 to take into account the fact that the contractor did not actually have to perform the contract, take that risk and was free to do other work). The plaintiff was also awarded costs for the preparation of its tender (which amounted to £6,530).

LIABILITY OF THIRD PARTY ADVISORS

The defendants sought contribution from the architects claiming that they were responsible for drafting, advising on and conducting the pre-tender and pre-contract process. The defendants argued that the architects, amongst other things:

- caused or permitted the tender to incorporate the Code and failed to seek the instructions or authority of the defendants for its inclusion;
- failed to advise the defendants of the potential breach of the Code in their decision to ask tenderers to re-price; and
- failed to provide advice in relation to the potential litigation exposure as a consequence of the breach of the Code.

The question was whether or not the architects could have been expected to know that the conduct being engaged in by the defendants was liable to be a breach of contract. The court determined that a competent architect would not have been in a position to advise a client taking the course which the defendants did that they were liable for a breach of the process contract. As a consequence the court dismissed the action against the architects.

LESSONS TO BE LEARNT

The two clear lessons to be learned from this very interesting and relevant case are:

1. Preparation of the tender document

Carefully consider and understand the legal implications of incorporating documents into the Invitation to tender and the legal effect of the tender conditions more generally; and

2. Engagement of advisors

Be certain that when engaging tender process advisors that they are competent and are fully aware of the legal risks.