

Leeds City Council successfully defended in procurement deceit claim

The High Court has dismissed a £43.5m damages claim against Leeds City Council for alleged breaches of the EU public procurement regulations and deceit.

1. On Wednesday 6th February 2013, the High Court (Supperstone J) handed down judgment dismissing claims by Montpellier Estates Ltd that Leeds City Council had committed the tort of deceit and breached its statutory duties under the EU public procurement regime in abandoning a tender procedure for the development of the Leeds Arena in November 2008. The Council was successfully defended by **Rhodri Williams QC** of **Henderson Chambers** and Mark Cawson QC and David Mohyuddin of Exchange Chambers.

Substance of the claim

2. The Claimant had alleged that the local authority had broken the EU public procurement rules, breached an implied contract and had deceived the company in order to keep it in a procurement tender competition which it could not win. Following a case which lasted nine weeks, in a judgement running to over two hundred pages, the Judge dismissed all of the Claimant's claims, finding decisively for the Defendant.

3. The case involved a procurement tender process using the competitive dialogue procedure to identify a developer which could build an arena in Leeds. The Claimant participated in this tender process. The local authority later cancelled the competitive process on the basis that it was unaffordable and did not offer value for money and instead proceeded with its own alternative plan which involved acquiring land on its own behalf and developing the Arena itself.

4. Montpellier argued that the Council was looking at alternatives whilst it was conducting the tender process and that it misrepresented this to the developer, encouraging it to continue in the tender process to no avail. The local authority argued that the alternative proposals were used as a 'public sector comparator' to test whether the private sector bids offered value for money and were a fall back option if it proved that they did not. The Court agreed with submissions made on behalf of the Council that it had the right to cancel the process when it did and rejected the allegation of deceit.

Findings of the Court

5. Significantly, the Court dismissed the claims that the Council had breached the public procurement regime found in the Public Contracts Regulations 2006, had gerrymandered the tender process in order to favour its own alternative plan and had carried out a flawed scoring process of the tenders submitted. A claim that there had also been a breach of an implied contract between the developer and the Council was also dismissed.

6. The Court found that whilst proper notice of the claim had been given before proceedings were commenced in February 2009, the majority of the claims, which involved allegations of breaches, which had occurred many months before the tender procedure was abandoned in November 2008, were statute barred by virtue of the three month time limit then applicable to claims such as these¹. Nor were there any good grounds for extending time.

7. On the substance of the claims, the Court accepted submissions made on behalf of the Council that the public sector comparators were not participants in the tender process and that the Council was entitled to develop its fall back option. The conduct of the Council in continuing with the competition until the final decision of its Executive Board in November 2008 did not breach the principle of good faith owed by the Council. The Council thus acted lawfully in deciding to abandon the tender process, having discovered that to award the contract on the basis of the advertised award criteria would not achieve value for money due to the level of public sector funding which it would need to make the project viable.

¹ The time limit has since been reduced to thirty days by virtue of the Public Procurement (Miscellaneous Amendments) Regulations 2011

8. Further, the Court found that it was not the case that the Council changed the award criteria from the terms set out in the tender documentation and that at no point did it adopt a fundamentally different procurement process. The introduction of a two-stage process whereby tenderers were to put forward their best commercial submissions so that the Council could properly judge whether value for money was being achieved before putting the tenderers to the increased costs of preparing best and final offers was consistent with the competitive dialogue procedure envisaged by regulation 18 of the 2006 Regulations .

9. In relation to allegations that there was a lack of transparency and equality of treatment, the Court accepted that there was no effective allegation of inequality of treatment as between tenderers and therefore no allegation of an actionable breach of the principles of transparency and equal treatment.

10. Finally, on the basis of decided authority, the Court found that the implication of further obligations, over and above an implied obligation to consider tenders in good faith, was not necessary to give efficacy to the contract, nor could there be a common intention that any implied obligations should extend further than the duties imposed upon the Council by virtue of the EU public procurement regime. In short the implied contract added nothing to the claim under the 2006 Regulations.

Barrister **Rhodri Williams QC**

Date 7th February 2013