

On the wrong track

Rebecca Williams and Ben Lamble discuss a recent case dealing with disclosure



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'The lesson for prospective claimants is clear: the strict time limits imposed on public procurement claims will be executed robustly in all but the most extreme cases.'

The Technology and Construction Court (the TCC) has recently recognised that public procurement cases, particularly those involving claims which seek to set aside the decision of a public authority or utility to award the contract in question, raise singular procedural issues and difficulties.

Those remarks were made in the 'Guidance Note on Procedures for Public Procurement Cases' (the TCC guidance) in the TCC, which can be found at Appendix H to the TCC Guide.

The TCC guidance goes on to say that the claimant commonly feels that it has insufficient evidence or documentation fully to particularise its case and that the provision of pleadings and documentation on disclosure often gives rise to serious difficulties in connection with confidentiality. More than that, the successful tenderer has a particular interest in the protection of the confidential information in its documents, and may wish to make representations in relation to confidentiality and other matters.

These remarks have proved to be highly prescient. Shortly after the TCC guidance was issued, Coulson J of the TCC was faced with a concrete example of those issues in the case of *CEMEX UK Operations Ltd v Network Rail Infrastructure Ltd* [2017], concerning the award by Network Rail of a major contract for the manufacture and supply of railway sleepers.

The judgment will be of interest to each party to a public procurement case. It addresses important issues such as the deadlines in public

procurement claims to set aside a contract award, the rights of a successful bidder to intervene in any such claim and whether an unsuccessful tenderer can obtain early disclosure of the confidential technical bid of the successful bidder. It is also the first decided case which takes the new TCC guidance into account.

The procurement challenge

In the procurement exercise, Network Rail awarded a railway sleeper contract to PCM RAIL.ONE AG (RAIL.ONE), which submitted the lowest price and thereby recorded a score of 100%. CEMEX finished third, with a score of 82%, meaning that RAIL.ONE's bid price was 18% lower than that of CEMEX.

CEMEX wanted to challenge the contract award on the basis that Network Rail should have investigated RAIL.ONE's bid to satisfy itself that RAIL.ONE's factory costs were not 'abnormally low'. It appears that CEMEX's suspicions initially arose because it felt that 'if it could not do it [at that low a price] then nobody could'.

CEMEX therefore filed a claim form with the TCC before Network Rail and RAIL.ONE had entered into a contract, with the effect that the contract award was automatically suspended until CEMEX's claim had been resolved, pursuant to Reg 110 of the Utilities Contracts Regulations 2016.

As with many other claimants, CEMEX was concerned that it had insufficient evidence and documentation to particularise its case in full. However, that desire to obtain more evidence

was at odds with the strict time limits to which its challenge was subject.

Pressed for time

As Coulson J noted:

... in the context of procurement challenges, everything has to be done in accordance with a very tight timetable from first to last.

This is in large part because there is a public interest in minimising disruption and delay to the valid award of public procurement contracts. Speedy resolution of disputes is therefore essential to ensure that validly awarded contracts can be performed in good time. The result is that challenges are subject to strict time limits which seek to balance two competing interests: the need to allow a party to challenge an unlawful tender process, while ensuring that such challenges are made expeditiously.

After filing its claim form, CEMEX had seven days to serve full details of its challenge in particulars of claim, as confirmed by para 9 of the TCC guidance. CEMEX was aware of the tight timetable which it faced, but instead of filing particulars it

submitted by the successful tenderer, RAIL.ONE.

This was a high-risk strategy by CEMEX. If the TCC refused to grant an extension of time, CEMEX's challenge could be struck out for a failure to meet the deadline for filing its particulars.

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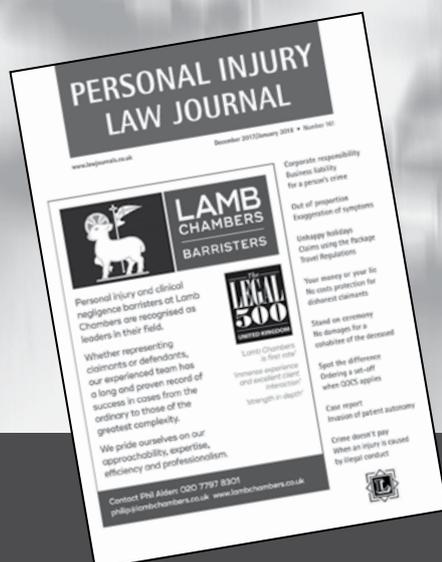
instead applied to the TCC for an order requiring Network Rail to give early disclosure of documents and an extension of at least seven weeks to serve its particulars to give CEMEX time to consider the disclosed documents. Among the documents which CEMEX sought were the technical bid documents

More time for challengers?

Coulson J recognised that challengers such as CEMEX might find themselves faced with a stark choice, either to make a claim based on incomplete or limited information, or to accept the relevant authority's or utility's decision. However, that is where his sympathy with CEMEX ended.

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First, he rejected a submission by CEMEX that a claim that a successful tender is ‘abnormally low’ is different from any other allegation of manifest error. Any party seeking to challenge a contract awarded to another tenderer only ever has the information given in the debriefing material by the contracting authority or the utility,

challenge. As a result, successful bidders can now become an ‘interested party’ to the challenge proceedings so as to make their interests clearly known to the court.

RAIL.ONE therefore explained that it was particularly concerned by the potential disclosure of its technical bid documents which it said were highly confidential,

Importantly for future claims, Coulson J also refused disclosure of the technical bid documents ‘because they are plainly and obviously highly confidential to RAIL.ONE’ and revealed ‘the DNA of the whole company’. Disclosure of such documents to CEMEX would be disproportionate and unjustified.

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whatever the grounds of challenge. A claim can still be pleaded on that limited information.

Second, Coulson J felt that it was wrong of CEMEX to suggest that a challenger in these circumstances can simply challenge a successful tender, be provided with information and then, in its own time, reach a view as to whether it will proceed with its challenge or not. To decide otherwise would be to go against the very purpose of the procurement challenge regime in ensuring that decisions by the authority or utility are subject to quick and very limited review by the courts.

Despite this and some scathing remarks by the judge regarding CEMEX’s conduct, CEMEX’s claim was not struck out. Network Rail said that it was willing to agree a short extension of time for CEMEX to provide its particulars of claim, which Coulson J put into effect. Nevertheless, the lesson for prospective claimants is clear: the strict time limits imposed on public procurement claims will be executed robustly in all but the most extreme cases.

As a result of Network Rail’s offer, Coulson J went on to consider whether RAIL.ONE should be permitted to make representations at the hearing and whether to order any early disclosure.

What about the successful bidder?

The new TCC guidance recognises that a successful bidder may be affected by any procurement

containing details of a proprietary system of manufacture. In addition, RAIL.ONE was concerned that two external technical advisers to whom CEMEX intended to provide the documents had refused to sign confidentiality undertakings. It was against that unpromising background that CEMEX’s application for early disclosure was considered.

Is early disclosure an option?

Where early disclosure has been ordered by the English courts in procurement challenge claims, it has generally been limited in scope. This, Coulson J noted, was consistent with the need in procurement cases to focus on the central issues and to guard against ‘fishing’ applications.

Network Rail was prepared to offer CEMEX early disclosure of financial information, but would not agree that it could be provided to any external advisers who would not sign confidentiality undertakings in relation to the information. Network Rail also refused to provide CEMEX with any documents on the technical and detailed elements of RAIL.ONE’s successful bid.

Perhaps unsurprisingly, Coulson J held in favour of Network Rail. He regarded CEMEX’s position as unreasonable and in circumstances in which the requested documents contained highly confidential information, it was usual for advisers to sign confidentiality undertakings.

Conclusions

The judgment confirms that parties thinking about challenging a public procurement contract award must act quickly and decisively. In the normal course, a party considering submitting a challenge will have little information on which to base its decision, making any such challenge a risky proposition.

There is nevertheless a strong argument that this result is in the public interest. If the balance were to be struck elsewhere, authorities and utilities may be subject to endless second guessing by private entities, with the result that public procurement contract awards could be significantly delayed.

In this case, the perceived conduct of CEMEX may also have tested the patience of the TCC. Network Rail appears to have gone out of its way to try to accommodate CEMEX’s concerns by offering to agree an extension to service of particulars and to provide certain documents as early disclosure. However, CEMEX refused to accept the offer of an extension to service of particulars until the hearing itself and its advisers refused to sign the confidentiality undertakings under which disclosure would be provided.

Looking ahead to future challenges, we are likely to see an increased number of successful bidders becoming ‘interested parties’ so as to make direct submissions to the court and thereby ensure that their interests are protected. At the forefront of those interests will be ensuring that the confidentiality of their technical bid documents are protected. As proprietary information becomes ever more closely protected, confidentiality is likely to be a focus of many more hearings before the English courts. ■

CEMEX UK Operations Ltd v Network Rail Infrastructure Ltd & anor
[2017] EWHC 2392 (TCC)