



LEGAL BULLETIN



Recovering the Costs of Unsuccessful Bids

By
Kevin Roberts Head of Legal Services (non-practising solicitor)

Those of you who regularly bid for PFI Project work will be all too familiar with the astronomic costs of bidding for that kind of work. The costs of bidding for non-PFI Project work can be just as high and it is for this reason that contractors are always on the lookout for ways of recovering the costs of preparing unsuccessful tenders.

So in what circumstances can a contractor (or sub-contractor) recover its costs of compiling and submitting a tender which proves to be unsuccessful, or recover compensation in the form of damages? Regrettably, the answer is “rarely”.

The relatively recent decision in the Northern Irish case of **J&A Developments Limited –v- Edina Manufacturing Limited (2006)** provides some hope to contractors seeking to recover the costs of unsuccessful bids.

The facts of the case were briefly as follows. Edina engaged an architect to draw up plans and prepare other tender documents for the erection of workshop offices and associated works at its premises on an Industrial Estate in West Lisburn. The plans and other tender documents were sent to contractors who had expressed an interest in carrying out the proposed works. One of the prospective tenderers was J&A Developments. The tender documents stated that the “*Tendering procedure was to be in accordance with the principles of the Code of Conduct for single stage selective tendering 1996*”.

The Code of Conduct included the following statement:-

“[the code] strongly 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 or to be made or to reduce tenders other than the lowest to a figure below the lowest tender.”

Edina received 6 bids of which the bid submitted by J&A Developments was the lowest. However, for whatever reason, Edina did not accept the lowest bid (it was not obliged to do so of course), but entered into negotiations with each of the three lowest bidders, including J&A Developments. It was during the course of those negotiations, that all bidders were invited to make arbitrary reductions to their bids.

J&A Developments declined to make any reduction to its bid but the next lowest bidder took the bait, reduced its price by £25,000 and was awarded the contract. Some of you may be thinking – this happens all the time – so imagine how surprised Edina were when J&A Developments commenced court proceedings against them for damages for breach of the tendering code.

In the court action, J&A Developments relied upon the decision made in the case of **Blackpool & Fylde Aero Club Ltd –v- Blackpool Borough Council (1990)**, and argued that a collateral contract had come into existence between themselves and Edina. In that case, the Borough Council sent out tenders for a concession to operate pleasure flights from Blackpool Airport. The tenders included a statement that the Borough Council would not be bound to accept the lowest bid and that it would not consider any bids submitted after a specified date. The Aero Club submitted a bid on time but the council staff failed to clear the letterbox so the bid was not, in fact, considered.

The Court of Appeal decided that, although collateral contracts were not implied lightly, the Borough Council had shown a clear intention to be contractually bound to consider all bids which were submitted on time. By failing to consider the bid which had been submitted on time by the Aero Club, the Borough Council was adjudged to be contractually liable.

J&A Developments argued that a collateral contract could come into existence between an employer and a tendering contractor and that, in the circumstances, a collateral contract was formed between Edina and itself which Edina had breached. In their defence of the court action, Edina sought to make a distinction between the circumstances of the Blackpool case, which concerned a public body seeking competitive tenders, and the circumstances of their case with J&A Developments, with Edina being a private body.

The court rejected that distinction and commented that, although there is a statutory distinction between a public body and a private employer, no such distinction could be made in common law.

The court decided that, by incorporating the Code of Procedure into the tender documents, it was a term of the collateral contract between Edina and J&A Developments that Edina would comply with that procedure and that in the event they failed to do so, they would be in breach of that collateral contract. The practice Edina had followed of inviting the three lowest bidders to arbitrarily reduce their bids was adjudged to be contrary to the Code of Procedure.

In the case of **Fairclough Building Ltd –v- Port Talbot Borough Council (1992)**, the Court of Appeal had stated:-

“A tenderer is always at risk of having his tender rejected either on its intrinsic merits or on the ground of some disqualifying factor personal to the tenderer. Provided that the ground of rejection does not conflict with some binding undertaking or representation previously given by the customer to the tenderer, the latter cannot complain. It is not sufficient for him to say, however understandably, that he regards the ground of rejection as unreasonable.”

The court decided that by inviting the tenderers to make arbitrary reductions to their bids, Edina directly breached the Code of Procedure written into the tender documents, themselves contract documents, and were therefore in breach of contract and liable to J&A Developments in damages for the costs of preparing their bid in the expectation that Edina would comply with the express wording of the Code of Procedure. The court also awarded J&A Developments damages representing the loss of profit it would have earned but reduced the amount of damages it awarded in recognition that its employees, who would have been employed on the contract with Edina had its tender been accepted, had been engaged on another profitable contract.

Contractors (and sub-contractors), should therefore consider whether the client (or main contractor), has inserted a procedural code or express stipulation in the tender documents which has the same or similar effect to the Code of Procedure in the J&A Developments case and consider, if the contract has been awarded to another tenderer, whether the client (or main contractor) has complied with that code or stipulation. If it hasn't then, subject to proof that it hasn't, the costs of preparing the unsuccessful bid will be recoverable.

END



Birmingham **Leeds** London **Nottingham** Purley **Milton Keynes**
Email: kevin.roberts@haleys-ltd.com: Website: www.haleys-ltd.com

This Legal Bulletin should not be taken to be, or used as, a statement of law, or for the purposes of giving advice to any party on any legal or contractual matter or dispute. Haleys therefore do not accept any responsibility for any such use or purported use and in all cases parties should seek appropriate and specific legal advice for specific cases. If you would like to discuss the circumstances of any of your contracts or projects, or you require further information on the services provided by the Contracts & Legal Services Division, please contact either of the following:-

Kevin Roberts – Head of Legal Services (non-practising solicitor)/Associate Director

Peter Graham –Regional Director

15 Wheeler Gate, Nottingham, NG1 2NA
Tel: 0845 367 8820; Fax: 0845 367 8821