

EU & Competition

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NI High Court rules on time-bar and award criteria issues in public procurement

The High Court in Northern Ireland has dismissed a challenge to a tender process run by Northern Ireland Water for the award of a contract for sludge management services (*Irish Waste Services Limited v Northern Ireland Water Limited*). Dundas & Wilson LLP advised NI Water, with Cleaver Fulton Rankin as local agents.

Whilst we are still awaiting the written judgment, the decision is important in two respects. Firstly, the Court has confirmed that bidders cannot “sit on their hands” during the tender process and raise legal objections to the tender documentation after they have been excluded from the process following the appointment of the preferred bidder. Secondly, the Court has rejected the substantive objection to the process. The substantive objection was that it is unlawful for a contracting entity to run a “two-stage” quality / price evaluation process when electing to award a contract to the bidder submitting the “most economically advantageous tender”. The argument was that the Regulations precluded a contracting entity from rejecting a tender following an initial quality evaluation (the tender failing to satisfy a minimum quality score threshold) without having conducted a price evaluation. An assessment of the most economically advantageous tender, it was argued, required

a “single-stage” assessment of quality and price to determine the tender offering best value for money.

NI Water defended the challenge arguing that the Regulations did not preclude a contracting entity adopting such an evaluation process and that, in any event, the challenge was time-barred as it should have been brought “*promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose*” (r.45(5)(b) of the Regulations), that being the date the ITN was issued to the 7 bidders (the ITN having set out the evaluation criteria).

After a two-day hearing at the end of May the judge, Mr. Justice Treacy, said he would give judgment by the end of the Court term (30 June). Whilst the written judgment is still to be delivered, Treacy J gave his decision last week, finding for NI Water and dismissing the action on the grounds that it was brought out of time and that the substantive objection to the process lacked merit. The injunction preventing NI Water from awarding the contract has been lifted and Irish Waste ordered to pay NI Water’s costs. Irish Waste will have 6 weeks from the date of the judgment to appeal.

This Alert! is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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