

Public Procurement

February 2010

Morrison obtains injunction against Norwich City Council to prevent award of multi million pound contract to Connaught on grounds of an abnormally low bid.

Facts

On 22 February 2010 the High Court in England & Wales imposed an interim injunction against Norwich City Council to prevent the award of a housing repairs contract to Connaught Plc. The Council put the contract out to tender in April 2009 on the basis that it would be awarded to the most economically advantageous tender and estimated the cost of the contract to be £25M. Morrison Facilities Services Ltd bid £23M for the contract but the Council awarded it to Connaught who bid £17.5M. Morrison sought an injunction from the High Court on the grounds that the Council had accepted an abnormally low bid without properly investigating the viability of it. Connaught's bid is 25-33% lower than the other bids submitted.

Procurement Rules

Under regulation 30(1)(a) of the Public Contracts Regulations 2006 a contracting authority may award a public contract to the most economically advantageous tender. In assessing whether a bid is economically advantageous, the authority may take into account various criteria including the price, quality and technical merit. Regulation 30(6) states that a contracting authority may reject an abnormally low offer but only if it has

requested in writing an explanation of the offer or of those parts which it considers contribute to the offer being abnormally low; taking account of the evidence provided in response to a request in writing; and subsequently verified the offer or parts of the offer being abnormally low with the economic operator.

Comment

The Regulations do not provide for automatic rejection of an abnormally low bid: use of the word 'may' rather than 'shall' in the wording of regulation 30(6) gives the authority discretion. Indeed automatic rejection would be contrary to EU law as confirmed by the Court of Justice of the European Union in joined cases *C-147/06 and 148/06 SECAP SpA v Comune di Torino*. A tenderer should not be discriminated against because their bid is abnormally low, however, an authority must be satisfied that the bid was the most economically advantageous based on the published award criteria in order to comply with the principles of transparency and to promote competition.

The Council estimates that it will cost them £1M a month to find a replacement provider until the hearing in June.

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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If you would like any further information on this Alert!, or any other EU & Competition issues, please call the person at D&W with whom you normally liaise, or one of the following specialists:

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