

J B Leadbitter & Co Limited v Devon County Council

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The judgment of Mr. Justice David Richards of 1 May 2009 considers the question of how procuring authorities are to treat tenders submitted incomplete, and exercise their discretion to accept supplements to those tenders after the deadline. Devon County Council ('Devon CC') undertook a procurement for a consortium of public bodies in the South West of England for a framework agreement for construction services. Tenders were to be submitted electronically, by 16 January 2009. J B Leadbitter & Co. Limited ('Leadbitter') uploaded and submitted its tender within the deadline, but due to an error the accompanying case studies were not uploaded, and the secure portal for electronic submissions would not allow Leadbitter to upload the additional documents. Devon CC refused to accept their submission by alternative means, and rejected the tender as non-compliant. Leadbitter challenged that decision, seeking an injunction to compel consideration of its tender, and damages for loss of a chance in the alternative.

Richards J. rejected Leadbitter's argument that Devon CC had breached Regulations 4 and 47(1) Public Contracts Regulations 2006, and in particular the Community law obligation to treat tenderers equally and in a non-discriminatory way. Although the deadline had been extended by three hours following a power failure experienced by one of the tenderers, that had resulted from circumstances outside the control of that other tenderer, and was a decision applied equally to all tenderers (paragraph 39). Further, although another tenderer had submitted its documents in hard copy following its concern that its case studies had not successfully been submitted electronically, that concern proved to be groundless, such that it was not in fact treated differently, its tender having been properly submitted electronically (paragraph 42). There was no inequality or discrimination in Devon CC refusing to waive strict compliance with the ITT and allow Leadbitter to rectify its error.

The suggestion that Devon CC's decision breached its duty to select contractors on the basis of the most economically advantageous tender was likewise rejected. Richards J. held "*It is inevitable that the application of the rules of a procurement process may exclude consideration of a tender which might otherwise have been successful.*" (paragraph 47).

Richards J. accepted Leadbitter's argument that public authorities are bound by the principle of proportionality in conducting procurement exercises. He acknowledged that Article 2 Directive 2004/18/EC made no reference to this principle explicitly, "*which might in accordance with the domestic principles of construction suggest that the intention was that it should not give rise to an enforceable obligation*". However, its presence in Recital (2), the obligation in Regulation 47 to comply with 'any enforceable Community obligation' rather than merely those expressly canvassed in the Directive, and the judgment of the Court of First Instance in Case T-211/02 *Tideland Signal Ltd v Commission of the European Communities*, confirmed that this principle must apply. It was held in *Tideland Signal* that Community law required a decision by a public authority be overturned where it was "*clearly disproportionate and thus initiated by a manifest error of assessment.*" (paragraph 43 of the CFI's judgment).

However, on the facts of the case, Devon CC's decision to reject Leadbitter's tender was held to have been proportionate. The deadline, and the need for a single submission for reasons of security and ensuring the integrity of the tender process, had been clear from the ITT and were understood by Leadbitter. "*In general, even if there is a discretion to accept late submissions, there is no requirement to do so, particularly where, as here, it results from a fault on the part of the tenderer.*". Although Leadbitter's position was stronger than tenderers who were simply late, as it was accepted its tender had been completed prior to the deadline and that the failure to submit was an unintended technical error (paragraph 64), nonetheless Devon CC was not required to undertake an investigation of those facts at the time of its decision (paragraph 68). Proportionality may require a waiver of strict deadlines in cases where they are missed as a result of a fault by the procuring body, but in a case where the fault is the tenderer's it is within the procurer's margin of discretion to refuse to accept the tender.

Michael Bowsher QC, Elisa Holmes and Ligia Osepiciu appeared for Devon CC.