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Procurement and Supply Contracts in the Construction Industry

Look before you leap pre-contract safeguards

Procurement is perhaps not the most exciting legal topic, but an incredibly important one in terms of the numbers and success or failure of a project if the mix is “wrong”. One only needs to think of Wembley, the National Physical Laboratory and Holyrood to think of three humdingers.

A variety of factors make a construction contract different from most other types of contracts. These include the length of the project, its complexity, its size and the fact that the price agreed and the amount of work done may change as it proceeds. The structure may be a new building on virgin ground. It may involve the demolition of an existing building and its full reconstruction. It could involve partial demolition and rebuilding, or the refurbishment and extension of an existing building or structure.

Contractors and consultants tendering for construction projects are expected these days to put together very comprehensive proposals, which not only answer the specific points raised in the tender enquiry documents, but also outline extensively the company’s expertise, experience, procedures and methods for the proposed works. In certain situations, tenderers are expected to prepare, on a speculative basis, full option appraisals which require an extensive understanding of the potential client’s needs.

It is salutary that a large construction project may typically take four years through planning, design, procurement, construction and completion during which time the contractor may only be given four weeks within the tendering process to quantify all the risks that may impact against quality, price and time. Often the extent of necessary work cannot be ascertained until the works have been started and essential opening up work undertaken. Moreover, the design process will never have been fully completed at the time the contact is made.

Like most things in life it is best to avoid an accident and that includes inadvertently contracting, ditto doing so on the wrong terms or a bad price. Tendering is an area where looking left and right and up and down is obligatory before you leap. This paper visits some touchstones.

Check out your client before you tender

There is obviously little or no point entering into what on the face of it seems to be a rewarding and prestigious project unless there is a realistic prospect of being paid for the work done. A basic point, but all too rarely are putative clients and paymasters investigated for form by contractors and consultants.

It is difficult enough with margins in the industry as they are. Having a bad client is not a brilliant start. One of the fundamental characteristics of all construction work is uncertainty. Reducing that uncertainty pre-contractually is the best advice any lawyer can give his client.

With any new client where there is no previous course of dealing, or none for some time, it is important to ascertain whether the client/employer has sufficient resources to see the project through. Joint venture companies and companies registered overseas, particularly in the Channel Islands, BVI, Grand

Cayman or similar secret or "private" registered residence should sound warning bells. Similarly, any off-the-shelf company purchased by a developer for a particular venture is, at the end of the day, no more than a shell. Contractors should not be scared of asking for security in these circumstances, be it by advance payment bond, PCG, escrow account or legal charge over property by securing all monies/ securing a fixed sum etc.

If in doubt do some basic research. There are a number of searches that can be made on line, e.g. through Dun & Bradstreet, Experian, Jordans, Lawtel, etc. A search on a good search engine on the web might also pull up some leads; Google is always a good starting point. It is relatively cheap to undertake these searches, and whilst historically the evidence provided from them will not be "live/real time" it can provide you with important information at the outset which will help you decide on how to proceed from an early stage. County Court Judgments, Directors Disqualifications, and insolvency portfolios are all indicative of folk who may not have the golden touch. It is always worthwhile carrying out a company search to find out who the main players are and an officer search can be made against the directors in question to see what other directorships they may hold. This may be helpful in determining whether there have been any previous hospital jobs that go with the men in the grey suits.

Play deal, no deal, sometimes no deal is your best deal.

Read the tender documents

Risk is the most important factor to consider in tendering procedure and contractual arrangements.

Whilst it may seem an obvious precaution to read tender documents very carefully, in my experience it is surprising how, time and again, contractors get into difficulties because they do not follow this basic rule. It is generally too late to ask your lawyers to try and get you out of a contractual condition to which you are already bound.

Make sure, for example, that you do not obligate your company to do what it cannot achieve, e.g. building what is practically impossible. Check tolerances, check for provisions which require gross internal or net lettable areas to be achieved or in default of the obligation to pay iniquitous damages. Design and build contracting[1] is a risky venture and anything which the employer does to make it more risky by tweaking the standard JCT/ICE/FIDIC documents should be resisted. One area which consistently holds contractors to ransom is the risk in dealing with existing structures. Sod's Law being what it is means lady luck is often not there to save a debacle. It is always important to take an early stand and to give positive reasons to the employer why a new provision should not be introduced. At its heaviest you can decide not to proceed further with the tender. In other cases you may well be able to agree an amendment but you need to undertake a risk assessment and price for it accordingly.

With design and build contracts, be very careful about terms which pass the burden of the unknown onto the contractor. Particularly where what is sought to be achieved is a situation where the contractor does not get more time and loss and/or expense. These are common ploys and you need to watch out for any changes to JCT and any of its derivatives.

If, at the end of the day, you contract to do something which you are unable to carry out and that includes things you are liable for via your domestic contractors, you will be in breach, damages will flow and you will be losing money. Bonus payments will have gone out the window by this stage!

1 The authoritative RICS 10th Contract in Use Survey 2006 (based on 2004 data) prepared by Davis Langdon shows design and build to be the single most prevalent method since 1995. Up until that point the surveys were dominated by bills of quantities. This was the time of major shifts in procurement strategies. This survey reinforces the dominance of design and build as a procurement strategy, but bills of quantities just refuse to die.

The survey further found that in 2004 92% of building projects used a standard form of contract, down from 95% in 2001. Design and Build procurement was the route of choice in just over 40% by value of contracts.

Therefore go through the tender documents with a fine toothcomb. Do not assume that anything will be normal and standard. Assume it will not be and check. Look for traps and mark them up.

References to other documents

Related to the question of reading the tender documents are those instances where you do not actually get copies of particular documents referred to in the tender package. This often happens with drawings, planning documents and geotechnical/ground investigation reports. You will typically see references to documents "which were available for inspection by appointment". If that is the situation make damn sure that an appointment is made and copies taken. If they are available on an intranet or some downloadable source bespeak the password and download them. Parties often make reference like this in contractual documents to the contract being "subject to conditions available on request". Such a reference, when brought to the notice of the other party, is sufficient to incorporate the current edition of those conditions of contract. This rule was decided in *Smith v South Wales Switchgear Ltd*.[2]

Sometimes the terms on which the work is to be let are referred to in correspondence passing between the parties, so watch out for this where the letter is made a contract document, particularly if that is not what you want. Again a common problem in my experience. Terms of a standard form of contract may thus be incorporated into the contract by such a reference. A contract was made by exchange of letters in *Killby and Gayford v Selincourt*.[3] On 11 February 1972 the architect wrote to the contractor seeking a price for alteration work. The letter concluded, "subject to a satisfactory price between us, the general conditions and terms will be subject to the normal RIBA [Royal Institute of British Architects] contract". The contractor provided a written estimate on 6 March 1972. The architect replied on behalf of the client, accepting the estimate and also stating "please accept this letter as formal instructions to start work". No standard RIBA (now the JCT) contract was ever signed. It was held that the exchange of letters incorporated the current RIBA form of contract.

Also make sure that if you are under a letter of intent, and you do not want to enter into a binding contract at that stage, you make it quite clear that is the situation by marking your correspondence "subject to contract". Similarly don't get yourself tied into a contractual obligation with subcontractors if you have not yet got a binding contract with your employer. Hence the importance of making sure back-to-back arrangements are properly sewn together.

You will also need to be clear when you are sifting through the various documents that make up the invitation to tender package and the proposed contract documents themselves, that some of the documents contained within it will form part of the contract and others not. If you want a particular document to form part of the contract document, you should say so expressly. Another example might be a situation where a plan shows access arrangements for delivery but you discover prior to contract that those arrangements will not be realised. Make sure that you make provision to cover the problems you envisage through that new access arrangement.

What is a tender?

A tender[4] at its most basic is a bid made by a potential supplier of goods and/or services, in competition with other potential suppliers, where they offer to provide goods and/or services to the putative employer.

2 [1978] 1 All ER 18, Smith overhauled South Wales Switchgear Ltd's electrical equipment for some years. The company wrote to Smith asking him to carry out the overhaul of equipment. A purchase note requesting work which read "subject to our general Conditions of contract 2400, obtainable on request" was sent to Smith. He carried out the instructions as requested but did not request a copy. An unrequested copy of the 1969 conditions was sent to him. There were two other versions of the conditions including the March 1970 revision. Held: The reference in the purchase order incorporated the March 1970 revision. There were three reasons for the decision:

1 It was clear how Smith could have ascertained the terms.
2 It was common knowledge that conditions of contract change over time.
3 If he had asked for the conditions he would have received a copy of the current one.

3 [1973] 3 BLR 104

4 An invitation to tender is usually an invitation to treat but in certain circumstances there may be a legally binding commitment to consider all bids submitted by the deadline.

The difference between a tender and an estimate

Tenders should be distinguished from estimates. A tender is in the nature of an offer which is capable of acceptance in the legal sense. It is usually a document which incorporates a priced bill of quantities or something similar. The term "estimate" is used far more widely and can either represent an offer capable of acceptance so as to form a lump sum contract or it can merely be the contractor's view as to the eventual claim he will make for payment under a cost contract or in quantum meruit. There is certainly no rule of law that the use of the word "estimate" on a document prevents it amounting to an offer, and where such a document carries standard terms and conditions then that will generally be a strong indication that the document is an offer capable of giving rise to a contract if accepted expressly or by conduct. Estimates may of course take verbal form as well as written form.

The precise terms of estimates should be carefully considered to establish whether they constitute an offer or merely a view as to the likely cost. Even if the estimate is merely a view as to the likely cost, the contractor may be held liable for its accuracy in this representation, for breach of collateral warranty, or negligent misstatement, see *Esso v Mardon*[5] and *Chaudhry v Prabhakar*[6].

We start here

First let's have a beginning.

When I were a lad we had what I will call "the traditional procurement method", a competitive tender process which was then the standard procurement model in the building industry and had been for more than 150 years following the emergence of the general contracting firm and the establishment of independent client consultants. The main feature is that the design function is separate from construction, and full documentation is required before the contractor can be invited to tender for carrying out the work. This is a rigid arrangement which relies upon clear tender documents and bidders providing unqualified bids (which rarely happens).

Beyond the negotiated basis of contracting, which spans from a straight haggle between the employer and contractor to more gentlemanly rituals to agree upon a price for a set piece of work, there was only one real tender process in the mid-1980s[7] when I came in and that was competitive tendering. Once the architect had prepared the design (yes he usually did in those days), and the quantity surveyors had prepared the bills of quantities[8] (yes, BQ's were common too), and the contractors on the tendering list had priced those bills of quantities, then the contractors all submitted their tender forms in pre-printed sealed envelopes by a set time and day. These tenders were then all opened at the same time by the employer or his architect, and the employer entered into a contract with the successful tenderer (usually but not always the lowest). A ritual which is far less common today.

Whatever the method of procurement adopted, the tendering process in the United Kingdom is based on competitive bidding.

There are open tenders which are a route whereby everyone who expresses an interest to a notice is provided with a full copy of the invitation to tender. The first step in this type of tendering is an advertisement in the technical press calling for expressions of interest. Parties can obtain the documents needed from the body placing the advertisement or its agents. The advertisement usually contains a brief description of the location, the type of work being proposed, the scale of the project and the scope of the proposed work. Interested contractors are invited to apply for the details. The main disadvantage of this type of tendering is that it is indiscriminate in its

5 [1976] QB 801

6 [1989] 1 WLR 28

7 Management Contracting as embraced by Bovis from about 1967 was still in its infancy and very much the one-off bespoke model.

8 Bills of quantities are a peculiarly British invention, and are largely unheard of outside Britain and the Commonwealth. Thus, American-based procurement systems, such as construction management, typically require trade contractors to tender off specifications and drawings rather than bills of quantities and that is now pretty common in the UK too.

approach, costly and likely to attract inexperienced tenderers. Local authorities have in the past tended to favour this method of procurement until EC law put an end to it in 1991.[9]

The mores and established convention is that the tendering contractors should prepare their tenders independently. To ensure transparency in this process the National Joint Consultative Committee (NJCC), a now defunct organisation consisting of the major professional bodies involved with construction, produced codes of procedure. Whilst the NJCC was disbanded in 1996 their documentation is still in use. It is famous for its single-stage and two-stage tendering methods and they exist to this day.

With single-stage selective tendering the NJCC code provides that this procedure is suitable for both private and public sector works. This procedure restricts the number of tenderers by pre-selection from either an approved list or on an ad hoc basis. A limited number (up to six) are selected on the basis of general skill and experience, financial standing, integrity, proven competence with regard to statutory health and safety requirements, and their approach to quality assurance systems. Thereafter, price alone is the criteria, the lowest tender being selected.

I deal with two-stage tendering later in this paper.

I should just briefly mention Selective Tenders, commonly of a design and build nature. By this method the tendering process can be limited to pre-selected qualified entities when (a) the required product or service is highly specialised and complex; or (b) there are only a limited number of suppliers of the particular goods or services needed; or (c) other conditions limit the number of firms that are able to meet contract requirements; or (d) critical goods, works or services are urgently required.

Taking covers

Occasionally when I came to construction I heard of tendering contractors "taking a cover". This might occur where a contractor is not in a position because of his current workload to undertake a contract for which he has been invited to tender, and yet does not wish to be seen to turn work away. He therefore contacts a friendly contractor who is also tendering and pitches his own price a little higher than that of the other contractor. The taking of covers is of course carefully concealed from the employer. It is of course illegal.

From a bidder's perspective the bad news is that about 18 month ago the Office of Fair Trading (OFT) rightly identified the construction sector as one of its targets for clamping down on such "anti-competitive" activities. The OFT has been scrutinising the construction industry for evidence of price-fixing and bid-rigging during tenders on the supply and contracting sides (which it believed was endemic; talk amongst the cognoscenti is that they were not wrong). The OFT came down hard on cover-bidding, bid-suppression (where one or several competitors refrain from tendering so that a particular bid will be accepted), and bid-rotation (where competitors agree to take turns on who will be best placed to win the tender by putting in the lower offer) as illegal practices. We have seen high fines for those have been found to be involved in such anti-competitive behaviour even with "leniency" applied.

It should be noted in passing that those agreements between contractors involved in cartels/colluding/meeting in the boozer on a Friday night to fix prices are within the scope of the Competition Act 1998.[10] Further, agreements between contractors relating to the tenders are likely to fall foul of EU Competition Law.[11] Article 81 (formerly Article 85) of the Treaty of Rome[12] prohibits all agreements between undertakings and concerted practices which may affect trade between member states. Also, EU legislation[13] may provide a

9 By the Public Works Contracts Regulations 1991 (SI 1991/2680).

10 The Competition Act 1998 repealed in large part the Restrictive Trade Practices Act 1976 which had statutorily dealt with this area.

11 "And while the law [of competition] may be sometimes hard for the individual, it is best for the race, because it ensures the survival of the fittest in every department", Andrew Carnegie, The Gospel of Wealth, he who was born in Scotland and made his fortune in steel and railways in America and then gave it away.

12 The Treaty of Rome of 1957 (often called the "EC Treaty") established the European Community.

Because competition law was included in the Treaty of Rome, it is correctly called "EC competition law". But, in general parlance, it is often called "EU competition law". They are the same thing.

The Competition Act 1998 (CA) introduced prohibitions of anti-competitive agreements and of abuse of a dominant position into UK law with effect from 1 March 2000. The CA replaced most of the Fair Trading Act 1973, the old law on mergers and monopolies. The principal aim of the CA was to align UK competition law with EU competition law. The Chapter I prohibition mirrors Article 81 EC Treaty while the Chapter II prohibition mirrors Article 82 EC Treaty. The Enterprise Act 2002 (EA) represented a further major shake-up of the UK competition law regime. Some of the changes attracting the most publicity were the introduction of criminal penalties for persons involved in hardcore cartels and the ability to disqualify directors involved in breaches of competition law.

The Office of Fair Trading has the power to investigate complaints of breaches of the Chapter I and Chapter II prohibitions and Article 81 and Article 82 of the EC Treaty under the Act. The Chapter I prohibition and Article 81 cover agreements between undertakings, decisions by associations of undertakings and concerted practices which prevent, restrict or distort competition or are intended to do so, while the Chapter II prohibition and Article 82 cover the abuse of a dominant position in a market.

13 The new Public Contracts Regulations 2006 which implement the EU Public Procurement Directive (2004/18/EC) came into force on 31 January 2006 and govern how public authorities procure works, supplies and services above specified financial thresholds. Those Regulations affect any "contracting authority" that intends to award a qualifying contract.

remedy to a tendering party who feels that he has been discriminated against by a body in favour of a contractor from its own country. I refer to some of the cases in this paper. There is, in fact, a growing body of EU procurement legislation, presently mainly confined to government contracts, but this is a developing area of law.

With traditional procurement, the realism of lump sums approximating with the outturn cost (or otherwise) will obviously depend on tenders having been prepared on the fullest possible information. Where that information is unlikely to be available at preconstruction stage, lump sum contracts are unlikely to be satisfactory and alternatives will have to be considered.

What are the problems with traditional tendering processes?

Traditional contract tendering processes often suffered from overly long lead-in times for the likes of employer developers uneasy with their funding commitments; in order for a meaningful lump sum to be obtained by tender (say JCT 98 With Quantities), it is necessary to design substantially the whole of the works before sending out the tender documentation to contractors. Logistically, however, there is no reason why the timescale of a project may not be foreshortened by having the contractor carry out the early work (such as site establishment, hoardings, site clearance, demolition of buildings, foundation works, etc.) at the same time as the detailed design of the building is being progressed, see two-stage tendering section below. A number of approaches may be adopted:

- The employer may let an enabling package or contract of work be done before the main work is let. Such enabling works typically involve the demolition of any existing buildings, and this approach is particularly common where it is necessary to stabilise the ground, or asbestos is to be removed where the building is contaminated.

- The employer may adopt a construction management approach, and there is in fact once more an increasing trend towards CM after the embers have cooled on Holyrood and the Great Eastern Hotel.[14] With CM the professional team will focus first on the design of the early packages, so those packages may be let and the work executed whilst the design for later packages is progressed. In this case, the construction manager will typically prepare an integrated design and construction programme or tender event schedule with a view to making sure that the designers produce their design information in sufficient time for tender documentation so that each package can be prepared in time for the package contractor to be brought on site at the right time. In practice, designers (particularly those unfamiliar with construction management) often fail to adhere to such programmes, with the result that contract packages are let on incomplete information. This in turn typically leads to claims by trade contractors pursuant to the terms of their trade contracts. Under the construction management system, these contracts are entered into directly between the trade contractors and the employer, such that the employer bears the risk of design delay. Occasionally, the employer will seek to recoup his loss from the construction manager or the design team.

- An alternative approach is for the employer to let the whole of the work at the outset on a design-and-build basis. Again, this enables the design-and-build contractor to execute the early work before he has finalised the design of the later work, but the employer's risk profile is markedly different, since it is the contractor and not the employer who bears the risk of any delay in the design of the later work.

14 In the case of construction management and management contracting, there is a tender process for each package of work. Where conflict arises in this area, it typically arises from the point that it is the construction manager or management contractor who is responsible for the tender process, but the employer who bears the cost of unnecessarily expensive procurement. Employers sometimes bring claims against construction managers or management contractors on the basis that the tendering process is not sufficiently competitive, or even that the construction manager or management contractor has favoured the trade contractor who will best conceal shortcomings in the management of the construction manager or management contractor, rather than the trade contractor willing to offer the best value for money for the employer.

Indeed, there are various procurement and contract strategies available which might be adopted. From the employer's perspective a spectrum from the low risk of PPP/PFI, which is essentially a service delivery, through to construction management, as referred above, where almost all of the risks lie with the employer client. It can be illustrated as follows:

What does a good old fashioned tender bid front end look like?

(NOTE: Such a document would form a part of the Form of Tender)

To ....

....

....

GENTLEMEN,

Having examined the Drawings, Conditions of Contract, Specification and Bill of Quantities for the construction of the above-mentioned Works (and the matters set out in the Appendix hereto) we offer to construct and complete the whole of the said Works in conformity with the said Drawings, Conditions of Contract, Specification and Bill of Quantities for such sum as may be ascertained in accordance with the said Conditions of Contract. We undertake to complete and deliver the whole of the Permanent Works comprised in the Contract within the time stated in the Appendix hereto

If our tender is accepted we will, if required, provide security for the due performance of the Contract as stipulated in the Conditions of Contract and the Appendix hereto.

Unless and until a formal Agreement is prepared and executed this tender, together with your written acceptance thereof, shall constitute a binding Contract between us.

We understand that you are not bound to accept the lowest or any tender you may receive.

We are, Gentlemen,

Yours faithfully,

Prescription of the tender procedure

JCT documents generally do not include express tender procedures covering tenders for the main contract works (see former Practice Note 6 to JCT 98, referred to below) but, where the main contract conditions refer to the use of specific documents, for example the naming of persons as subcontractors (Intermediate Building Contract (IC)) or the use of Works Contractors

(Management Building Contract (MC)), there is a requirement that such tenders be invited in accordance with the relevant documents. Although JCT does not generally prescribe the tender procedures to be followed its "Practice Note Tendering" provides model forms for use in tendering for main contract works.

Is an invitation to tender an offer?

In most cases the invitation to tender/negotiate is not an offer.[15] It is when tenderers submit their tender bids, possibly in a form prescribed for them, that the offers are made (subject to the rules set out in the invitation). It is therefore crucial that putative employers submitting tender invitations reply carefully, as their response may constitute an acceptance of the tenderer's offer, and therefore constitute a binding contract.

Whilst the contractor's offer to carry out the works is usually a tender/bid offer, it may well happen that as a result of negotiation it is the employer who eventually makes the offer. In any event a statement, to amount to an offer, must be definite and unambiguous. The person making the offer is for the purposes of this part of the law termed the offeror; the person to whom it is made, the offeree.

Any contractor submitting a tender bid needs to know its tender may be withdrawn until the moment of acceptance[16] and the contractor owes no obligations to the employer until such acceptance unless the tender is expressed to be open for acceptance for a set time[17] and even then the law allows a wriggle.

Also, ordinarily, an invitation to tender is not an offer binding the employer to accept the lowest or any tender. It is comparable to an advertisement that one has a stock of compact discs to sell or yachts to charter, and such advertisements have been described as "offers to negotiate-offers to receive offers to chaffer".[18] It follows that the clause frequently inserted in tenders to the effect that the employer does not undertake to accept the lowest or any tender is probably unnecessary in law. But an express offer to accept the lowest tender can be binding and have the effect of turning the invitation to tender into an offer. For an offer to be in law, an invitation to tender must be construed as a contractual offer capable of being converted by acceptance into a legally enforceable contract.

Discrepant and qualified tenders

Subcontractors often send in qualified tenders, i.e. tenders that do not conform precisely to the instructions to tenderers in the tender enquiry, such as not bidding on some parts of the bills at all or putting in provisos. It is not unusual to see the covering letter of a tender listing the assumptions that have been made as the basis of pricing a tender, or which suggests an alternative approach or embraces suggested changes to the specification in order to save costs. This, of course, amounts to a counter-offer. It makes sense, therefore, that such a tender should be put forward or accepted "subject to" such matters being discussed further if the bid is to remain live. If the acceptance requires the tenderer to remove a qualification, or reduce a price, or to sign a form of guarantee, for example, then such "acceptances" constitute counter-offers because they require the tenderer to agree to the new proposals regarding price, programme or form of guarantee, etc. It will only be when the tenderer comes back agreeing to the new proposals and thereby agreeing everything, that a contract will come into existence.

The tenderer may in fact not agree with the new proposals and may themselves come back with some counter-proposals.[19] In those circumstances, a contract will only be concluded if such proposal is accepted by the main contractor. It may not be accepted and the negotiations may continue on points of detail. It

15 A call for tenders is usually considered an invitation to treat. See also Canadian case of R. v Ron Engineering & Construction Ltd, [1981] 1 S.C.R. 111, however, the Supreme Court of Canada found that a call was an offer where there the call was sufficiently "contract-like". Later, in M.J.B. Enterprises Ltd v Defence Construction (1951) Ltd [1999] 1 S.C.R. 619, the Court again found a call to be an offer which was accepted with the tender submission (known as Contract A.

16 Dickinson v Dodds (1876), 2 Ch. D. 463 (C.A.)

17 See Routledge v Grant (1828) 4 Bing 653, offer can be withdrawn (revoked) even if the offeror has promised to keep the offer open for a specified time. The defendant offered to take a lease of the plaintiff's premises, "a definite answer to be given within six weeks from March 18, 1825". On April 9 the defendant withdrew his offer, and on April 19 the plaintiff purported to accept it. It was held that there was no contract.

18 Bowen LJ in Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 at 268.

19 Note, too, that statements of fact in the invitation to tender about such matters as the quantities or the site or existing structures may, if a contract is entered into, have no legal effect at all, or they may take effect as representations, or they may form collateral warranties, or they may give rise to a claim for negligent misstatement, or they may subsequently become incorporated into the contract. It is a question partly of fact and partly of construction, to determine the nature of such statements.

is generally only when all matters are agreed that the contract will come into existence. Generally the last shot across the bows is the document which becomes relevant to deciding the issue. See *The Machine Tool Co. Limited v Ex Cell-O Corporation (England) Limited* [1979].

The acceptance of the tender may be conditional. For example if the tender is accepted subject to planning permission being granted. In these circumstances, a contract will come into existence only if planning permission is granted, i.e. the “condition precedent” is satisfied.

Even where a tender does not deviate from the instructions in the tender enquiry it is not uncommon for many contractors to write letters of “acceptance” accepting a tender, subject to further discussion about price, programmes, possession of the site, ordering of materials, loan approval, planning permission and so on. That is, of course, no acceptance at all due to the conditionality.

Disingenuous invitations to bid

Ordinarily, there is no implication that a contractor is to be paid for his costs of preparing his tender[20] as one might expect this is so even where an amended tender is necessitated by bona fide alterations in the bills of quantities and plans, which may be considerable. However, a contractor may be entitled to payment for preparatory work, even if a contract for the main work is never placed.[21] There is a line of authority illustrated by the case of *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*[22] that says a collateral contract can exist between a tenderer and an employer. In that case a clear intention to create a contractual obligation was found on the local council to consider the plaintiffs tender in conjunction with other conforming tenders and that the council were contractually liable to the plaintiffs for any failure to do so.

There was for some time a general paucity of authority on the position of unsuccessful tenderers where there has been some irregularity on the part of the prospective employer in the tender process.

Under our general law, if the employer invites a tender without any intention of entering into a contract and the contractor, believing the invitation to tender to be genuine, incurs expense in tendering, the contractor may have a claim for damages in fraud against the employer.[23] There is nothing novel in the Court inferring the existence of a contract between two interacting parties and thereby imposing mutual obligations on the parties.

Let’s look at an example: As part of the process of tendering, specialist contractors sometimes carry out works of design. In the absence of agreement, the costs of such works are ordinarily part of the costs of tendering unless the employer makes some use of the design or causes the contractor to carry out work beyond what is normal in the circumstances. By analogy in *William Lacey (Hounslow) Ltd v Davis*[24] the plaintiff’s tender had been sought and in the belief that the contract would be placed with him the contractor subsequently prepared various further estimates, schedules and the like which the employer made use of in negotiation with the War Damage Commission and used, not to ascertain the cost of erecting or reconstructing some genuinely contemplated building project, but for some extraneous collateral purpose for which the defendant required it, namely, negotiations with the War Damage Commission so as to enable the defendant to agree a much higher “permissible amount” with the Commission. It was held on the facts, it was impossible to hold that a binding contract had ever been concluded between the defendant and the plaintiff; but on the plaintiff’s claim on a quantum meruit, the court should imply a promise that the defendant would pay a reasonable sum to the plaintiff

20 William Lacey (Hounslow) Ltd v Davis [1957] 2 All E.R. 712. It was held that the contractor was entitled to a reasonable sum for the work carried out subsequent to the tender. There was held to be an implied promise to pay. The modern legal analysis may be that the obligation to pay sounds “in quasi-contract or, as we now say, restitution”.

21 In Comyn Ching v Radius Plc (1997) CILL 1243, it was found that the submission of a tender in response to an invitation did not constitute the supply of a service within the meaning of s.12(1) of the Supply of Goods and Services Act 1992.

22 [1990] 1 WLR 1195

23 Richardson v Silvester (1873) L.R. 9 Q.B. 34. An advertisement was placed in the press offering a farmhouse to let when the advertiser had no authority to let it. Held: The action gave rise to an action in deceit founded on the implied representation that he did have authority.

24 [1957] 2 All ER 712

for the whole of the services which were rendered to the defendant.

Also, a party inviting tenders which are submitted in accordance with the required tender process should give these tenders due consideration. It is unclear as to how much consideration should actually be given to the tender and in the Court of Appeal *Fairclough Building Limited v Borough Council of Port Talbot*[25] it was decided that provided a recipient of the tender gives the tender some consideration and behaves reasonably in rejecting the tender, then the tenderer can have no cause for complaint.

Lord Justice Nolan in Fairclough said:

> "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."

But there has since had some doubt cast on *Fairclough in J&A Developments Ltd v Edina Manufacturing Ltd* where the nature of the common law obligations, to which public bodies may become subject in a tender procedure, was examined. In this case developer J&A was approached by Edina to tender for the erection of workshop offices. Edina employed ADP as its architect. Tenders were sent out to a number of contractors. The conditions of tender included a statement that "Tendering procedure will be in accordance with the principles of the Code of Procedure for Single Stage Selective Tendering 1996."

Relevant extracts from the Code (published by the National Joint Consultative Committee for Building (NJCC)) included the statements:

> "Good tendering procedure demands that the contractor's tender price should not be altered without justification *In particular the NJCC 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."*

In this case, there were six tenders, J&A submitted the lowest tender. A decision was then made in discussions between Edina and ADP that a meeting should be held with the three lowest bidding contractors to see if their prices could be reduced further. These meetings took place and the three contractors were all invited to make arbitrary reductions in their tenders. J&A refused but another tenderer agreed to reduce its price by £25,000 and was subsequently awarded the contract. J&A sued for damages.

Sir Liam McCollum held:

- The Code was incorporated into the tendering procedure through the reference in the tender documents;
- The effect of the incorporation of the Code was to make it a term of the tendering procedure that the future employer would comply with the procedure and any failure to follow the procedure would be a breach of a collateral contract[26] formed between the contracting parties and the employer; and
- Inviting three tenderers in and requesting them to reduce their prices was a direct breach of the Code.

The Court determined that the correct measure of damages was the cost of tendering plus loss of profit on the job lost. The Court reduced the loss of profit by 20% to allow for the availability to regular employees of other work. Sir

25 [1992] 62 BLR 86

26 For detail on tender documents giving rise to a collateral warranty or implied term that the ground conditions are as described see Bacal Construction (Midlands) Ltd v Northampton Development Corp. (1975) 8 BLR 88 and as to possible misrepresentation for pre-contract representations under Misrepresentation 1967 Act see Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd (1977) 9 BLR 34.

Liam McCollum also held:"while there may be a statutory distinction in the position of a public body and a private employer the common law recognises no such distinction."

In this case the incorporation into the tender documents of the NJCC Code for single-stage selective tendering created a contractual obligation to comply with the principles of the Code and meant that to conduct a Dutch auction was a breach of the Code, causing the employer to pay damages to a contractor who had been the lowest tenderer but who had not ultimately been selected. This case confirms, and in a private sector project, applying *Blackpool and Fylde Aero Club v Blackpool Borough Council*, that a tender contract is a collateral contract between tenderers and employer. The measure of damages was held to be the cost of tendering plus loss of profit.

This is clearly in contrast to the normal position of a tenderer described above by Lord Justice Nolan in *Fairclough Building Ltd v Port Talbot*. It is a decision of relevance to professionals (and their insurers) advising clients on tendering procedures.[27]

Lastly here, we take a look at the Privy Council decision in *Pratt Contractors Ltd v Transit New Zealand.*[28] We see a case where a contractor has been unsuccessful in tendering for a highway contract, and believe that it has been unfairly treated.[29] The contractor learned that its bid had been scored by the Tender Evaluation Team (TET) of the client (Transit New Zealand) similarly to that of the successful bidder. The decisive factor telling against Pratt was the TET's perception of Pratt as more litigious and aggressive than its rival (just goes to show what counts sometimes!). Pratt challenged TET's decision and eventually the appeal came to the Privy Council from the New Zealand Court of Appeal.

A number of authorities were cited to the PC, and amongst them was *Pratt Contractors Ltd v Palmerston North City Council*. What Gallan J said there was this:

> "in selecting a particular tenderer, the council is in my view bound by the terms it has itself imposed, as well as the requirements of fairness and equity which may well have an application".

Also, *Hughes Aircraft Systems v Air Services Australia*[30] where Finn J said the duty in cases of preliminary procedural contracts for dealing with tenders is "a manifestation of a more general obligation to perform any contract fairly and in good faith".

In the Privy Council Lord Hoffman regarded these more general notions of fairness as a "somewhat controversial question into which it is unnecessary for their Lordships to enter because it is accepted that in general terms, such a duty existed in this case". Lord Hoffman's decision contains three important elements.

First, he acknowledges the existence of the tender contract. This can now be established as settled law and must, at least arguably, extend into all private sector contracts, although the obligations will not be the same without the backdrop of the public sector regulatory regime.

Second, as to the content of the obligation in this case:

- The evaluation ought to reflect the views honestly held by the members of the TET.
- All tenderers should be treated equally.

27 It is also relevant to note that the defendant employer sought an indemnity in respect of its liability to the claimant from its professional adviser in the process, in this case its architect. The architect here was not liable because the Judge found, broadly, that a competent architect could not have been expected to have advised the employer that a contractual obligation had been created and that in taking the course of action the employer had taken, trying to "horse trade" down the price, would render it liable to the tenderers. Also, the Judge found in this case that the employer would have disregarded such advice even if it had been given.

28 [2003] UKPC 83 Privy Council

29 It is generally well known that if a public authority does not adhere to applicable public procurement law (colloquially the "OJEU Procedure") when tendering for work then it is susceptible to a claim by an aggrieved tenderer. The whole thrust of the public procurement law is to ensure that those tendering are able to compete on an equal basis and that public contracts are awarded fairly. It is perhaps less well known that in addition to the OJEU Procedure, there is common law authority to the effect that public authorities engaged in tendering processes may in fact create collateral contracts with the tendering parties. The nature of those contracts is likely to be that if the public authority in question has stated that it will evaluate tenders in accordance with a given procedure, then that public authority is obliged to the tendering parties to do just that.

30 [1997] 145 AR1

- Where tenderers' attributes are the same, they cannot be marked differently.
- It would be bad faith if a TET member sought to reject information which might show his opinion was wrong.

Third, what would not be included in the obligations of the awarding authority:

- No obligation on TET to give the same mark if it honestly believed the attributes of tenderers to be different.
- No obligation to appoint to TET only members without views on the individual tenderers.
- No obligation on the TET to act judicially.
- No obligation to grant a tenderer a hearing to explain or justify itself.

Indeed, in my experience it is not uncommon for a tenderer/bidder to seek to recover its bid costs through a "quasi contractual" remedy, where it has been "used", based on the concept of "unjust enrichment" and restitutionary principles (in accordance with a line of legal authority expressed in *Countrywide Communications Limited v ICL Pathway Limited and Another*,[31] or alternatively the existence of the tender contract. Whilst as we know there is no doubt that, in most cases, a person who carries out work in the hope of obtaining a contract, for example a builder who prepares an estimate, cannot claim the cost of doing so. In general, parties are free to withdraw from negotiations at any time before a contact is entered into, for good or bad reasons or for none at all, without incurring liability. If it were otherwise, persons seeking quotes for work might routinely find themselves liable for the expenses of several disappointed bidders. In most cases prospective contractors expressly (for example by offering a free estimate or when negotiations are "subject to contract") or impliedly do the work at their own risk. Not so in the *Countrywide* case.

The court recognised, even before *Pratt Contractors Ltd v Transit New Zealand*, some exceptional cases in which the prospective contractor will be able to recover, not pursuant to an implied contract based on the actual or presumed intention of the parties, but because the court imposes an obligation to pay.

In his essay on Ineffective Transactions in *Essays on Restitution* (ed. Finn, chapter 7, pages 211-2) Professor Carter describes the problem of services rendered under "contracts which do not materialise" as follows:

> "An anticipated contract may fail to materialise for any number of reasons. Every day negotiations which might ultimately lead to a contract break down. The breakdown may be a source of disappointment, even bankruptcy, but normally no remedy is available…
>
> Where the negotiation process breaks down, one party the Claimant may have justification for feeling aggrieved. By the word "justification" I mean that there exists some supernormal factor which at least raises the possibility of a legal (or equitable) remedy. The factors which may count as a justification all focus on the conduct of the defendant. Apart from fraud, they are unconscionable conduct and the contravention of some statutory code of behaviour. If we concentrate on restitution for a benefit received by the defendant, rather than restitution based on a wrong done, unconscionability must be the context of any restitutionary claim. It takes three main forms:
>
> (a) the contradiction of a promise, representation, or conventional state of affairs;

31 [2000] CLC 324

> (b) the failure to disabuse the Claimant of a mistake, or false expectation, usually in relation to the award of the contract itself; and
>
> (c) the attempt to retain without payment a benefit conferred at the defendant's request in circumstances where the defendant knew that there was no intention to make a gift of the benefit.
>
> It is clear from the above description that the conferral of a benefit is not the primary source of the concern or "justification". Reliance, expectation and, to put the matter broadly, "fault" clearly have roles to play. The relevance of expectation in at least some of the no contract cases is enough to explode the myth that concepts of contract law have nothing to do with restitution.
>
> It has been said, with some justification, that neither contract nor restitution provides a satisfactory solution to the problems created. This is hardly surprising given the reluctance of the common law to develop a doctrine of good faith in contract negotiation. The focus of most of the debate in the law of restitution is the element of benefit"

The relevant passage in Goff and Jones (5th edition, chapter 26, pages 664-5) is also tentative on the restitutionary claim in principle:

> "It is not surprising, given that only in relatively recent years has the principle of unjust enrichment been expressly recognised, that the courts have inquired in general terms (a) whether the Claimant's services had enriched the defendant, and (b) what is the basis of the Claimant's claim, the unjust factor."

(a) *What is meant by "benefit" in this context?*

As has been seen, there is little difficulty in concluding that a defendant has gained a benefit if he accepted goods and services which he requested, even though there may be no contractual obligation to make a payment. Moreover, it is now accepted that he is enriched if he has received an incontrovertible benefit. What is debatable is whether he is benefited if he requested another to perform services, but received no benefit from the other party's expenditure. The resolution of this question, and the collateral question of the valuation of services rendered, is particularly important in this context.

(b) *What is the "ground" (the unjust factor) of the restitutionary claim?*

There are a number of possible grounds of the restitutionary claim, which, as the law now stands, may depend on the nature of the benefit conferred. These include free acceptance; mistake; total failure of consideration; and unconscionability, which may well be the basis of the doctrine of proprietary estoppel.

Even if the Claimant can demonstrate that the defendant has been enriched and that it would be unjust if his claim were denied, there is a third question which must be answered:

(c) *Did the Claimant take the risk that he would be reimbursed his expenditure only if there was a concluded contract?*

Other academic writers take the view that there is no single principle and that liability is simply imposed if this is justified on the facts of the case. For example, Mr J D Davies, commenting on the New South Wales case of S*abemo Pty Ltd v North Sydney Municipal Council*,[32] at 305 says:

> I want to suggest that Sheppard J. comes out on top. In Sabemo he accepts that the law imposed liabilities outside the traditional categories. By so doing he reduces artificiality and places emphasis where it belongs. There is no ascription of facts to categories of which they are not a natural part. There is no expansion of categories to fill all needs. Instead, there is analysis of the facts; and this ensures that the legitimate grounds for imposing a liability emerge. There is no

32 [1977] 2 N.S.W.L.R. 880 in 1 OJLS (1981)

> word magic; and any labels, or titles, that then get used to describe the results will be less liable to confuse. This seems the best way of developing a comprehensive body of law.

An obligation may therefore be placed on the employer to pay for benefits resulting from services provided by the bidder in anticipation of being awarded the contract, for which it would be "unconscionable" for the bidder not to be recompensed. To succeed in a claim in this regard a bidder would need to establish that the employer was enriched by the bidder's actions, that it would be unjust for the bidder not to receive payment in respect of the work carried out and that the bidder did not assume the risk of bearing the costs of this work if the contract was not concluded. So back to *Countrywide*, they were successful in quantum meruit in their High Court action. The judge said this:

> I would regard it as most unjust if Countrywide were not appropriately recompensed for their work before and after the submission of the bid in March 1996. Put shortly, this is because (1) they were induced to provide their services free of charge by an assurance, ultimately dishonoured, that ICL Pathway would be prepared to negotiate a contract with them if the bid succeeded, and (2) their services provided ICL Pathway with a benefit for which (in the absence of such an assurance) they would otherwise have had to pay reasonable fees for time spent, namely advice and assistance in connection with the public relations and communications issues during the bid and subsequently.

Good faith and tendering

I turn next to a Northern Irish case from the High Court of Belfast in 2007, *Gerard Martin Scott & Ors v Belfast Education & Library Board*,[33] kindly brought to my attention by Tony Bingham. As far as I am aware this is the first UK judgment that has expressly stated that there is an implied term on the employer to act "fairly and in good faith" when assessing a tender. It also shows that the duty to act fairly requires the lack of any material ambiguity in the tender documents that would significantly affect the tender. This was also an ICE 5th Edition Contract which expressly deals with ambiguities.

In this case, the public authority in Belfast instigated a tendering process for a public works contract. The contract was below the financial thresholds of the European Regulations that apply in relation to public works contracts.

There were two preliminary issues:

- First, did the tender documents give rise to an implied term of fairness and good faith?
- If so, did the implied term of fairness and good faith require the absence of any material ambiguity in the tender documents that would significantly affect a tender?

The contractor sought an interim injunction, restraining the employer from proceeding with the tendering process. It contended:

- There was an implied contract between tenderers and prospective employers at common law. This implied contract had emerged in parallel with legislation on the domestic and European scene in relation to public service contracts. It seems that the reference here is intended to be to public works contracts.
- There was an implied term of fairness and good faith in this implied contract.

The employer refuted any concept of an implied contract arising out of the tendering process.

33 [2007] NI Ch 4, Weatherup J.

The judgment did not set out the facts of the present case, but answered the two preliminary issues.

Preliminary issue no. 1: Did the tender documents give rise to an implied contract, the terms of which were that the employer must act fairly and in good faith?

Yes.

- An implied contract could arise from the submission of a tender. It may arise by inference from the scheme of the tendering process and the presumed intention of the parties.
- An implied contract may arise from a tendering process for a public works contract even though the particular contract was below the financial thresholds of the European Regulations that apply in relation to public works contracts.
- The parties to such a public works contract like the present were parties to an elaborate tendering process which was designed to achieve best value for the provision of public services.
- The terms of such an implied contract included an implied term of fairness and good faith.

The implied term of fairness applied to:

- the nature and application of the specified procedures;
- the assessment of the tenders according to the stated criteria; and
- evaluation of the tenders in a uniform manner and as intended by the tender documents.

Preliminary issue no. 2: Did the implied terms of fairness and good faith require the absence of any material ambiguity in the tender documents that would significantly affect the tender?

Yes.

- A mistake in the tender documents might give rise to one or more tenderers adopting a different approach to the tender to that which was intended by the tender documents. This in turn might affect the assessment of the tenders and the uniformity of the evaluation of the tenders. Such a mistake could therefore affect the fairness of the process.
- An ambiguity in the tender documents which went undetected until after completion of the tender which had affected the approach of the tenderers might affect the assessment of the tenders and might affect the uniformity of the evaluation.
- An ambiguity might be material if it caused the tenderer to proceed on a misguided basis or on a different basis to other tenderers. Fairness required that it had to have a significant effect on the tender (i.e. one that was more than negligibly different from the tender which would otherwise have been submitted).

Comments

At least in relation to the public sector, this case confirms that employers must treat tenderers fairly in inviting and evaluating tenders.

EJC takes the lead

It is evident from the case law of the European Court of Justice that the decision to discontinue a tender procedure is challengeable in the national courts. The standard against which that decision is to be judged is set by the general principles in *Hospital Ingenieure Krankenhaustechnik Planungs GmbH v Stadt Wien*,[34] and *Kauppatalo Hansel Oy v Imatran kaupunki*,[35] Case C-244/02). A bidder may seek to recover wasted bid costs under the principle of "legitimate expectation", in line with the principle set out in a European Community procurement law case, *Embassy Limousines and Services v The European Parliament*.[36] It was argued successfully in this case that a non-contractual liability can lie against an employer where, before a contract is awarded, a bidder is encouraged by the employer to make irreversible investments in advance and thereby go beyond the risk inherent in the business of making a bid. A full analysis of the tender documents, the correspondence, the conduct of the employer and the bidder during the procurement process and all the surrounding circumstances may establish an exception which could enable a bidder to recover its wasted expenditure or, alternatively, the benefit that has been conferred on the employer. In this area of law, firms like mine regularly make recoveries for our clients where misfeasance is present.

At the very least it is now trite that there can be a contract entered into as a consequence of the request for and submission of a bid in accordance with the terms of the request. The Court of Appeal has now appeared to accept that express obligations to negotiate may sometimes be valid: *Petromec Inc v Petroleo Brasilieiro*.[37] On the basis that the obligation to act in good faith or to exercise care or act fairly towards bidders is a consequence of this inferred contract. It is in any event to be treated as a contractual duty to act in good faith which is to be distinguished from the pre-contractual duty to negotiate in good faith which was dismissed in the House of Lords case of *Walford v Miles*.[38]

One must not overlook decisions such as in *Harmon CFEM Facades (UK) Ltd v The Corporate Officer of the House of Commons*.[39] Harmon, a European-based firm, had tendered for the works at the new parliamentary building for the House of Commons. The contract was ultimately awarded to a British competitor. Harmon successfully brought an action claiming that the House of Commons had breached the UK's obligations under the Treaty of Rome not to discriminate on the grounds of nationality and the principle of equal treatment of tenderers (Article 6). Harmon also successfully claimed damages for breaches of regulations 20 and 31(3) of the then Public Works Contracts Regulations 1991, on the basis that the criteria for selection was used (under Regulation 20 a contracting authority cannot award a public works contract unless it either offered the lowest price or was the most economically advantageous to the contracting authority, and the contracting authority is required to state which of those two options it intends to use) was not stated in any of the tender documents. Harmon was awarded for both the loss of gross profit and the wasted tender costs.

PFI projects and tendering arrangements

I will keep this brief, as it warrants a subject in its own right and others are speaking on PPP/PFI.

In November 1994 the then Chancellor of the Exchequer of the Conservative Government announced that the Treasury would not approve any capital projects procured by the public sector unless private finance options had first been explored.[40] Since that time, the private finance initiative (PFI) has had a significant impact upon the way in which substantial public sector projects are procured.[41] In fact it is the dominant vehicle.

34 [2002] ECR I-5553
35 [2003]
36 ECJ, 1998 Page II-04239, T-203/96
37 [2005] All ER (D) 209
38 [1992] 2 AC 128, HL
39 (1999) 67 ConLR 1
40 The Private Finance Initiative (PFI) is a small but important part of the Government's strategy for delivering public services. The Government has created an Operational Taskforce, acting on behalf of HM Treasury, based in Partnerships UK. The Taskforce has set up a helpdesk to assist public sector partners with operational PFI issues. Standardisation of PFI contracts (SoPC) Version 4 This is the latest version of standard wording and guidance to be used by public sector bodies and their advisers when drafting PFI contracts. It supersedes Version 3, issued in April 2004.
41 Supply and service procurements with an estimated value of €200,000 (currently £144,400), and works contracts with an estimated value of €5,278,000 (currently £3,611,300) must be advertised in the OJEU. According to European mantra and diktat, the total public procurement spend across Europe represents over €1500 billion, which is over 16% of EU GDP. The procurement Directives, which are based on the principles of transparency, non-discrimination and competitive procurement, are of great significance in promoting the single European market and in facilitating the achievement of value for money for the taxpayer.

PFI/PPP projects require unusually complex and highly expensive tendering arrangements (even with the know–how of the last 12 years) and, save only in the case of low value projects, EU law requires that projects be put out to public tender.

PFI typically involves more than the mere construction of public works. In a PFI scheme, the private sector is typically expected to take on responsibility for the funding, design, construction and operation of an asset, and in return is offered a commercial return or sometimes a deferred interest in the project. Typically, the private sector is not paid "up front" but enjoys its return over the period during which the asset is performing its intended role. It is a fundamental objective of the Government in PFI projects that the private sector assumes not only the burden of funding the project, but also the risk of cost overspends. Because of the size of many PFI projects, and the diversity of what is required, it is typical for consortia to be put together for the purpose of bidding for PFI work. One member of such consortia is typically a substantial building or civil engineering contractor. The contractual structure in these cases is that it is the consortium that enters into contract with the relevant government agency, and the consortium as a whole then enters into contracts with a number of designers and contractors, including a building contract with the contractor. Such contractual arrangements are excluded from the Housing Grants, Construction and Regeneration Act 1996.

Thus, for example, a private sector provider may be offered nothing for the design and construction of a hospital, but will then enjoy a lucrative fixed term maintenance contract.

Thus, for example, a private sector provider who is designing and building a hospital is not, typically, entitled to any additional payment if the hospital turns out to be unexpectedly expensive to design and build, and in that sense the provider assumes the risk of cost escalation. He will typically attempt to pass on as much as possible of that risk to other companies to whom the design and construction work is subcontracted. Those contractors are in turn likely to seek to pass on as much risk as they are able to their own subcontractors.

This is called the PFI Agreement, and sometimes the Concession Agreement.

The current legislation implementing EU requirements includes The Public Contracts Regulations 2006 which implement the new Public Sector Procurement Directive (2004/18/EC) which provides revised rules for the procurement of supplies, works and services, above certain thresholds, by public authorities. The Utilities Contracts Regulations 2006 implement the revised Utilities Directive (2004/17/EC) which provides, in a similar way, revised rules for procurement in the utilities sector.

A competitive negotiated procedure is usually adopted, which requires the following steps:

- Prior Information Notice in the Official Journal;
- Contract Notice in the Official Journal of the European Union (OJEU);[42]
- Invitation to Negotiate (ITN) goes to a limited number of bidders;
- The final Invitation to Tender (ITT) goes out to bidders inviting them to submit fully conforming bids;
- The valuation of tenders;
- Award of Contract.

The successful bidder is not necessarily the cheapest, but the "most economically advantageous tender" (MEAT), in other words the best value offer for the client.[43] This allows the public sector to evaluate the risk inherent in the various bids.

42 See, www.ted.europa.eu
43 It may for example embrace sustainability issues, e.g. on a highways contract, "Tenders will be assessed using sustainability criteria, with a requirement to include recovered materials. 'Recovered materials' refers mainly to recycled and secondary aggregates."

Most recently, the Competitive Dialogue Procedure (CDP)[44] has been adopted as the standard procedure for UK PFI and particularly complex projects. A key feature of the use of the procedure in the PFI health sector (and this may be extended to other sectors) is that the competition between the bidders will not include the price of the funding for the project, since there will be a separate funding competition after the appointment of the preferred bidder. However, the evaluation of the bidders will include the bankability of the project arrangements and the deliverability of the funding arrangements by the bidder.

The early stages of the CDP are similar to the negotiated procedure in that normally:

- an Information Memorandum will be sent to prospective bidders;
- bidders will be invited to pre-qualify in accordance with the normal criteria of technical expertise (this is general but can include particular skills required for the project (see Regulation 25)) and financial strength (see Regulation 24). Authorities may include particular sub-criteria under these main headings.

However, there is now a new requirement (compared with the negotiated procedure) to pre-qualify at least three bidders, or a sufficient number of bidders must be in the line-up to ensure genuine competition.

Again, this is to be published in the Official Journal.

The cost of bidding for a PFI project can easily run to hundreds of thousands of pounds, even low millions are not unheard of, and for this reason, sometimes bidders will seek arrangements for the payment of their bidding costs regardless of whether they are successful. I will leave it to others to fill in the detail, as I wanted simply to address it in outline as a tender process.

Practice notes on tendering and standard form contracts

There are many rules relating to tendering,[45] and case authority, but most standard contracts, such as JCT and ICE, have practice notes governing their application e.g. (JCT Practice Note 6/1998 Edition, Series 2, published in July 2002 and ICE Practice Note on Tendering for Civil Engineering Contracts).

Most of this audience should be familiar with JCT Practice Note 6 apropos JCT 98 which contains a very useful summary of tendering rules, and brief notes on its use. JCT Series 2 Practice Note 6 recommends two alternative straightforward procedures. Under Alternative 1 correction of the tender price is not permitted and under Alternative 2 correction of the tender price is permitted. The choice between Alternative 1 and 2 must be made before contractors are invited to tender and tenderers informed which Alternative is to apply at the Preliminary Tender Enquiry Stage. Generally, Alternative 1 applies in my experience, however it may be considered inappropriate with a "partnering approach" and two-stage tendering procedures.

The Practice Note covers UK domestic construction tendering, and not international works; usually by way of single-stage tendering where design responsibility belongs to the client's professional team. Accepting this traditional approach, the JCT Practice Note and its Model Form covers:

- preliminary enquiry/pre-qualification steps that normally follow a preliminary listing of potential contractors;
- subsequent invitation to tender; and
- the tender itself.

44 It enables a contracting authority to open up discussions with bidders with the aim of '"identifying and defining the means best suited to meet the contracting authority's needs". This may take place in successive stages to reduce the number of solutions discussed and bidders involved. The dialogue phase comes to an end once the required solution or solutions have been identified. Those bidders remaining are then invited to submit final tenders based on the solution(s) identified during the dialogue. Final tenders can then be "clarified, specified and fine tuned" provided there is no change to the basic features of the tender (as such variations are regarded as likely to distort competition or have a discriminatory effect). Once a preferred bidder has been selected, there is a further opportunity to "clarify aspects of the tender or confirm commitments", provided, again, that there are no substantial changes to the tender which would otherwise distort competition or have a discriminatory effect.
45 Previously, the NJCC (now defunct) produced publications on tendering and the JCT Practice Note 6 filled that void.

There are special “contractual” issues that arise with electronic tendering, and most practice notes issued do not address these special concerns. It is very important when setting electronic tendering rules up, that appropriate special attention is given to the IT systems that accompany them, including passwords to preserve confidentiality. In addition there are general contractual rules regarding tenders which need to be recognised:

- There is not usually any obligation on the client to accept the lowest of any tender (see *Blackpool & Fylde Aero Club Ltd* v *Blackpool Borough Council* [1990] 1 WLR 1195).
- Tenders may be accepted subject to conditions.
- Tenderers must be treated openly, equally and fairly in the context of the terms of the rules of tendering (see *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons 67* Con LR 1).
- Duty of fairness and honesty did not mean that the tender panel could not offer their own views about tenderers, whether favourable or adverse, or that the tender panel has to act judicially or be impartial (see Lord Hoffman in the Privy Council case of *Pratt Contractors Ltd v Transit (No.2)* [2003] UKPC 83).

As far as I know, the JCT have not printed a companion as yet for JCT05.

Keeping the contract ball in the air

Keeping the contract ball in the air is a legitimate commercial tactic and may not be as difficult as you might think. In fact, in many building cases the question of whether a contract exists between the parties or not is not always easy to establish. Where there is no document signed by both parties, then the terms of the contract can be extremely difficult and may not be resolved until trial. Certainly it closes off any real chance to adjudicate because of s.107 of the HGCRA.

A useful tactic if you are suspicious or uncomfortable about the job you are being asked to tender for is to keep the contract ball in the air.

For example, keep sending back the contract document saying that it is not acceptable, there are x and y number of points which need to be resolved meanwhile working away on the job.

Eventually you will either feel comfortable about the signing or you will run out of points. Or, the whole contract issue will be forgotten until you get to the end of the job and a fight breaks out. Even if a contract has been concluded, if there is no formal signed up document, the way is left open for an argument and an opportunity to exert commercial pressure. For example, arguing for a reasonable time to complete or asserting it is implied and denial of liquidated damages recovery.

At the slick end of the spectrum, contractors will keep several points up their sleeve to bring out, in the event that they want to avail themselves of the no contract argument.

Practically, if you wish to prevent a contract coming into existence, or the problems that arise when determining whether there is one or not, then you must make this clear in your dealings. The best way of doing so is by marking your correspondence and documents “subject to contract” which has the time-honoured meaning that no contract will come into existence unless and until such a formal document is signed by the parties.

It is also important to bear in mind that the Courts will try and find a contract between the parties if at all possible, especially where work has been executed, and it is only where the "agreement" is too ambiguous or uncertain and incapable of being saved by implied terms arising from the business matrix of the dealings between the parties, that no contract will result.

However, the bottom line is that a contract cannot come into being until the essential terms are agreed. These are the terms that are essential for a contract to be legally enforceable and commercially workable, and are usually considered to be agreement as to parties, price, time and description of works although the obligation to complete within a reasonable time will be implied if the other essential terms are agreed. Subject to this "the parties are to be regarded as masters of their contractual fate" in deciding what terms are essential.[46]

Retracting offers before the balls land

It is not uncommon for a contractor to realise after it has put in its bid that perhaps it should not be pursuing the work at all. Swift action is required in these circumstances. In strict legal theory an offer can be withdrawn at any time before it is accepted. However, once acceptance has taken place a binding contract generally results provided the acceptance is unequivocal and is communicated to the offerer. Acceptance can be communicated by mere conduct, provided the acceptance corresponds to the mode of acceptance contemplated or specified by the offer. It is important to bear in mind the postal rules with regard to acceptance since unless otherwise specified, acceptance is constituted by the mere posting of the acceptance, even though it does not arrive at your door for several days, or the sending of an email sitting in your inbox unread. Therefore, make sure that if you are going to try and withdraw an offer you do so in the most expeditious means possible, e.g. fax, email or by jumping in your car and dropping a letter round to your potential client.

You can put a finite time limit on your offer by making express provision for the offer to lapse by effluxion of time. Another way is to encourage a counter-offer which will kill your own offer. If in doubt speak to a solicitor, as they say!

Occasionally the parties to negotiations do not appear to have completed their negotiations, either orally or in writing, but one party may get on with executing the works in question thus giving the impression that agreement has been reached. This may give rise to an acceptance by conduct. In other words, if it appears to the Court or arbitrator that one party has, by its conduct, accepted the latest proposal put to it by the other party, even though that proposal has not been specifically addressed, then the judge or arbitrator may find that a contract has been concluded by conduct if no other rational objective interpretation of such behaviour can be construed. The device of acceptance by conduct will, more often than not, conclude a contract between the parties where counter-proposals have not been expressly dealt with. Some main contractors' standard terms seek to encapsulate an "acceptance by conduct" into their Orders, e.g.:

> This Order constitutes an offer the mode of acceptance of which shall be the return to the Contractor of the duly signed and completed acceptance copy of the Order or the commencement or continuation of the sub-contract works.

The most common mistake made by non-lawyers is that no contract exists unless a written agreement is entered into. The fact that the parties are agreed that a formal agreement is to be entered into embodying the terms they have agreed, which is intended to be signed does not, by itself, show that they are still negotiating. As long as all matters have been agreed a contract

46 Pagnam v Feed Products (1987) 2 Lloyds Rep. 601

will be in existence even if such formal agreement is never executed (save for the special position with guarantees, insurance contracts and contracts involving the sale or purchase of land where written agreement is required).

Conforming and non-conforming bids

The time to challenge anything you do not like about the conditions of contract or anything in the conditions of tender is when you return your tender not after the contract is signed. Simply saying, "Well I know I signed it but everybody knew that we thought we had a loss and expense clause", will get you nowhere.

If, however, in the covering letter with which you return your completed tender documentation you write clearly, setting out how much of what is proposed you do not accept and your counter-proposals, then, if your tender is accepted, it will be deemed to be accepted on the terms which you specify. If you are being asked to tender only on the basis of lousy conditions the trick is to put in two prices one high bid for the unreasonable conditions and one sensible bid if they are prepared to contract on normal fair terms. Then see whether the main contractor will negotiate. This is known as a non-conforming bid or "alternative bid system" and it works. It is surprising how often two prices can persuade a main contractor to become commercial. They get used to dealing with you on fair terms.

You need to be clear when you are sifting through the various documents that make up the Invitation to Tender package that some of the documents will form part of the contract and some will not. If you particularly want one document or the other to form part of the contract documentation then you should say so expressly. Otherwise, where agreement between the parties is finally reduced to one document, it may be difficult to show that other documents, or indeed statements made at meetings not expressly incorporated or referred to in the document, do achieve the status of contractual terms.

Statements of fact made in an invitation to tender, for example, about the quantities or the state of the site may, or may not, have any legal effect. This can be very important if you are looking for a way out of a contract down the track.

Where a non-compliant bid is accepted, a tendering authority may be exposed to a damages claim by compliant bidders, even where the tendering authority has acted in good faith.

JCT Practice Note 6 has this to say about non-conforming bids:

> "A tenderer who submits a qualified tender should be given an opportunity to withdraw the qualification(s) so as to produce a compliant tender, but without amending the price. If the tenderer refuses to withdraw the qualification(s), the tender should be rejected; negotiation of a non-compliant tender is contrary to the principal of equal treatment and in most cases it is impractical at that stage to make other arrangements that would be fair both to the client and to the other."

Two stage tendering

What is two-stage tendering?

Like so many things, describing the aspiration is easier than attaining the prize. The objective of contract procurement is in round terms to identify an appropriately skilled contractor and to secure an appointment based on the right team, agreed costs, programme and appropriate transfer of risk. This seemingly benign objective has become increasingly more difficult to achieve as programmes have accelerated and as both employers and contractors seek,

in particular, to strengthen their position with regard to the apportionment of risk. That ping-pong is the meat and veg of the non-contentious lawyers.

Yet value and cost certainty still rank for a great deal in the overall balance of most clients' priorities and as a result, competitive tendering will continue to be used on a large number of projects.

Historically, clients have mostly chosen contractors based on lowest cost. Although many commentators now recommend the adoption of negotiation and partnering-based arrangements, many clients continue to seek the reassurance of some element of competition in their tendering processes. Indeed, there is evidence to demonstrate that, where lump-sum contracts are in use, this approach can still deliver good value solutions if the process is not abused.

In a two-stage tendering arrangement, a preferred contractor is appointed early on in the design and planning process, on the basis of usually limited information, with the purpose of achieving cost-certain and time-certain outcomes for the employer through further negotiation with the preferred contractor once the detailed design and planning work has been undertaken. An initial tender is normally obtained from a number of pre-qualified bidders on the basis of a preliminary/outline: design; scope of work; budget and programme.

The first-stage tender will include details of the contractor's profit margin, preliminaries cost and other overheads, in addition to the pre-contract services fee. The employer will make a largely qualitative assessment, based on the contractor's experience, resources and track record and not on a firm price. The preferred bidder is identified and a pre-contract services agreement will normally be entered into, usually on a fee plus cost reimbursable basis.

The second stage, which typically is managed as a negotiation between the employer and the preferred contractor, relies upon competition between second-tier contractors for work packages. The second stage is concluded with the agreement of a lump-sum contract sum, based upon the competitive tender of 70% of the value of work packages.

The preferred bidder will thus work with the design team to agree a final design; market test/tender works packages; agree a programme and cost plan; and finally, once the employer agrees the price, enter into a main contract, usually these days on a design and build basis. The final price is concluded when upwards of 70% of the works by value has been tendered to subcontractors.

Two-stage and other forms of tender, negotiation versus competitive tender; public and private processes

Two-stage tendering is a more elastic process then single-stage. On the whole, as we have seen above, tenders are submitted on the basis of a projected work package, by the submission of an overheads and profit percentage and a preliminaries cost. The bidders would also submit a projected build period. The preferred contractor is then taken through to the second stage, whereby the contractor will coordinate with the design team to develop a final design, together with a final price and programme prior to signing up to the contract.

The main disadvantages are that as the design is developed during the second stage, the contractor may increase his price substantially, in a situation where it may not be attractive for the employer to go back to the first stage and select a different contractor. The project agenda and the time it takes to finalise the single-stage process, can mean that the successful stage 1 contractor's bargaining power increases. Also, as first-stage tenders are not submitted on the basis of a completed scope of works, it is possible that once

the final scope of works is defined, then the ensuing cost of the works may be outwith the employer's budget. Equally, there have been situations where the project timetable has forced an employer to let the contract on the basis of a letter of intent whilst the second stage has not been completed, not that uncommon and lousy for cost certainty. Such a situation cannot be commended as designing the project concurrently with trying to construct it will inevitably cause trouble with the interface between packages and the programme for the works.

I will focus on the commonly used "open-book" approach as a way of facilitating a smooth transition between the first-stage tender and a cost-certain contract, and think about the lessons to be learned from the recent decision of the Technology and Construction Court ("TCC") in *Plymouth South West Co-operative Society v Architecture, Structure and Management Limited*.[47]

The benefits of employing a two-stage tender

- Procurement through two stages is a more flexible approach; it allows the employer to begin work on site earlier and affords potential for the contractor to assist the design team in developing the design, which improves the quality and efficiency of the design and ultimately can lead to time and money savings.

- By bringing the contractor on board at an early stage other risks are also minimised. Contractors will be able to advise on buildability and sequencing; help to reduce the risk of supply chain issues that might adversely impact the programme (e.g. in the selection of specialist subcontractors and not using products and materials that are either uneconomic or difficult to obtain); and generally identify and manage construction risk.

- Retaining greater client involvement in the pre-selection and appointment of subcontractors.

- A two-stage process can achieve a greater degree of transfer of risk onto the contractor by its involvement at an early stage in the design development process and with matters such as ground/site investigation.

Potential difficulties with two-stage tendering

An important outcome of employing a two-stage process is that the contractor in situ as preferred bidder maintains considerable pull throughout the second-stage process and the employer may be restricted in its ability either to negotiate the terms of the final contract or to oblige the contractor to agree a guaranteed maximum price, target cost or lump sum contract price. There is no warranty of a cooperative approach (indeed, there is potential for negotiations between the parties during the second phase to take on an adversarial nature) and there is always a possibility that the contractor may threaten to walk off the job, leaving the employer open to the risk and cost of re-tendering on the merry-go-round.

Clients must take specific steps to strengthen their commercial position in the second-stage negotiations. These include letting a portion of the measured work in the competitively tendered first stage and always retaining an 'opportunity chest' card with some leverage on the preferred contractor.

A further disadvantage is that programme and cost are not finalised until the main contract is entered into and that any risks associated with changes to the scope in the pre-contract services phase are not eliminated. The costs, generally, of two-stage tenders tend to be higher mainly due to the risk

47 [2006] EWHC 3252

transfer allowances which this type of procurement can introduce. Any last minute variations or inclusions may push the cost up further and leave the employer with very little room for manoeuvre.

Unfortunately, the tenderer is under no contractual obligation to submit a competitive second-stage bid. There is also no guarantee that a contractor's attitude to a project will remain consistent during an extended tender period. Furthermore, going down the two-stage route is no guarantee of a non-adversarial approach to post-contract relationships with the contractor.

Preserving competition

The key concern faced by an employer is to encourage a contractor to switch from a low-risk, fee plus cost-reimbursable based pre-contract services contract, to a cost-certain and time-certain contract in which the design and construction risk is passed to the contractor. Given that the real competitive pressures in the second-stage process will be generated by competition for the various subcontract packages, it will be imperative for the employer to participate fully in the tender process, including the selection of those subcontractors invited to tender and the assessment of the tenders submitted. This is to ensure an authentically open-book approach to the tendering of subcontracts, in that way limiting the inclusion of extra costs in the second-stage tender. It will also be important to make certain that those packages the contractor intends to retain for its own account are also put out to competitive tender.

Although an open-book approach has gathered recognition as a practical approach to this problem, much of the recent critical discussion on two-stage tendering has been more ambiguous, focusing heavily on the risks of contractors presenting an overstated second stage tender due to a lack of lucidity and competitive pressures. Conventional approaches to minimising this risk have included: employing a not-to-exceed budget as a limit on the costs of the works whereby surpassing this limit will permit the employer to tender the work based on a single competitive tender; including gain-sharing/pain-sharing arrangements in a guaranteed maximum price or target cost arrangement; and limiting the contractor's on-site involvement prior to the award of the main contract. However, as partnering principles become more preferred by the industry, it is suggested that a cooperative, open-book approach is well suited to developing market practice.

In an entirely open-book process, the hard element of negotiation can, to a large extent, be isolated from the second-stage tender, and the conversion from the pre-contract services phase to a final priced contract can be achieved by a mechanical/formulaic aggregation of subcontractors' bids, once a sufficient portion of the works by value have been successfully tendered. This approach also prevents the renegotiation of the contractor's mark-up at the second stage of negotiations, and places the burden on the contractor to establish its margins at the first stage, when value can be driven into the bid in response to competitive pressures from the bidding process.

Adapting two-stage tendering for design and build

Design and build derived procurement has become the most widely used on design team-led schemes[48] where the employer is aiming to transfer both design and commercial risks. Two-stage tendering arrangements should, in theory, be well suited to design and build procurement for the following reasons:

- The contractor has the chance to work with the client's designers ahead of novation, enabling relationships to be developed and giving the contractor the opportunity to contribute to the design process on

48 See RICS 10th Contract in Use Survey 2006 (based on 2004 data) which shows design and build to be the single most prevalent method since 1995. This survey reinforces the dominance of design and build as a procurement strategy, but bills of quantities just refuse to die. The survey further found that in 2004 92% of building projects used a standard form of contract, down from 95% in 2001. Design and Build procurement was the route of choice in just over 40% by value of contracts.

buildability, sequencing and so on.

- The two-stage tender permits, in theory, further overlapping of the design and build procurement programmes.
- The preferred contractor is strongly motivated to ensure fleshing out of the design to an agreed level of definition.
- The procurement of specialist subcontractors with design responsibility should be more effective with the input of the preferred contractor, e.g. on the M&E and space utilisation of voids.
- The contractor's second-stage bid should be based on a thorough understanding of the design solution and the client's requirements.

However, when tendering on a two-stage basis for large and complex schemes the issues raised in the second-stage negotiation can be both diverse and also difficult to bottom-out. As a consequence, and notwithstanding these seminal reasons to adopt two-stage tendering on design and build, clients can find themselves facing some unpleasant surprises at the conclusion of the second-stage negotiation. The provinces of potential disharmony include allowances for design development during the tender period and risk allowances for the completion of the design. Other risk issues that clients need to be aware of include:

- The design team remaining the responsibility of the employer until novation occurs. As a consequence, any design development carried out after the second stage will be a variation for which the client will have some design responsibility. It is a prudent, although possibly an impracticable step, to suspend design work during the second-stage bid period, so there is a clear relationship between the contract sum and the novated design. In practice not easy.
- Novation can only occur once the second stage is completed and the main contractor appointed.
- The switch to negotiation during the second stage makes it much more difficult for the client to monitor levels of main contractor risk allowances built into subcontractor tenders without policing to a high level which comes at a premium.

By all events, the adoption of a two-stage tender route on design and build projects gives the employer considerable benefit in terms of the balance between client control over design development and the eventual transfer of design responsibility to the contractor. However, there is a price to pay for this additional risk transfer. The preferred contractor's role in design development will strengthen its negotiating position, enabling it to drive a particularly hard bargain in the closing stages of the second-stage tender.

The following case is illustrative of how it should not be done.

Plymouth and Southwest Co-operative Society v Architecture, Structure and Management Limited

In *Plymouth and Southwest Co-operative Society v Architecture, Structure and Management Limited (ASM)* the TCC considered the nature of an architect's duties when advising its client to enter into a two-stage tendering process. The court also considered the circumstances in which the architect's duties may be scaled down, where its client is an experienced developer.

The case related to the Plymouth and Southwest Co-operative Society's (Plymco) decision to redevelop their flagship store, Co-operative House, in

Derry's Cross, Plymouth; a claim arising out of a two-stage process (albeit not based on a design and build form of contract). Modest design progress had been made during the second stage and almost 90% of the works remained subject to undefined provisional sums. Nevertheless, the architect advised the client to agree a JCT 98 With Approximate Quantities form of contract, without advising of the decisions that the client still needed to take in order to complete the design. As the works progressed substantial cost overruns occurred. The works progressed but, as a result of the significant volume of provisional work, over 7,500 variation instructions were issued and substantial cost overruns occurred.

The final cost to complete the works significantly exceeded the contract sum and Plymco alleged that some £2m of the overspend arose as a result of negligence on the part of ASM in the manner in which it had procured the building contract and the advice it gave to ASM in that regard. In particular, Plymco alleged that ASM should have advised that the works should have been procured in two distinct phases: one to carry out the building works for Argos and then the other to complete the remainder of the development.

It was alleged that most of these additional costs could have been avoided had the client been advised not to proceed without a sufficiently detailed design, rather than relying upon the bullish advice of ASM that the project could be completed on time and to budget, notwithstanding the preliminary nature of much of the design work. ASM were found liable for in excess of £1.3 million for having provided negligent advice.

The court noted that ASM had failed to appreciate the overriding importance of the second-stage process resulting in a fully detailed building project. Although not part of the ratio in the Plymouth and Southwest case, it will also be clear that without detailed design, it is impossible to ensure that competitive pricing is obtained from subcontractors during the second-stage tender.

Conclusions

There are clear advantages to having the main contractor involved at an early stage as well as the ability to start on site before the second stage of tendering is completed. These benefits weighted against the requirement of retaining commercial competition during the preparation of the second-stage tender and the clear message of the *Plymouth and South West* case show that early commencement is no substitute for detailed design and project planning. By adopting an open-book approach, however, it is possible to agree in advance of the main contract the conditions under which a contractor will be obliged to submit a second-stage tender and to define the scope of the design work that must be completed before such conversion can occur.

Thus for you, the audience, the question is whether two-stage tendering as a mechanism enables a more collaborative approach to be adopted by clients and their contractors, while still delivering value for money, or does its use potentially compromise a client's commercial position? I for one am inclined to the latter having seen value for money go out the window in stage two, particularly ion design and build. Objectively speaking, the answer is a typical legal one and lies somewhere in between in that the main benefit of two-stage tendering, speed of programme, inevitably comes at the price of some degree of cost premium. Furthermore, for clients following a public sector OJEU procedure, limits on their discretion to engage in any negotiation with the preferred tenderer effectively eliminate the opportunity to drive value into the bid.

As for what is the best tendering method, I prefer good old-fashioned open tenders and if I know who I am dealing with and my client has done his groundwork, a negotiated basis. It is a case of horses for courses. Much

depends on the type of works and service and their overall value, whether public or private, and the dominance of speed of build, need or otherwise for involvement in the design process and price robustness. In order to preserve the integrity of the competitive process, it is always imperative that the evaluation of proposals is undertaken with objective fairness, consistently andwithout bias towards particular contractors/suppliers, but that evaluation will of course depend on the client's wants and needs. Tenders are best evaluated against a predetermined set of criteria. Thinking time is paramount, too.

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6 December 2007