

# Settling the score

In the third of four articles on common areas of dispute in the rail industry, **Paul Thwaite** and **James Hammond** of Stephenson Harwood LLP consider the issues that arise when a bidder for a public contract wants to challenge the scores awarded by a procuring authority

**Y**ou have just received a notification via the e-portal of a public contract award worth many millions of pounds.

You know you have a good chance of winning. You have one of the best track records of all of the bidders in the competition and you spent countless hours working on your tender with a team of bidding specialists. After you recently won a similar contract against the same competitors, you must be the favourite.

You open the notification on the e-portal: you did not win. When you look at the enclosed scoring summary, it gets worse; you lost out because you received low scores in categories where you usually score well. The winner's scores seem too high. Something is not right, but what can you do about it?

## Act quickly

Public procurement disputes have a very short timeframe in which legal proceedings can be brought against the authority. You have 30 days from the date you first knew or ought to have known that there were grounds for a challenge. If proceedings are

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not started within this period, they cannot be brought at a later date.

So that unsuccessful bidders can assess the outcome of the procurement and decide whether or not to challenge the decision before the contract is signed, there is a 'standstill period' for a minimum of ten days following the decision notice by the authority. During the standstill period, the authority is unable to enter into the contract with the winning bidder. This is crucial for the challenger, as the remedies available to it depend on whether the contract has been let.

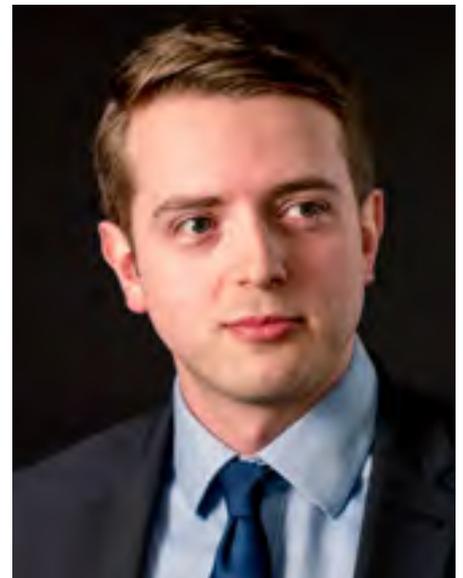
If court proceedings are started before the contract has been signed, the procurement is automatically suspended until the proceedings have ended. This means that the authority is still not allowed to sign the contract, even after the original standstill period has expired. However, the courts have shown a general willingness to grant applications made by authorities to lift the automatic suspension.

Most recently, in *Bombardier Transportation UK Ltd v Hitachi Rail Europe Ltd & Ors* [2018] EWHC 2926 (TCC), the court granted the authority's application to lift the automatic suspension on the basis of the 'balance of convenience'. In this case, it was because delaying the contract would likely cause disruption to Piccadilly line tube services and the public interest lay with replacing the existing fleet of trains as soon as possible.

## Possible remedies

If the contract has not been signed, the challenger can seek damages or an order setting aside the award decision. The calculation of the damages is based on the loss of profit the unsuccessful bidder suffered from losing the contract.

If the contract has already been entered into the challenger can still claim damages but cannot seek to set aside the contract award. However, the challenger can sometimes seek a declaration of ineffectiveness which means that any part of the contract not already performed will be cancelled. A declaration can be obtained where the contract was awarded by the authority without publishing a valid contract notice or where the contract was entered into in breach of the standstill period, automatic suspension, or an order of the court.



The remedies available also depend on the stage of the procurement at which the challenge arises. For example, if a bidder has been eliminated at the pre-qualification stage of the tender, damages are unlikely to be a satisfactory remedy as the bidder has lost the chance to submit a bid for the contract rather than lost out on the contract itself.

For pre-qualification stage claims, the remedy of being readmitted to the process

should be preserved. In these circumstances an expedited trial is often ordered by the court, so that the claim can be resolved prior to the submission of tenders.

### Re-scoring bids

In recent years, the courts have shown a willingness to undertake re-scoring of bids. In *Energysolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC) the judge carried out a detailed re-scoring exercise after finding that manifest errors had occurred in the procurement.

The result of the exercise was that an unsuccessful bidder was determined to have submitted the most economically advantageous tender. The judge also found that the bidder that entered into the contract should have been disqualified from the process. In this case damages were awarded.

In *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 (TCC), the judge corrected various scores where manifest errors were found to have occurred. The judge's corrections to the scores meant that the claimant's bid outscored the winning bidder's bid. The court set aside the award decision, amended the authority's records to reflect the judge's version of the scores, and ruled that the challenger was also entitled to damages.

Most recently, in *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 1589 (TCC) the court held that it was unable to undertake a re-scoring exercise. A distinguishing feature of the Lancashire Care case was the lack of reasoning provided by the authority for the scores it had given to the bids.

If the authority had provided cogent reasons for the scores, the court would no doubt have been more willing to re-score. Nevertheless, the lack of reasoning from the authority either in contemporaneous records or evidence from witnesses resulted in a successful claim to set aside the award decision for lack of transparency without the need to show manifest error and to re-score.

What is clear from these cases is that, while the court is not a forum for all disappointed bidders to seek re-scoring of their tenders simply because they did not win, there is scope for the court to reassess the scores awarded by the authority in the case of manifest error when sufficient information is available.

### Getting information

One of the biggest hurdles for any challenger in a procurement dispute is the information imbalance in favour of the authority. The authority knows the content of each bid and holds all of its evaluation records as well as its evaluation policies and procedures. All the bidder has is the award notice and scoring summary of its own and the winning bid, plus knowledge of its own bid and its view of how it was likely to have been

assessed in the procurement.

This information imbalance leaves potential challengers in the dark with only a ten-day standstill period in which to issue a claim or risk the contract being entered into with the winning bidder. One way to address this imbalance is to request and obtain early disclosure from the authority. Often, the early disclosure will include the authority's evaluation reports and notes of consensus and moderation discussions. These might show the challenger that its scores were actually fairly awarded, and it will decide not pursue its claim. Alternatively, the reports may increase the challenger's conviction that there has been a breach by the authority. A failure to keep adequate records can itself be a ground of successful challenge as in the *Lancashire Care* case.

The authority is expected to provide full pre-action disclosure to a potential challenger and the courts have repeatedly made clear that they will penalise an authority that fails to do so. In the recent case of *Serco Ltd v Secretary of State for Defence* [2019] EWHC 515 (TCC) the court again reiterated that authorities must respond promptly to information requests. Indemnity costs were awarded against the authority that had refused to provide basic information about the reasons for the scores given to the bidder, meaning that the authority was ordered to pay all of the costs claimed by the challenger in relation to the application for disclosure.

If requested, authorities should provide the key decision materials to the challenger without delay and, if refused, the bidder is very likely to get a court order for disclosure. Once legal proceedings have been started, the authority is obliged to provide relevant documents as part of the litigation process and this will often determine the outcome of a procurement claim as it is the point at which the challenger finally gets access to all the documents it needs.

### Tips for unsuccessful bidders

If you are considering making a claim: Scrutinise carefully the award notice and any other information provided about the decision at debrief and consider whether you might have a claim. At this stage, it can be useful to ask an independent third party to objectively consider how it would expect your bid to have scored in each category.

Act quickly as you may have only a ten-day standstill period from the date of the award notice until the contract is signed, and 30 days in total before any claims are time barred which means that they cannot be brought after the 30 day period has expired. You should instruct lawyers as soon as possible if you think you might have a claim so that you have as much of the little time available to prepare a claim.

Request more information from the authority so you can better understand the result. Again, this must be done quickly given the timescales involved.

Examine the processes adopted by the authority and measure these against the standards set by the courts and the authority's own procedures. There are increasing numbers of procurement claims that change the outcome of the initial decision and unsuccessful bidders are more frequently seeking redress where there has been a breach by the authority. Consider requesting an extension to the standstill period from the authority if you need more time or information to assess your position.

### Advice for procuring authorities

In order to minimise the risk of a claim from an unsuccessful bidder procuring authorities should:

- Keep thorough records so that the reasons behind scoring decisions can be fully justified and evidenced and are readily available if requested by an unsuccessful bidder.
- Provide early disclosure. There is often reluctance from procuring authorities to give voluntary early disclosure, but failure to do so can result in costs penalties from the court. Also, failing to give voluntary disclosure creates suspicion from unsuccessful bidders that the authority is hiding something and may encourage a claim.
- Make sure that internal guidance on running the procurement is followed by those conducting it. We have seen authorities produce detailed guidance materials on how the evaluation will take place only for those performing the evaluation not to follow it. This creates a bigger problem for the authority than if there had been no guidance at all.

### Conclusion

In recent years, there has been a marked increase in the number of rail related procurement disputes, which is a trend we expect to continue. With very high value contracts at stake, unsuccessful bidders are increasingly willing to challenge the scoring of their bids and the courts are open to performing a re-scoring exercise where manifest error can be shown.

For unsuccessful bidders, it is important to make a realistic assessment of your score and to take quick action if there appears to have been an error by the authority. For procuring authorities, it is important to ensure full record keeping and compliance with internal procedures if the procurement process is to be defensible and stand up to the scrutiny of a court challenge.

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