



LITIGATION AND DISPUTE RESOLUTION

Result of a Public Tender is set aside by Supreme Court

by **Jill Callanan**

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Supreme Court rules tender competition must be set aside following manifest error in evaluation process. Jill Callanan explains.

Word Perfect Translation v Minister for Public Expenditure and Reform [2019] IESC 38

The Supreme Court has delivered its judgment in the long running litigation brought by Word Perfect Translation against the Minister for Public Expenditure and Reform in connection with the review of a tender award for interpretation services.

The Supreme Court found that there was a manifest error in the award of marks in one category of the tender process and so the result of the competition must be set aside.

If an error is identified and it is clear that it is an error then the test for "manifest error" is met.

Background

The dispute related to the award of a contract for the provision of interpretation services to the immigration services, including the Refugee Appeals Tribunal and the Legal Aid Board (Lot 4). Three entities were appointed to this Lot 4 including Word Perfect Translation and Forbidden City Limited trading as Translation.ie. On foot of an invitation to tender for a mini competition within Lot 4, Translation.ie was the successful tenderer.

It was this mini competition which was the subject matter of these proceedings issued by Word Perfect Translation against the Minister for Public Expenditure and Reform under the European Communities (Public Authorities' Contracts) (Review Procedures) Regulations 2010.

Court of Appeal

The Court of Appeal had previously overturned a decision of the High Court and found that the contracting authority had committed "manifest errors" in its evaluation process. Leave to appeal to the Supreme Court was granted to the Minister on the following issue:

What is the test by which a tender award under public procurement legislation may properly be reviewed by a Court and was that test met in respect of the two grounds as to narrative statement and professional development whereby the tender award was overturned by the Court of Appeal?

The test related to two elements of the tender -- the Service Delivery Plan and the Quality Assurance Plan.

Service Delivery Plan

In the invitation to tender there was a requirement to demonstrate the methods that would "ensure" interpreters retained their skills and fluency. Word Perfect Translation complained that the response of the

successful tenderer did not include any proposal to “ensure” skills retention. This complaint was rejected by the High Court. However the Court of Appeal overturned the High Court’s decision on this and concluded that a manifest error did take place by the evaluator in this regard. In particular the Court of Appeal noted that in its response the successful tender simply stated that it would “encourage” skills retention among interpreters but that there was nothing in the service delivery plan that demonstrated how they would actually “ensure” this.

Quality Assurance Plan

In the response of the contracting authority to a request for clarification in relation to the quality assurance plan, it was stated that “each report must include a narrative summarising the information provided including how they ensure that these [Management Information] reports will be provided to framework clients in a timely manner”. Word Perfect complained that the authority was incorrect in finding that the successful tenderer had supplied such a “narrative” in its response. The Court of Appeal determined that the tender documents required a written narrative in addition to visual tools and that narrative was not provided by Translation.ie. In light of this the Court of Appeal found that it was a manifest error on the evaluator’s part to award the successful tenderer a mark in the highest bracket of marks permitted for this question.

Supreme Court

In its judgment of 27 May 2019, the Supreme Court reviewed the applicable law to identify the standard of review required in any evaluation by the contracting party. Helpfully, it reaffirmed the decision of the Supreme Court in *SIAC Limited v Mayo County Council*, which is considered the leading case in this area. In the *SIAC* case the Supreme Court held that the standard of review required was that of “manifest error”. In the present case the Supreme Court further considered the “manifest error” test. It concluded that one must consider the degree of confidence with which it can be said that a decision was wrong. If an error is identified and it is clear that it is an error then the test for “manifest error” has been met.

The Supreme Court concluded that the decision to award Translation.ie full marks in the service delivery plan was not a “manifest error” within the *SIAC* test and therefore set aside the decision of the Court of Appeal in that regard. Word Perfect had argued that an increase of marks which occurred during the evaluation in respect of the tender of Translation.ie demonstrated that a “manifest error” had occurred in the evaluation process. However the court did not accept this. The Court also commented that the process leading up to the decision rather than the decision itself should be considered. In the present case the Court was of the view that the review of the decision making process showed a “well-structured and conscientious approach” by the evaluator.

With regard to the Quality Assurance Plan the Supreme Court agreed with the decision of the Court of Appeal that a narrative summary in text form was required. The Court concluded that the award of marks in the higher band to Translation.ie was a manifest error by reference not to the marks awarded, but instead because of the definition given for the submission which would attract marks in this band.

In conclusion the Court held that the result of the competition must be set aside.

Costs Application

At the costs hearing the Supreme Court held that some allowance must be made for the difference in how the case was run and the ultimate award made. The Supreme Court commented how the litigation started off as a very board case in the High Court but was won on a single issue. Taking the foregoing into account the Supreme Court awarded Word Perfect Translation a percentage of its costs (60% of its High Court Coats and 80% of its Court of Appeal costs).

Conclusion

This long running case is an excellent example of the complexities and issues which often arise in public procurement litigation. Indeed the Supreme Court in its judgment highlighted a number of concerns it had in relation to the process and the fact that the drafting of a tender and the construction of the tendering process must be carried out with significant consideration.

The case also scrutinises the effectiveness of Public Procurement litigation. In the present case the estimated value of the mini competition was €300,000 to €600,000 and the term of the contract was to be for one year. As noted by the Supreme Court by the time of the delivery of its judgment the time period of the contract had lapsed and the legal costs incurred would have been disproportionate to the value of the contract. While it is difficult to identify a solution to this issue it is clear that all parties to procurement litigation have to weigh the value and timing of the contract against the likely cost and length of any such litigation. As the Supreme Court concluded the regime of public procurement is an important and beneficial scheme in ensuring fairness but it is equally important that the process “be capable of functioning in an effective manner and ensures that the public service obtains the benefit of the services tendered for”.

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