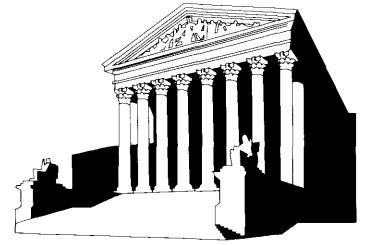


Tender Controversy



A recent press report (see “Row Over ‘Lavish Flat’ Contract”, *South China Morning Post*, January 17, 1999) surrounding the award of a \$2.3 billion contract to build flats for the disciplined services, has highlighted public divisions of opinion over the criteria that should be employed to choose successful bidders for public works contracts.

This month *J A McInnis* reviews the background to the controversy and some of the implications.

The \$2.3 Billion Lee On Road Contract

The contract in question was awarded to a joint venture between Hsin Chong Construction and Taylor Woodrow (“HCTW”) for the design and construction of 2,220 flats at Lee On Road, Kwun Tong. The choice of HCTW was made despite the fact that China State Construction Engineering Corp (“CSCEC”) had submitted the lowest tender at \$2.04 billion. The director of Architectural Services Pau Shiu-hung defended the award of the contract on the basis of the technical superiority of the bid by HCTW. In contrast, Legislative councillor Lee Wing Tat criticised it on the basis of the high price. A spokesman for CSCEC is reported to have said that action regarding a possible complaint to the World Trade Organisation, is being looked into. The question the differences of opinion raise is — whether the award can be justified?

The Justification

While as a general rule works contracts are awarded to the lowest bidder – subject always to full compliance with the tender specifications, terms and conditions – Government almost never binds itself to accepting the lowest, or for that matter any tender at all. The reason is simple: Government must be able to take into account other relevant factors. Indeed, in practice, unrealistically low prices are a cause for concern and are routinely given additional scrutiny, independent verification, and are only ultimately accepted with the fullest explanation. This is not to say the CSCEC was such a bid, but rather that both high and low tenders must be very carefully vetted. Once again, the reason should be obvious – any contractor could put in the lowest bid. Therefore some other factors besides the lowest price deserve to be considered.

Today the most important factor in this regard is quality, and increasingly sophisticated measures are being adopted both locally and overseas to see that quality is properly taken into account. Two ways in which quality is taken into account are through pre-qualification exercises and tender marking schemes.

Pre-qualification exercises seek to ensure that contractors satisfy both minimum financial and technical standards. Marking schemes, on the other hand, may employ further relevant weighted criteria to still better assess the tenderers.

In the Lee On Road contract award, all of the tenderers would have been given details of the evaluation criteria to be used for assessment, and their relative weighting, in advance of submitting their bids. The tenderers, in deference to this process, would have submitted their bids in two parts. The first part of their bids would have comprised a technical submission – which Pau Shiu-hung mentioned – as well as a tender price submission – which Lee Wing Tat cited. Both parts of the tenders would have been separately and independently assessed.

While the technical submission will be left outside the scope of the contract documents that HCTW will sign, it still remains the basis upon which it was chosen as the recipient of the contract over CSCEC. All the tenders in the Lee On Road contract would have been assessed by a 6-member assessment panel. Two groups with three members each would have evaluated the conforming tenders on both technical and price bases. Each member of the panel would have individually marked the HCTW as well as CSCEC tenders (along with any other conforming tenderers) according to the notified relevant weighted criteria to arrive at an average mark for each bid. The marks would have been used in making the award.

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negotiations over a dispute, it will be.

Equally the absence of the label "without prejudice" does not necessarily prevent a document or discussion from actually being "without prejudice". However, it is often harder to argue successfully that discussions during an ongoing contract are "without prejudice" if no one said they were intended to be at the time. This is particularly the case during an ongoing construction or engineering contract when there are inevitably all sorts of operational and contractual discussions and arguments taking place.

Generally (and there will always be exceptions), if there is any risk during negotiations of you having to make potentially embarrassing or damaging statements, you are better to say at the outset that you assume that the discussions are "without prejudice". If so, you should also record this in writing either in a document to the other party or in your own meeting notes etc. Equally, it is a sensible precaution for correspondence concerning the negotiations to be headed "without prejudice". Recording the "without prejudice" reference in writing serves two functions. First, it is likely to assist in establishing that the communication is actually "without prejudice". Second, it will serve as a reminder if you get to arbitration months or years later that the communication was intended to be "without prejudice" and ought not to be put before the arbitrator by either party.

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Marking Schemes

The tender package for the Lee On Road contract contained a marking scheme for assessing the bids. It was divided into price and quality categories. The price category comprised assessment criteria for tender sum and adequacy of pricing document. The quality category comprised assessment criteria for: compliance; design; quality assurance/construction quality/safety and environmental protection; project management team; design team/management; and better offer. Marks would have been assigned to each tenderer using these criteria (and their subcriteria) as measured against possible maximum marks allocable for each one. Formulae would have then been employed and minimum passing marks required for both tenderers to remain under consideration. In the case of HCTW both Hsin Chong and Taylor Woodrow would have been separately assessed in this way and a weighted average arrived at and assigned according to each contractor and their respective share of the work. After their submissions had been assessed in this way it could be expected that the assessments would have been used to arrive at a *combined quality/price score* for each tenderer. In Lee On Road, price and quality were equally weighted at 50/50. Thus, ultimately, HCTW would have been awarded the contract *not on the basis of being the lowest tenderer but on the basis of having the highest combined quality/price score.*

There will, of course, be circumstances when you might be better not to make it clear that the discussions are not "without prejudice" (for example, when you are really confident that the other party will have to make embarrassing concessions and you will not). To protect your back, however, this should be a carefully evaluated decision. You may also need to re-evaluate this approach as discussions progress.

In summary, if you are trying to resolve a dispute by negotiation, you should always consider (and in appropriate circumstances obtain advice upon) whether to expressly state that the negotiations (including documents) are "without prejudice". You should also remember that the mere fact that you say that something is "without prejudice" does not, however, guarantee that it will be. ■AAC

If you have any particular question you would like answering please submit them to the Editor. Unfortunately separate correspondence with individuals cannot be entered into.

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Summary

In summary, the Central Tender Board and the Architectural Services Department ("ASD") should be applauded for taking up the challenge to move toward the greater use of marking schemes and tender assessments based upon combined price/quality scores with significant quality ratios, rather than simply relying upon the lowest price as the measure for awarding public works contracts. In so doing, they are following the trend in many other jurisdictions, fully complying with Hong Kong's new obligations under the World Trade Organisation *Agreement on Government Procurement*, and respecting their own best practice and value for money policies. Indeed, Government has obliged itself and others to consider not just the lowest price in making awards but many of the criteria to which I have referred above. Government, its related bureaux and departments are committed to open, fair, consistent and non-discriminatory treatment of contractors. In my view there is nothing in the recent award of the Lee On Road contract to suggest otherwise. ■AAC

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