

DISQUALIFICATION FROM THE TENDERING PROCESS—'MAY' VS 'MUST'

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KEY POINTS

- For owners/governments, careful drafting of tender requirements is essential.
- Bidders must carefully analyse what constitutes a 'conforming tender' in the tender documentation.

When does a 'process contract' require the Government to disqualify bidders from a tendering process if their tenders do not comply with the requirements of a Request for Tenders? A recent Hong Kong case¹ illustrates that it depends on the wording of the Request for Tenders.

BACKGROUND

In 2002, the Government of Hong Kong sought tenders for a large construction project comprising:

- (a) an 18 hectare area of reclamation of the harbour
- (b) a 500m tunnel (the 'CWB Tunnel'); and
- (c) a 40m extension overrun tunnel (the '40 metre EOT').

Only the reclamation referred to in (a) was guaranteed to be awarded to the successful bidder. The tender document provided that the CWB Tunnel and 40 metre EOT referred to in (b) and (c) could be excised from the works at a future date. Although the tenders had to include prices for all three components, all tenderers knew that (b) and (c) may be excised from the project.

The excisable status of (b) was important because if the CWB Tunnel component went ahead, it would form a large part of the project. To avoid price manipulation of the various components by the tenderers, the Government included a provision, SCT-2, in the tender, which set out a formula for price calculation so that the price for (b) had to represent at least 33.7 percent of the overall price.

SCT-2 stated that the tenderer 'shall price' the works so that the formula 'is' complied with, and stated that 'failure to price the tender in accordance with the above condition may invalidate the tender'.

China Harbour and four other tenderers tendered for the contract. China Harbour's tender was the only tender that complied with the formula contained in SCT-2. Another tenderer, Leightons, however achieved the highest score. The scoring system awarded points for many different factors, including pricing. If all three works (a), (b) and (c) went ahead, Leightons' bid was the highest scoring bid. If only (a) and (c) went ahead, China Harbour was the highest scoring bid.

At the time that the winning bid was chosen, it seemed likely to the Government that the CWB works would go ahead and the Government felt that was desirable that the same contractor carried out the works for (a), (b) and (c). The contract was therefore awarded to Leightons.

THE ACTION AND SUBMISSIONS

China Harbour sued the Government, claiming breach of contract and arguing that as the only compliant tenderer, it should have been awarded the contract. It further submitted that the use of 'shall' and 'is' in SCT-2 made compliance with the formula mandatory and invalidated all non-compliant tenders. This claim relied on a submission that the word 'may' where used in SCT-2 should be read as 'must'. The Government argued that the word 'may' gave the Government a discretion not to invalidate non-compliant tenders and that the word 'may' meant that a tenderer who chose not to comply with the formula ran a risk of having its tender disqualified.

THE DECISION

Justice Burrell found that there was a process contract arising from the Request for Tenders. He rejected China Harbour's claim and found that if the word 'may' was read as 'must', the final sentence of SCT-2 would serve no purpose. Rather, 'the message to tenderers is— do your sums according to this equation, if you do not you run the risk of being disqualified however good the rest of your bid is.' Justice Burrell found that SCT-2 had a clear and unambiguous meaning that was interpreted by every tenderer but China Harbour in the same way, and that if China Harbour had been confused it could have sought confirmation that bids that did not comply with the formula would not be invalidated.

Justice Burrell also found that there were many other examples in the process contract of the tenderers being directed that they 'shall' do something and that if they fail to do so, their bid 'may' be disqualified. He said that it was desirable that the word 'may' should consistently mean the same thing in the process contract and that it would be confusing for one occurrence of 'may' to mean 'must'. Justice Burrell also pointed out that there were many examples in the tender documents of mandatory provisions where non-compliance would have inevitable consequences so that if compliance with the formula was to be mandatory, SCT-2 would have been drafted accordingly.

Justice Burrell also took into consideration that all the tenderers were big players in the Hong Kong construction industry, and that they were highly experienced and regular bidders for Government contracts. China Harbour's decision to take a conservative approach to the bidding process did not mean there was an unlevel playing field.

THE APPEAL

China Harbour appealed, claiming that:

- it was a term of the process contract that only conforming tenders would be assessed;
- it made the only conforming tender; and
- the underlying rationale of the approved marking scheme was to compare like with like and as there was only one conforming tender, the Government acted in breach of contract by comparing it to the non-conforming tenders and awarding the contract to a non-conforming tenderer.

The Court of Appeal dismissed the appeal. It agreed with Justice Burrell that if the word 'may' in the final sentence of SCT-2 was read as 'must', that sentence would be useless. If the word 'may' was read as 'may', the effect would be to confer on the Government a discretion to invalidate any tender that did not comply with the pricing formula. Unless and until a tender that otherwise complied with all of the requirements was invalidated by an exercise of the Government's discretion, it would remain a valid and conforming tender.

IMPLICATIONS OF THE DECISION

Although this decision may not be binding in Australia, there are two key messages arising from this case which have universal application:

- for owners/governments, careful drafting of tender requirements is essential to ensure that any desired flexibility in decision-making is retained; and
- for bidders, careful analysis of what constitutes a 'conforming tender' in the tender documentation is essential to ensure that tenders submitted have the maximum prospects

for success. If a bidder is in doubt about the effect of particular tender requirements, clarification should be sought at the earliest opportunity.

REFERENCE

1. *China Harbour Engineering Company (Group) v The Secretary for Justice of the Hong Kong Special Administrative Region* HCCT 44/2004 and *China Harbour Engineering Company Limited (formerly known as China Harbour Engineering Company (Group)) v The Secretary for Justice of the Hong Kong Special Administrative Region* CACV 138/2006

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