Judgment exposes public sector procurement failure

Speed read

As we've observed in the past (see for example 'Public Procurement')[1] New Zealand's public sector procurement practices are too often flawed, as those of us involved in these things see. Part of the problem is the lack of judgments holding agencies to account due to the way the law has developed. Earlier this year, the court did, rightly, decide that the Ministry of Education may well have messed up a procurement, negatively affecting suppliers.

This case shows that there can be remedies in the courts for poor and unfair processes. But it won't always be easy, and vendors are reluctant to sue as that can bounce back on them.

One untested option is whether breach of Government's procurement rules provides enforceable legal remedies.

We also question whether it was a good idea for the Ministry to defend this application. Its approach could have led to poor outcomes for NZ Inc in the original RFP process. And vendors in the future are less likely to pitch to the Ministry when it seeks to defend what happened here, regardless of the legal position.

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The Detail

The Ministry went to RFP for services to deliver ultra-fast broadband to schools. The RFP said it expected to appoint 2 to 3 suppliers.[2] In the end, the Ministry decided to select only 1 supplier. Pricing based on doing the work for 100% of the schools would likely be lower per school than pricing based on 33% or 50% of the schools.[3] The court applicant, Telco, priced based on 33% to 50% of the schools. It argued that it would have priced differently if it had known that one supplier only would be appointed.

There were the usual sort of clauses in the RFP including as to amending the RFP by written notice; considering or rejecting alternative proposals; negotiating and concluding any number and type of contracts, and running the RFP in such manner as the Ministry sees fit. Wide words that, on their face, permit wide discretion to the Ministry.

Telco sought an interim injunction restraining the Ministry from contracting with the single chosen supplier. The interim injunction was granted.[4] The upshot was that the Ministry re-tendered.

The grounds for the application were:

- judicial review based on the legitimate procedural expectation that the Ministry would issue a formal amendment to the RFP if it was to appoint one supplier; and
- estoppel.

The court did not need to decide the estoppel point.

The Ministry relied on the *Lab Tests* Court of Appeal decision to argue that judicial review should not be applied in this commercial context. Noting that *Lab Tests* was a more complex case, and this matter had simplicity, the Court said that "*...judicial review is available in a commercial tendering context where the Crown may have breached procedural expectations in a*

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material way to the detriment of a tenderer." Additionally, said the Judge, *Lab Tests* was dominated by a statutory framework whereas this situation is not. Most procurements are more like this situation in terms of legislative context.

The Ministry failed to give formal notice of the change and thus arguably breached the procedural expectation. The interim injunction was granted having regard to that and other factors.

There was some communication around having just one supplier, and a disputed recollection as to what happened at a meeting about that issue. But that was not enough to overcome the granting of an injunction. The required formal notice was not given.

It is disappointing that the Ministry defended this case when it could so easily, and relatively quickly, re-tender on the proper basis. Such a major change as moving from 2 -3 suppliers to 1 should have been handled in unequivocal fashion, and not left to other less clear means. This is not just a legal issue.

The net effect in the long run is that:

- Vendors become less willing to tender in the future as they see these sorts of things happening (and they do happen quite a bit as we have seen); and
- NZ Inc and Government get sub-optimal outcomes: here for example, the Ministry did not get the benefit of seeing Telco's lowest possible pricing. Why do a process when the Ministry isn't ensuring that vendors have full opportunity to put their best foot forward?

Probably there is more going on under the hood in this case than we are seeing. After all, Telco got some indication that a single supplier might be appointed. But it is hard to get around the desirability of the Ministry getting the simple stuff right: here, doing what it said it would do and give clear notice of change from the clearly set up expectation – despite what the Ministry argued – that there would be two to three suppliers.

We've earlier raised the prospect that the Government's mandatory rules could provide legally enforceable obligations on Ministry's and that is another issue that can be considered in future cases.

1. http://www.wigleylaw.com/assets/pdfs/2010/getting-the-deal-through---public-procurement-an-0.pdf

2. The Court quickly decided that any argument that this might include one supplier only was not available: the expectation was 2 to 3 suppliers.

3. This is due not only to economies of scale. Also at issue here was that some schools are more expensive to provision than other schools. Allocation of expensive schools to a supplier relative to its proposal could lead to substantial cost. Providing all schools via a single supplier de-risks this.

4. *Telco Technology Services v Ministry of Education* [2014] NZHC 213

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