School Buses Clarify Public Sector Procurement and Judicial Review

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A new decision on school bus routes further clarifies when Courts can step in to review public sector procurement. However, court risk is not the only risk in public sector procurement.

Bus Company, Bayline, lost a tender for school bus routes in Tauranga to another bus company, Bethlehem.

This happened even though Bayline had the lowest price for the same service (using procurement lingo, it gave the best "value for money").

The reason it lost is that the decision maker decided Bethlehem should win because, if it didn't, it may not stick around for the next tender. Why this was said to be important was the need to preserve competition in the next tender round.

In other words, the short term financial gains of giving the two-year contract to Bayline were outweighed by the longer-term advantages in maintaining competition. This two year contract was designed to fill a gap before a major tender in 2008.

The ultimate decision maker was the Secretary of Education ("Education"). The work was undertaken by a trust called Multiserve, established by the Ministry. There was a tender evaluation committee, chaired by someone from Multiserve.

This on-going competition factor wasn't an express issue raised in the tender, nor was the point put to the tenderers. The decision was made for reasons that differed from what the parties understood would be the reasons.

Retention of competition for the future seems to be a sensible motive, taking a long term perspective. However, making a decision on grounds that fundamentally differ from what is put to the affected parties will understandably raise questions for anyone interested in public sector decision-making. That doesn't mean that what happened is wrong. It's a trigger for questioning the process.

The relevant departmental guidelines had a clause that didn't limit the grounds on which Education's decision could be made.

The court decided[1] that this decision was not amenable to judicial review. It was a commercial issue at the less reviewable end of the spectrum[2], between reviewable decisions (eg, human rights) and those are less amenable to review (eg, "back office" purchasing decisions to buy stationery).[3]

Even though the decision was made pursuant to a statutory framework, that framework did not specify how the decision was to be made. So the statutory framework didn't change this conclusion (sometimes it will). Thus, this was like many other situations where public sector agencies buy goods and services commercially. Judicial review is not available, absent limited circumstances such as bad faith.

The court went on and considered the position if judicial review was available. Even then,

[1] *Bayline v Secretary of Education*; High Court, Wellington; 29 August 2007
[2] Or, more accurately, "rainbow", as Professor Taggart describes it, as it is not a linear situation
[3] For further background on competitive tendering and legal issues see our more general article *Tenders, RFPs and Competitive Purchasing: Traps for Unwary Buyers & Sellers* at http://www.wigleylaw.com/Articles/ArticleArchive/TendersRFSCompetitivePurchasing/

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Education was not reviewable. The most extreme concern was said to be the fact that Tender Evaluation Committee didn't actually meet. Instead, its Chairman discussed the approach with each Committee member separately. The Court expressed some concern about this "hub" approach but in the end did not need to pursue it in detail.

The various conclusions in this case, dealing as it does with a controversial area in the ever-developing area of judicial review, could be debated.[4]

For public sector agencies, the decision shouldn't provide too much comfort. Assuming the decision is followed in subsequent cases, each situation differs. They are still at risk anyway of criticism by the Auditor-General and the Ombudsman[5]. (Would the Ombudsman review a situation where the key decision is made on grounds not put to the parties, and those grounds differ entirely from what the parties expected?).

Then there's the new big kid on the block, the Mandatory Rules[6]. If this long-term competition issue is not raised with the parties, could the decision be made on that basis if the new Rules are applied? Even if the issue is put to the parties, can it be valid criteria under the new Rules?

Soon to follow is the Office of the Auditor-General's update of its procurement guidelines. This could change what's happening too.

Increasingly important are sustainable procurement issues. That's bringing with it a bunch of changes, not all of which would be regarded as directly related to sustainability. That's well demonstrated by the Commerce Minister's guidance in her letter to Public Service Chief Executives of 28 August.[7]

This remains a challenging area.

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[4] Just as the decision in *Schelde Marinebouw BV v Attorney-General* [2005] NZAR 356, could be debated.

[5] See our article *Public Sector Purchasing and the Ombudsman: A New Decision* at http://www.wigleylaw.com/Articles/ArticleArchive/Public-sector-purchasing-and-the-Ombudsman/

[6] See our article *Mandatory Rules for Procurement – One Year On* at http://www.wigleylaw.com/Articles/LatestArticles/mandatory-rules-for-procurement-one-year-on/

[7] http://www.med.govt.nz/templates/MultipageDocumentTOC____31884.aspx

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