

### PPP LESSONS TO BE LEARNT

*Cubic Transportation System Inc v State of New South Wales & 2 Ors* [2002] NSWSC 656, New South Wales Supreme Court, Adams J

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State governments have embraced public private partnership (PPP) models as a means of procuring public infrastructure. The PPP style of procurement is different from traditional methods of public sector procurement and private sector participants should be aware that there are a number of risks associated with the tender process, such as transparency, probity issues and satisfactory compliance by all parties with government tendering procedures.

The recent *Cubic Transportation System Inc v State of New South Wales & 2 Ors* [2002] NSWSC 656 decision highlights the significance of such risks. The case involved an application by a disgruntled, losing tenderer seeking to restrain the New South Wales Government from entering into a contract with the Government's preferred tenderer for its proposed new integrated ticketing system, on the basis of non-compliance with tendering procedures.

#### BACKGROUND TO TENDER

The New South Wales Government sought to introduce an integrated ticketing system to overhaul Sydney's public transport ticketing system. A lengthy tendering process ensued. In May 1999, the Department of Transport issued the initial call for proposals, which was followed by a detailed call for proposals in July 1999. As a result, four tenderers were short-listed, including Integrated Transport Solutions Pty Limited (ITSL), jointly operated by ERG Limited and Motorola Inc, and Cubic Transportation Systems (Australia) Pty Limited (Cubic). Cubic entered into a joint venture with the Commonwealth Bank to pursue the tender under the name Smartpos. In October 1999, ITSL and Smartpos lodged detailed proposals for the project. However, no decision was made and a call was subsequently made by the

Department of Transport for revised offers.

An evaluation committee was established to assess the tenders and make recommendations to the project control group, which had been set up by the department to provide overall direction to the project. Throughout the tender process, the evaluation committee recommended that ITSL be nominated as the preferred tenderer and the recommendation was endorsed by the project control group.

#### CUBIC CHALLENGES THE DECISION TO AWARD TENDER

Cubic commenced proceedings, seeking injunctive relief restraining the Government from entering into a contract for the supply of the integrated ticketing system by ITSL on the basis that the tender evaluation process was unfair.

Initially, Justice Kirby granted interlocutory relief to restrain the Government from contracting with ITSL (*Cubic Transportation Systems Inc v State of NSW & Ors* [2001] NSW SC 1195). The application for final relief was heard before Justice Adams in March 2002.

The basis of Cubic's case was that it was entitled, as a matter of contract, to a process of evaluation, the failure of which meant that the recommendation of ITSL as preferred tenderer should not have been made. Cubic relied on the call for revised offers as the source of contractual obligations. In the alternative, Cubic relied upon an implied term of fair dealing, based on the judgment of Justice Finn in *Hughes Aircraft Systems International v Air Services Australia* (1997) 76 FCR 151 (Hughes Aircraft).

Cubic alleged that the process that led to the selection of ITSL as preferred tenderer:

- was not reached by following the requirements and procedures set out or referred to in the call for proposals;

- was not a fair process; and

- did not afford an equal opportunity to both tenderers.

In seeking to establish that the tender process was unfair, Cubic alleged a number of conflicts of interest and procedural flaws.

## THE JUDGMENT

Justice Adams held that the terms of the call document and the Codes of Tendering and Practice for NSW Government procurements gave rise to an implied term of fair dealing in connection with the assessment of the bids. However, no unfairness or breach of any obligations owed by the Government to Cubic with regard to the tender process was established.

In relation to the allegations of bias, it was held that the probity auditors had satisfied their obligations under the terms of the call by investigating whether there was any evidence of actual bias. The Government had acted strictly in accordance with its obligations in the call and was entitled to accept the probity auditor's view of the matter.

## LESSONS TO BE LEARNT

An inherent tension exists between the interests of the parties in a tender situation. In his judgment, Justice Adams observed that it is generally the desire of the inviter to avoid any litigation concerning the tender process. On the other hand, the tendering party will often be willing to test the tender process through litigation, as litigation will frequently provide an opportunity for discovering detailed information on the process of consideration of the tender.

The decision contains a number of key points that should be considered by public and private sector parties involved in the tender process.

## ENSURE TENDER DOCUMENTATION IS DRAFTED CLEARLY

Tender documentation should be carefully drafted and clearly state the actual undertakings and legal obligations. In the Cubic case, the terms of the revised call document were not clearly drafted and they were uncertain as to the nature of the obligations owed by the Government and whether the Government was in fact under a contractual obligation to comply with the NSW Codes of Tendering and Practice. Clear and well-drafted tender documentation will usually avoid the consequence of protracted and costly litigation.

## COURTS WILLING TO IMPLY TERMS OF FAIR DEALING INTO TENDER PROCESSES

The law in Australia is developing towards much greater scrutiny of the public tendering, outsourcing and procurement process. A number of recent judicial decisions have dealt with the contractual issues under a tendering process. While the law of contract traditionally treated the tendering process as a preliminary communication prior to contractual commitment, there has been a shift in the construction of the duties owed between inviters and tenderers and there is now more scope for notions of fairness to intrude in defining the contractual obligations of parties. In recent decisions, courts have been more willing to recognise that parties may become bound by a preliminary contract to the processes that will be followed (see *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313).

The *Hughes Aircraft* decision is authority for the general proposition that pre-award tenders with public bodies contain an implied term of fair dealing as a matter of law. The decision highlights the need for government departments to arrange and conduct their tender processes with diligence, bearing in mind that the tender process might be treated by a court as contractual in nature.

## PROBITY PLAN

The key objective of PPP projects is to provide value for money. It is integral to the success of the partnership that tender processes are transparent and fair. Probity practices should be implemented to ensure that fairness of process is achieved and that conflicts of interest are avoided. The PPP policy material in Victoria, NSW and Queensland emphasises the importance of transparent tender process and compliance with probity requirements.

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