BUDDLE FINDLAY

Legal alert - Government procuring agencies must follow the rules

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28 July 2015

Problem Gambling Foundation of New Zealand v Attorney-General [2015] NZHC 1701

The Problem Gambling Foundation (the Foundation) has successfully judicially reviewed the Ministry of Health's (the Ministry's) decision to award problem gambling services contracts to providers other than the Foundation, following the Ministry's request for proposals (RFP) procurement process.

The High Court set the Ministry's decision aside on the basis that:

- The Ministry breached the Mandatory Rules of Procurement by Departments (which have since been replaced by the Government Rules of Sourcing) and the Foundation's legitimate expectation, by not following the evaluation criteria and methodology that the Ministry set out in the RFP
- The Ministry's evaluation methodology was flawed
- Some of the panel members evaluating responses had an apparent bias, on the basis that the Court applied a high standard of apparent bias that usually applies to judges and jurors.

The case shows that the courts will enforce the Rules of Sourcing and any terms set out in the RFP rules. Government agencies conducting a procurement process should comply with the requirements set out in the Rules of Sourcing and in their own procurement documents. This reinforces the principle that purchasing agencies should be careful about what they say in their RFPs and procurement documents, and do what they said they will do.

Background

In July 2013, the Ministry issued an RFP seeking providers of public health and clinical problem gambling services, on a regional and national basis. The Ministry made its final decisions on the RFP process in around March 2014, and the Foundation, which was the largest incumbent provider, was largely unsuccessful, being offered only two small contracts.

Scope of judicial review

The first issue was the scope of judicial review. The leading case was *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, which concerned the procurement of laboratory services by the three Auckland region DHBs. It held that judicial review of contracting decisions made in a commercial context will be available only on the grounds of failing to follow applicable statutory requirements, and fraud, corruption, bad faith or "analogous grounds".

However, the Court distinguished the problem gambling procurement decision from *Lab Tests*. The Court placed great emphasis on the statutory context in which the Ministry's decision to tender for problem gambling providers was made. The Ministry is required under the Gambling Act 2003 to put in place a problem gambling strategy concerned with both public health and clinical aspects of problem gambling. The Court considered that this statutory framework, and the Ministry's statutory responsibility to implement the strategy, moved the problem gambling case a considerable distance from the type of service in issue in *Lab Tests* and some (or perhaps all) other cases that have considered the scope of judicial review in commercial contexts. The Mandatory Rules were also not applicable to the DHBs in *Lab Tests*.

The Court also relied on a range of other contextual factors to distinguish *Lab Tests*. Of particular interest is the observation that the *Lab Tests* case highlighted that the DHB decision-makers had specific statutory obligations to act in a commercial way. In contrast, there were no statutory provisions on how the Ministry was to implement the problem gambling strategy. The Court also referred to the comments in *Telco Technology Services Ltd v Ministry of Education* [2014] NZHC 213 that "*the vacuum created by an absence of specific legislative provisions may be filled by public law principles such as natural justice and procedural fairness*".

Evaluation process in the RFP was not followed

The Court held that the Mandatory Rules were binding and enforceable against the Ministry as a ground for judicial review despite there being no statutory obligation to follow the Mandatory Rules. The Mandatory Rules had a legal force greater than mere voluntarily adopted 'rules' or guidelines because Cabinet required government departments to follow them and they were prescriptive in nature. The Mandatory Rules required the Ministry to follow a notification process if it changed the evaluation methodology in the RFP document, and there was a legitimate expectation that would be done.

The Court found, following a detailed analysis, that the Ministry did not follow the evaluation criteria and weightings detailed in the RFP, and did not follow the change notification process. Because the Mandatory Rules required the Ministry to follow its RFP, the Court did not need to treat the RFP as a process contract.

The Ministry also conducted a moderation process, following the formal scoring process, to discuss and adjust rankings. The moderation process was not referred to in the RFP and constituted a material change that should have been notified.

Evaluation process was flawed making the final decision unreliable

The Foundation submitted expert statistical evidence to show that there were material errors in the scoring and evaluation process. The Court accepted that expert evidence and found that the evaluation decisions made were unreliable because they were based on a flawed methodology and evidence that was not probative. The Ministry argued that an overall, global assessment of each respondent had been made, but the Court found that, given the detailed requirements of the RFP, that could not save the flawed methodology.

Apparent bias

On the issue of managing conflicts of interest of the panel members evaluating the responses, the Court first considered what standard should apply. There were no relevant statutory provisions, unlike in *Lab Tests.* Given the lack of statutory provisions, the Court identified four sets of rules that were binding on the panel members: the Mandatory Rules and three of the Ministry's own documents.

Rule 14 of the Mandatory Rules required departments to "have *in place policies and procedures to* ***eliminate*** *any potential conflict of interest on the part of those engaged in or having influence over a procurement*" and rule 43 required that "*Departments must receive, open and evaluate all tenders under procedures that* ***guarantee*** *the fairness and impartiality of the procurement process*" (emphasis added). The Court emphasised that "eliminate" and "guarantee" are strong words.

A Ministry document required that panel members would have regard only to the content of proposals and exclude all prior knowledge, which the Court referred to as "the personal knowledge exclusion rule".

The Court found that those rules required a high standard and that the standard of apparent bias from *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72should be applied. This is a standard applied to judges and jurors, of whether a fair-minded observer would reasonably think that the decision-maker may have been unconsciously biased. The Court acknowledged that the standard would usually be substantially lower for administrative decision-makers, but in this case the context meant the high standard applied.

The Court found that there was apparent bias because many panel members had knowledge about organisations submitting proposals and had a current or previous working relationship with them. The Court said (at [335]) *"On an objective assessment there was apparent bias because the Ministry established an evaluation panel with five of its seven members armed at the outset with knowledge they were then required somehow to eradicate, not just from their conscious thoughts, but also from their subconscious minds."*

If the standard being applied is *Saxmere* apparent bias, then it is not possible to manage what might be described as a potential or apparent or conflict interest. If a decision-maker is required to be free from apparent bias, then having the apparent bias will disqualify them, even if no actual conflict of interest exists.

Key messages for conducting government procurement

The key message for purchasing agencies is: do what you said in your procurement documents you will do, and therefore be careful when saying what you will do.

The Court required the Ministry to follow the Court's interpretation of the evaluation methodology set out in the RFP. The Court also enforced the high standards set for the Ministry in the Mandatory Rules and in its own conflicts of interest rules.

The Mandatory Rules have been replaced by the Government Rules of Sourcing. Compliance with the Rules is now a matter of statutory compliance for most Crown entities, following a direction under the Crown Entities Act 2004. The case also indicates that the Courts will enforce the Rules of Sourcing against government departments.

The Rules of Sourcing set a lower standard for dealing with potential conflicts of interest, requiring policies and procedures to identify, notify and manage interests, and act transparently and impartially (Rule 2). There is no requirement to "eliminate" potential conflicts. This will provide relief for government agencies if their own documents and policies also permit that lower

standard. The requirement to have procedures that *guarantee* all suppliers' responses are "treated fairly" remains, but not a guarantee of impartiality (Rule 40.1).

Public agencies can control the requirements and standards set by their own RFPs and other procurement documents. Do not say anything inconsistent with the Rules of Sourcing and otherwise only say you will do the things that you can do and will do.

Government procurement has for some time operated within a substantial framework of rules that now appears to be enforceable by the Courts. This case may be a departure from previous cases that restrict the grounds of judicial review in a commercial context, but it is not surprising that the Courts will enforce "rules", which are after all requirements that can be enforced.

However, it is notable that, although there are differences in the legal context, the end result of this case is that public law standards have been applied to the Ministry's procurement of problem gambling services, but not to the procurement by Auckland region DHBs of laboratory services, a significant public health service valued at around $560 million over 10 years.

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