

NAVIGATING THE TENDER PROCESS – A FOLLOW UP DUTY TO ACT FAIRLY AND IN GOOD FAITH

This paper is an update of Navigating the Tender Process, following the Privy Council speech delivered on 1 December 2003 by Lord Hoffman.

Following the decision in the High Court in favour of Pratt Contractors (see earlier article), Transit appealed to the Court of Appeal (see *Pratt v Transit New Zealand* [2002] 2 NZLR 313).

In a judgment delivered by McGrath J, the Court of Appeal did not accept, as a matter of fact, that there had been any breach of the preliminary contract and that the taint of bias which influenced the High Court was not real and was not relevant to the consideration of the preliminary contract.

Pratt appealed to the Privy Council, and in a judgment delivered by Lord Hoffmann on 1 December 2003, the Privy Council agreed with the analysis of the Court of Appeal and found for Transit (see *Privy Council Appeal No 84 of 2002*).

After accepting that a preliminary contract did exist, the question then arose as to what the terms of that contract were. Their Lordships found that the internal Transit manuals, which the tender evaluation team appear not to have followed, did not form part of the preliminary contract terms.

The sole implied term which their Lordships were prepared to accept in this contract was a duty to act fairly and in good faith. Their Lordships observed (*in para 47*):

It is nevertheless necessary to identify exactly what standard of conduct was required of [the Tender Evaluation Team (TET)] in making its assessment. In their Lordships' opinion, the duty of good faith and fair dealing as applied to that particular function required that the evaluation ought to express the views honestly held by the members of the TET. The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same. But Transit was not obliged to give tenderers the same mark if it honestly thought that their attributes were different. Nor did the duty of fairness mean that Transit were obliged to appoint people who came to the task without any views about the tenderers, whether favourable or adverse. It would have been impossible to have a TET competent to perform its function unless it consisted of people with enough experience to have already formed opinions about the merits and demerits of roading contractors. The obligation of good faith and fair dealing also did not mean that the TET had to act judicially. It did not have to accord Mr Pratt a hearing or enter into debate with him about the rights and wrongs of, for example, the Pipiriki contract. It would no doubt have been bad faith for a member of the TET to take steps to avoid

receiving information because he strongly suspected that it might show that his opinion on some point was wrong. But that is all.

Their Lordships would not be drawn on the more general obligation to perform any contract fairly (see *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1, 36-37), stating only that this was a *somewhat controversial question* which did not need to be addressed as it had been accepted by the parties that the duty existed in the present case.

While the determination falls short of clarifying whether or not there is a general obligation on the parties to act in good faith in all contracts as a general principle, it does provide good guidance on the issue of bias and the conduct of tender evaluation teams. A predisposition on the part of a team member, based as it is on previous experience of a tenderer, will not of itself invalidate a tender evaluation.

It may even be a positive advantage.

The advance text of the judgment is available on:

<http://www.privvy-council.org.uk/files/other/pratt.rtf>