Kluwer Arbitration Blog

Bid Challenges: What Role Can Arbitration Play in Tender Disputes?

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Competitive tendering for construction and engineering contracts is an essential element of business for the industry. Huge expenditure is devoted to public infrastructure projects and effective competition is essential to achieve value for money and appropriate use of public funds. The World Bank estimates that Governments worldwide spend US$9.5 trillion in public contracts every year. What role is there for arbitration in resolving tender disputes? In this post, we address review procedures for public procurement derived from international sources, arbitration of disputes arising from contractual tender procedures, and consider how arbitration rules could be adapted to suit the particular requirements of bid challenge disputes. The post addresses issues considered in more detail in a new chapter to Kluwer Law's International Construction Arbitration to be published in its 3rd edition in February 2021.

Public procurement review procedures

Mechanisms for review of public procurement procedures provided for under international sources such as the Government Procurement Agreement (***the GPA***), UNCITRAL Model Law, and EU Procurement Directives provide for some level of judicial review, but make no *express* reference to arbitration. Instead, generic reference is made to independent review bodies coupled with ultimate review by the courts. States are generally left free to determine the nature of domestic challenge mechanisms, to enable alignment with existing national laws and legal systems. National public law, for example, may require decisions relating to the conduct of public bodies to be determined exclusively by way of judicial review before the national courts. In these circumstances, an arbitral tribunal will have no jurisdiction. Indeed, public policy may ordain transparency of decision-making and accountability in relation to public expenditure be secured in a public process as opposed to a confidential arbitration process. Foreign bidders, however, may be sceptical about the independence of national review bodies and prefer international arbitration with a neutral panel. Attempts at redress for tender decisions have been the subject of investment treaty arbitrations. However, demonstrating a qualifying investment has proven challenging where no contract has been awarded.

Arbitration of contractual obligations to tender contracts

It is common for obligations to run competitive tenders to be imposed on concessionaires responsible for the construction, operation, and maintenance of public infrastructure and operators under production sharing contracts (***PSCs***) for the exploitation of natural resources. Disputes may arise regarding the manner of award of such contracts, such that aggrieved bidders may bring a complaint. Alternatively, the State entity awarding the concession or PSC may claim that procedures adopted by the concessionaire/operator were in breach of contract. Such disputes are commonly subject to arbitration.

In November 2020, reference to an ICC arbitration award addressing tender disputes reached the public domain. The arbitration was between Doula International Terminal (***DIT***) and the Autonomous Port of Doula (***APD***), and arose under a container terminal concession for the Port of Doula in Cameroon. Press reports indicate that the disputes that arose under the concession agreement relate both to the sharing of parking rights and the exclusion of DIT from participating in the tender procedure for a replacement concessionaire launched by APD in January 2018. The ICC tribunal ordered APD to pay DIT damages and to re-issue an open tender notice including DIT. In parallel, DIT's shareholders commenced proceedings in the Cameroonian courts to challenge the irregularity of the tender procedure and the illegality of the public company implemented by APD to operate the container terminal in place of DIT.

A proposal for a tribunal-based system as an adjunct to the Courts in the UK

In December 2020, the UK Government published a Green Paper entitled 'Transforming Public Procurement' (***the Green Paper***) which proposes reform to Court procedures and investigation of the possibility for establishing a tribunal-based system for a subset of procurement challenges. This subset includes "*low value claims or challenges to process on an ongoing competition, such as a claim that a specification is discriminatory or that a bidder has been wrongly excluded*". There is potential for referring more cases to a tribunal-based system "*should the anticipated benefits of Court reform not be realised*". There is no express reference to arbitration in the Green Paper and it remains to be seen what system is proposed for this purpose.

Adapting arbitration for the resolution of tender disputes

The need for speed

There are significant challenges in designing arbitration procedures appropriate for the resolution of tender disputes, not least the need for speed. When a bidder is informed that it has not been successful in a tender procedure, its principal concern will be to try and stop the entry into the contract so that the procurement can be rerun. Arbitral procedures can and are designed to allow for expedition. The appointment of emergency arbitrators is contemplated under institutional rules such as those of the ICC and LCIA. Alternatively, a standing panel of arbitrators with appropriate expertise could be constituted to hear bid challenge disputes on an urgent basis. The arbitration rules would need to be tailored to accommodate emergency applications for urgent relief and provide for fast-track resolution of the substantive dispute where the suspension of the contract award is ordered.

Disclosure of relevant information

A difficulty frequently faced by losing bidders is obtaining information regarding the reasons for the decision to assess the merits of bringing a claim. In some jurisdictions such as Germany, the tender file for public procurements is made available to the bidders, but in others such as England, the losing bidder is dependent on a debrief by the awarding entity and its willingness to provide further information in response to questions. Where the information is not forthcoming, the losing bidder has to apply for disclosure. Interestingly, the Green Paper proposes increased transparency in the procurement regime to provide bidders with "*immediate and more comprehensive access to much of the information that might be sought under a traditional disclosure process*".[1)] This suggests that applications for disclosure may not be necessary or may be more limited in scope than is currently the position. Clear provisions for establishing confidentiality rings in bespoke arbitration rules would also be of benefit to manage the disclosure, production, and deployment of confidential information.

Joinder of the winning bidder and interested parties?

Should the winning bidder be joined to an arbitration? Ideally, arbitral procedures would allow for such joinder, given the winning bidder has an obvious interest in the outcome of the dispute and will want to ensure protection of its confidential information. While the winning bidder's interests may be essentially aligned with the awarding authority's, those interests may diverge on questions such as the extent of disclosure to be made and, if a contract is ordered to be set aside, the consequences that flow.

Public proceedings and publication of awards

The GPA requires that the procedure for review of tender decisions within the scope of the GPA must provide for public hearings or, in the alternative, allow for decisions of a first review body to be subject to judicial review. The GPA does not limit the circumstances in which decisions can be judicially reviewed. In order to be compatible with the GPA, therefore, any review carried out by an arbitral tribunal would have to either: (i) allow for hearings to take place in public (as well as complying with the other procedural requirements in the GPA); and/or (ii) allow for *any* arbitral award to be subject to judicial review. Where the law of the seat or indeed any institutional rules governing the arbitration only allow for arbitral awards to be judicially reviewed in certain circumstances (e.g., where the tribunal has acted beyond its jurisdiction), the review process would arguably be non-compliant with the GPA.

Of course, it is well-known that the ICC from January 2019 has changed the approach to publication of its awards. The default now is that awards will be published two years after notification to the parties unless either party objects. This practice goes some way to addressing the above transparency concerns. The ICC rules, however, would still arguably not be fully compliant with the GPA given that the rules exclude appeals on a point of law and accordingly limit the scope of judicial review.

State Aid, Public Law, and Competition Law

Tender disputes may be coupled with challenges in relation to unlawful state aid, breach of public law, and competition law. In developed legal systems, bodies other than arbitral tribunals may have jurisdiction to address such issues. As noted above, for example, typically the courts have jurisdiction to address questions of breach of public law. These jurisdictional issues are not fatal to an arbitration process but would need to be addressed when devising bespoke arbitration rules where there is a potential overlap with public law, state aid, and competition.

The answer posed by this blog post is clear – there is undoubtedly a role for arbitration in tender disputes. Such role holds potential for further development, including the development of suitable rules adapted to be fit for purpose.

References

?1 Ibid at para 197.

This entry was posted on Saturday, January 30th, 2021 at 8:01 am and is filed under Arbitration, Disclosure, Domestic Courts, Emergency Arbitrator, Public Procurement, State Aid, Tender Dispute, UNCITRAL Model Law
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