

Accuracy of tender specifications under scrutiny:

Ipex ITG Pty Limited v Melbourne Water Corporation (No 5) [2009] VSC 383

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On 11 September 2009, judgment was given by Justice Byrne in the Supreme Court of Victoria dismissing claims by IT services provider Ipex ITG Pty Ltd (**Ipex**) that Melbourne Water Corporation (**Melbourne Water**) had made misleading and deceptive representations in Melbourne Water's tender specifications.¹

Even though Ipex was unsuccessful, this decision highlights the importance of ensuring that information contained in tender documents, including information supplied by third parties, is accurate and not misleading.

Bidders frequently rely on this information when preparing their bids, and broad disclaimers of liability are generally not effective to prevent a bidder from establishing that it has relied on this information.

Furthermore, if a supplier genuinely cannot supply the services for the contracted price, the result can often be an unhappy and unproductive relationship between the parties.

Background

In April 2000, Melbourne Water invited several IT service providers to submit tenders for the provision of IT services to Melbourne Water, a significant part of which involved the provision of help desk services.

Melbourne Water's invitation to submit tenders was accompanied by a request for proposal (**RFP**). The RFP contained data as to the number and type of help desk calls received by Melbourne Water in the previous six months (**HD Call Table**). The figures for total calls varied from a low of 364 to a high of 527 calls per month, but the average was 433 calls per month.

Ipex was the successful tenderer and entered into a contract with Melbourne Water for a three year term commencing 1 August 2000. Ipex was required to assume most, if not all, of the risks involved in providing the IT services over the three year term and it was therefore required to build into its tender price an allowance for this.

Over the term, Ipex experienced an average of 675 help desk calls a month – far in excess of the average number described in the HD Call Table. Ipex sought payment from Melbourne Water for the extra costs involved in

servicing this higher number of calls. Melbourne Water rejected the claim because it had contracted for the provision of the services for a lump sum.

Ipex subsequently brought a claim in the Supreme Court of Victoria alleging that the representations made by Melbourne Water, in relation to the HD Call Table and the RFP, amounted to misleading and deceptive conduct under section 52 of the *Trade Practices Act 1974* (Cth). Ipex claimed that it relied on this conduct when calculating its tender price and entering into a contract to provide the services for that fixed price, and suffered loss as a consequence.

Decision

Representations

Ipex alleged that Melbourne Water had made four misleading representations:

- that the average number of help desk calls had been 433 per month during October 1999 and March 2000;
- that the information contained in the tender documents was an accurate summary of the type, number and categories of help desk calls;
- that the average number of help desk calls would be and continue to be 433 per month throughout the term of the contract; and
- that the information contained in the tender documents was sufficient to allow the tenderers to cost their proposals.

In regards to the first and second representations, Ipex asserted that Unisys, who was Melbourne Water's previous IT service provider, submitted a tender which was at least twice the price of the other tenders submitted in response to the RFP. Ipex argued this significant difference indicated that Unisys quoted this higher amount because it was aware there would be more than an average of 433 calls per month, and Melbourne Water should have similarly been aware of this information.

In response Melbourne Water asserted that these representations were simply a mere “passing on” of information obtained from Unisys and further that nowhere in the RFP was a “monthly average” of 433 calls stated.

Justice Byrne firmly rejected Melbourne Water’s contention that it was simply passing on information. His Honour found that Melbourne Water had made an active decision to select and insert into the RFP only parts of the Unisys data which represented an average of 433 calls. Further, even though no “monthly average” was expressly stated in the RFP, Justice Byrne determined that Melbourne Water had represented that there was an average of 433 calls per month over the six month period because it was “not a difficult calculation to average the six total figures [provided] and arrive at 433”.²

Despite this, Justice Byrne found that the representations were not misleading or deceptive, since the help desk call data was found to be for the most part accurate. Moreover the higher quoted Unisys tender reflected the company’s much greater unit costs and overheads.

In regards to the third representation, being the future number of calls, Justice Byrne found that:

- no witness could attest to the proposition that help desk calls would remain unchanged;
- there was nothing in the tender specification to lead to the conclusion that Melbourne Water’s IT environment would remain constant; and
- the RFP itself warned bidders to accommodate for future changes.

Finally, in regards to the fourth representation which concerned the representative sample, Ipex alleged that Melbourne Water knew or ought to have known by examining the entirety of the Unisys log that the number of help desk calls would be much higher than 433 per month and that this “silence” was both misleading and deceptive.

In response, Melbourne Water successfully argued that it was correct not to disclose the data prior to October 1999 because these numbers arose as a result of significant disruption to its IT environment caused by the rolling out of a standard operating environment (SOE) program. Moreover, it asserted that the call data prior to the rolling out of the SOE program was also irrelevant since once the SOE was successfully implemented, the number of help desk calls was significantly reduced.

Reliance

Even though none of the representations were found to be misleading or deceptive, Justice Byrne went on to consider the issues of reliance and causation in relation to each of the alleged representations.

Importantly, in relation to reliance, despite the fact that Ipex was unable to produce any documents or key witnesses to explain the role the help desk call data actually played in calculating its tender price, Justice Byrne found that Ipex had indeed relied on the representations made by Melbourne Water in the tender documentation.

Justice Byrne stated, “Melbourne Water compiled and included in its RFP a mass of material to enable tenderers to prepare their tenders... [It] intended that all tenderers rely upon the information provided to them. It cannot escape responsibility for this by hedging this information with disclaimers. The question of reliance is a question of fact, and a fact of this sort cannot be contractually deemed out of existence”³.

Causation

With respect to the issue of causation, Ipex had been unable to produce any satisfactory evidence. On the other hand, Melbourne Water was able to produce several emails which suggested that Ipex’s proposed capacity for help desk calls was much greater than 433 per month.

Accordingly Justice Byrne noted that even if there had been misleading or deceptive conduct by Melbourne Water, Ipex would have failed to establish that this conduct caused its loss (except with respect to its relatively minor claim for costs incurred in investigating the allegedly misleading or deceptive conduct).

Finally, Justice Byrne noted that the contract was for a lump sum price, with Ipex assuming most, if not all, of the risks involved in providing the services to Melbourne Water over the term of the contract.

Impact on outsourcing agreements and tender specifications

In light of this decision, customers going to the market need to be careful to ensure information contained in tender documents (including information supplied by third parties) is as up-to-date and accurate as possible.

There is a substantial likelihood that vendors will be relying on the information provided in tender documents when putting together their bids, and that general disclaimers of liability for the content of an RFP will not be effective to exclude liability for misleading and deceptive conduct under the Trade Practices Act.

¹ *Ipex ITG Pty Limited v Melbourne Water Corporation (No 5)* [2009] VSC 383

² *Ibid* at [77]

³ *ibid* at [151]