

## Reliance on customer tender material: take two

### *Ipex ITG Pty Ltd v Melbourne Water Corporation (No 5) [2012] VSCA 169*

*By Anne Petterd*

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*Anne Petterd is Special Counsel at Baker & McKenzie in the Technology, Communications and Commercial Group.*

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The 13 August 2012 appeal decision of *Ipex ITG Pty Ltd v Melbourne Water Corporation (No 5)*<sup>1</sup> reminds customers and tenderers to take care with information customers supply during the tender process.<sup>2</sup> In particular:

- (a) Customers providing tenderers with information about the customers' current environment, should explain in the tender terms how they wish tenderers to use the information. If a customer fails to explain the context for the information, the customer risks a misleading conduct claim.
- (b) Tenderers should take care to document customer information and other materials relied on in pricing their tenders. Tenderers should identify in their response what they relied on. If the matters relied on still apply at contract signing, they should be included in the contract as part of defining scope.

#### **Background**

In 2000, Ipex was awarded a contract by Melbourne Water. The Ipex bid was the lowest tender. A significant part of the contract was providing help desk services for IT problems. The contract was awarded on a fixed price basis.

Melbourne Water issued tender materials containing a table with help desk call data covering the six months prior to March 2000 (the HD Calls Table). The average monthly help desk calls over that period were 433 per month. However, under the project, Ipex experienced a much higher call rate, averaging 675 calls per month over three years.

Ipex sought payment from Melbourne Water for extra costs for servicing help desk calls. Ipex attempted to have this treated as a variation in scope. Melbourne Water rejected this claim, primarily because the contract

was a lump sum contract and Ipex bore the risk of the level of help desk calls.

In 2003, Ipex commenced proceedings against Melbourne Water for misleading and deceptive conduct in breach of the then *Trade Practices Act 1974* (Cth) and *Fair Trading Act 1999* (Vic).<sup>3</sup> Ipex's misleading conduct allegations centred upon what the HD Calls Table represented. Justice Byrne in the Victorian Supreme Court dismissed Ipex's claims.<sup>4</sup>

Ipex's appeal was also dismissed by the Victorian Supreme Court of Appeal.<sup>5</sup>

#### **Issues for appeal**

Relevant issues for appeal were Ipex's claims that Melbourne Water had represented:

- (a) that the data in the HD Calls Table was a representative sample sufficient to allow tenderers to cost their proposals on a proper basis (Sample Representation); and
- (b) by silence, by omitting from the tender materials help desk call data from the period before that shown in the HD Calls Table. This earlier data showed higher call rates prior to the standard operating environment (SOE) applying when the tender was issued.

#### **Sample Representation**

The trial judge concluded Melbourne Water did not make the Sample Representation.<sup>6</sup> There was no representation that the incumbent supplier's actual experience reflected in the HD Calls Table conveyed the numbers tenderers should apply to price their tenders. This was because tenderers were instructed to introduce innovation and change in their approach to achieving the tender objectives.

On appeal, Ipex argued this reasoning was in error, submitting that:

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- (a) the current IT environment was the required base for costing the tender. The expectation of innovation and change did not make the current IT system irrelevant for costing help desk services. Ipex referred to a statement in the tender terms that the required services were to be provided in respect of the current IT environment;
- (b) the HD Calls Table was a representation by Melbourne Water that the experience of the incumbent over the identified period was typical of the help desk services required by Melbourne Water at the time of the request for tender; and
- (c) the information in the HD Calls Table was:
  - (i) sufficiently representative of Melbourne Water's IT system;
  - (ii) appropriate or proper for use in the costing process and could be relied upon for that purpose.

Mandie JA observed that Ipex on appeal seemed to be attempting to resolve ambiguities in their trial case.<sup>7</sup> Ipex's argument at trial did not seem to identify:

- (a) what the HD Calls Table was intended to represent; or
- (b) that the figures in the table were represented as "typical" of the current IT environment.

Ipex also argued it was industry practice to calculate the cost of IT infrastructure services based on historic help desk call data. This was because of certain assumptions, including that help desk calls remained on average constant over time. However, Ipex provided no expert evidence to support their argument.

Finally, Ipex argued the trial judge erred in interpreting the alleged Sample Representation to be that the HD Calls Table was representative and *alone sufficient* to allow tenderers to cost their proposal on a proper basis. Ipex submitted that the alleged representation was that the table was *sufficiently representative* (of the environment in which tenderers would have to provide their services) to allow tenderers to cost their proposal on a proper basis and accepting that other relevant matters could be taken into account. It was held the trial judge had not applied the interpretation Ipex claimed. The trial judge's point was, Melbourne Water put the data forward as material to take into account in costing proposals, but only as data reflecting the six month period it covered.

It was held there was no error in the trial judge's conclusion. Primarily this was because there was no evidence that Ipex considered, believed or acted as if Melbourne Water providing the HD Calls Table represented that the data constituted a "representative sample". The data in the table did not appear to have been advanced by Melbourne Water as a sample. The

evidence showed Ipex treated the data as accurately reflecting Melbourne Water's help desk experience during the six months covered by the table.

### Representation by silence

The trial judge had rejected Ipex's submissions on representation by silence on the basis that the Melbourne Water environment prior to the SOE was largely irrelevant to tenderers.

Ipex argued it was inappropriate to only include the six months' SOE data in the HD Calls Table, as there was the possibility (given uncertainty with moving to a new environment) that help desk calls would revert to their earlier higher levels. Ipex argued it would be misleading to supply data for an environment covering six months if:

- (a) you could not be confident that the environment would be permanently maintained; and
- (b) there was a real possibility that all levels would revert to earlier levels.

The key question on the representation by silence was whether the information not disclosed was reasonably material to assessing the information disclosed. Melbourne Water's expert explained it would have been confusing to provide information relating to the environment prior to the new SOE environment. The expert identified three different environments being the original environment, changeover environment and new SOE environment. He said they were fundamentally different environments, and the help desk figures across the environments were not comparable. The expert's evidence was essentially unchallenged by Ipex.

On appeal, it was held that Ipex failed to establish that the trial judge should have found the representation by silence was misleading.

### Damages

The discussion on damages illustrates difficulties a tenderer can face in showing customer tender conduct caused the tenderer loss. At trial, Ipex claimed the following heads of loss:

- (a) the difference between the actual contract price and higher price it would have tendered, had Ipex been given correct help desk call data;
- (b) greater costs of performing the contract than expected; and
- (c) costs of investigating and negotiating Melbourne Water's misleading conduct.

The trial judge found only the third heads of loss sufficiently related to the claimed misleading conduct. The first two heads were further considered on appeal.

On the first heads of loss, it was held that, had Ipex submitted a higher price, it was by no means certain Ipex would have been selected. If an Ipex tender would not

have been accepted, the first head of loss could not be attributed to Melbourne Water's alleged misleading conduct.

Ipex argued the trial judge's finding ignored that all tenderers would probably have submitted higher prices had they received the correct information. It was held on appeal to be no evidence supporting Ipex's argument. Ipex provided no evidence on how the help desk data not disclosed by Melbourne Water would have affected Ipex's tender price. The Ipex evidence only contained a general statement that, if the call data disclosed in the HD Calls Table had been much larger, this would have changed Ipex pricing.

The second heads of loss needed to overcome the same problem as the first. At trial it was held there was no satisfactory evidence to establish any kind of loss. The claimed loss was a mere assertion of a very high improbability. Ipex had made no real attempt to provide a factual basis for the required causal link. For example, the higher cost could have been due to Ipex's deficiencies or for another reason.<sup>8</sup>

On appeal, Ipex argued the trial judge had confused the effect of the alleged misleading conduct in setting the contract price with the costs of performing. Ipex criticised the trial judge's speculation on the potential other reasons for increased cost of performance. It was held there was no evidence of any losses or any causal link between the alleged representations and extra costs.

As can be seen from the above, a key difficulty for Ipex was the limited evidence Ipex submitted to support their claims.

#### **Dealing with inaccurate customer tender material**

The data in the HD Calls Table was found to be accurate. Given this, the case did not address the issue of a customer providing inaccurate data during a tender process.

For complex technology service arrangements, such as outsourcing, a tenderer can be heavily dependent on customer provided information about the customer's current technology environment for the tenderer to scope and price its bid. If a customer cannot guarantee accuracy of its data, the customer and tenderers will need to factor in the potential consequences of this for tenders and end contract.

Often customer tender information is accompanied with a disclaimer that the information may not be accurate and the tenderer is responsible for identifying what due diligence it needs to do. A customer is likely to consider that a competent tenderer will know the relevant parameters to check and consider in pricing, scope and delivery. If a customer has taken these positions:

- (a) the tenderer needs to factor them into its response; and
- (b) it would be dangerous for the customer to assume such a disclaimer will sufficiently protect the customer against any liability for misleading conduct relating to accuracy of their data.<sup>9</sup>

Tenderer concerns about the accuracy of customer data can be addressed in several ways prior to contract. A tenderer can:

- (a) condition its response on first undertaking due diligence;
- (b) insert sufficient parameters into the tender and contract to enable the supplier to revisit departures from the assumed parameters; and / or
- (c) factor risk into price.

The tenderer's approach requires judgement calls. For example, a tenderer needs to weigh up the risk of including too many assumptions or pricing contingency so its bid seems uncompetitive (or even non-compliant), against failing to identify when the tenderer would wish to revisit price.

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<sup>1</sup> [2012] VSCA 169.

<sup>2</sup> For an overview of the facts and analysis of the first instance decision, see the earlier article published in this Journal. M. Squires and N. Riitano *Accuracy of tender specifications under scrutiny: Ipex ITG Pty Limited v Melbourne Water Corporation (No 5)* [2009] VSC 383 (September 2010) *Computers & the Law* 14.

<sup>3</sup> The claim brought was for breach of s.52 of the *Trade Practices Act 1974* (Cth) and its Victorian equivalent. This provision is now s.18 of the *Australian Consumer Law* contained in Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

<sup>4</sup> *Ipex ITG Pty Limited v Melbourne Water Corporation (No 5)* [2009] VSC 383.

<sup>5</sup> The judgement was delivered by Mandie JA, with whom Beach AJA and Redlich JA agreed.

<sup>6</sup> At trial, it was also held that had it been found that the representative sample representation was made, it was not misleading. Further, there was no reliance by Ipex on the representation, assuming that it had been made.

<sup>7</sup> Other comments were made on appeal of the ambiguities in Ipex's arguments.

<sup>8</sup> Ipex's means of calculation were also questioned against the evidence presented.

<sup>9</sup> This article does not address that misleading conduct laws apply in a more limited way to government bodies than private sector bodies.