

Legal Torque

PREFERRED SUPPLIER

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-Cathy Bormans-

It is not uncommon to see transport contracts which state that the contractor is the "preferred supplier", but what does "preferred supplier" actually mean? Does it mean the contractor is the exclusive supplier of services, that the contractor has preferential rights to supply the services, or does it mean that the contractor is merely approved to provide the services? If the phrase "preferred supplier" is not defined in the agreement, then the position is less than clear.

In the English case of *Proforce Recruit Limited v Rugby Group Limited* the High Court found that the words "preferred supplier status" do not mean exclusive supplier and do not confer priority rights on the supplier. The Court said that "preferred supplier" in that particular case meant no more than the supplier has been approved by the customer and therefore does not need to be subjected to further checks or an evaluation process in the future by the customer.

In that case, Proforce Recruit Limited ("PRL") had entered into a contract with the Rugby Group Limited ("RGL") pursuant to which PRL was to supply cleaning services. The dispute centered around the following clause: "This Contract will be of a minimum two year period and will be re-negotiable at the end of that period. During that period Proforce will hold preferred supplier status."

The phrase "preferred supplier status" was not defined in the contract. PRL argued that the clause should be construed as meaning that:

- 1) during the contract period, PRL would be offered the first opportunity to supply labour and hire equipment to RGL in preference to other suppliers; and
- 2) RGL would not obtain contract labour or hire equipment from any other suppliers without offering PRL a reasonable opportunity of meeting RGL's requirements.



RGL disputed this construction of the words in question and argued that they did not agree to such obligations, and that they had merely agreed to confer the status of "approved supplier" on PRL as a marketing tool for PRL's use.

When interpreting a clause or a phrase in a contract the Courts do not generally look to the negotiations between the parties prior to entering into the contract to determine the meaning of the clause or phrase. This is because at that time i.e. prior to entering into the contract, nothing is agreed and the position of the parties could alter. Only in exceptional circumstances will the Court consider the admissibility of pre-contract negotiations. For example, if a clause is ambiguous, then the Court will look to evidence from the negotiations to determine whether the parties had agreed their own dictionary meaning of the term (the "private dictionary" test) and had then progressed the negotiations on that understanding.

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In assessing the pre-contractual negotiation evidence in this case, the Court held that the parties had not come to an agreed interpretation of "preferred supplier status", and therefore the private dictionary exception was not applicable. There had been no agreed understanding as to what the term had meant.

As a result, the contract in that case was construed according to established principles, which include the meaning that the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time the contract was made. The Court also considered the commercial context in which the contract was made and favoured a commercially sensible construction wherever possible.

The Court held that "**preferred**" in this context did not mean "exclusive", as in "preferred above all others". Nor did it mean "preferred choice" or "preferred over others", as in "you can expect us to approach you first"; or "all other tenders being equal, we will prefer yours over anyone else's"; or as in "you will get the contract if you can match the highest bidder". It meant only "**approved**", in the sense that the supplier has been approved as being a supplier which the customer is happy to use.

The decision in this case suggests that unless there is evidence to the contrary, "preferred supplier" denotes an "approved supplier" and does not confer any particular rights on the party supplying the services. It does not oblige the customer to give a first (or last) right of refusal to the supplier nor does it give it an exclusive right of supply. Put simply it does not mean "exclusive", "priority" or "sole" supplier.

If parties intend to have such clauses in their contracts, they should ensure that the contract is properly drafted and define what is meant and the obligations on each party in plain English terms that are not ambiguous or leave things open to doubt.

If you have any queries regarding this article, please feel free to contact Cathy Bormans on 09 915 2412 or Shafraz Khan on 09 915 2422.

Transport Team Contact Details

Catherine Bormans

Telephone **09 915 2412**

Email: cathy.bormans@fortunemanning.co.nz

Shafraz Khan

Telephone **09 915 2422**

Email: Shafraz.khan@fortunemanning.co.nz

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