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Procurement Update

Summer 2014

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1. Welcome

There have been a number of significant developments in procurement law over the last six months. Most importantly, the new procurement directives were adopted by the EU institutions and were published in the OJEU on 28 March 2014. They came into force on 17 April 2014 and the UK now has 2 years to implement them into national legislation. The new directives are:

- Directive 2014/24/EU on public procurement;
- Directive 2014/25/EU on procurement by entities operating in the water energy, transport and postal service sectors;
- Directive 2014/23/EU on the award of concession contracts.

The Cabinet Office has issued a number of discussion papers in areas where the directives allow Member States a choice on whether or how to implement particular provisions. It is expected that the Cabinet Office will launch a formal consultation on the draft implementing regulations later this year.

2. Summary of case law

2.1 What detail has to be included in a writ?[1]

In November 2012, Caerphilly County Borough Council (**Council**) began a tender for a supply contract for building materials. The invitation to tender stipulated that tenderers should provide confirmation from their parent of their consent to provide a parent company guarantee. Travis Perkins Trading Company (**TPT**) did not respond adequately in this regard. The Council asked for clarification on the matter to be provided by 9am on 11 April 2013 or the tender would be automatically disqualified. The correct information was not submitted until 9.12am. The Council excluded TPT's tender. TPT issued a claim form seeking damages. The claim form referred to the procurement process, the exclusion and mentioned the information received in response to the freedom of information request which showed that incomplete tenders had been received from other bidders. TPT asked the court to make a declaration that the Council had breached the Public Contracts Regulations 2006, as amended, (**Regulations**), general EU and/or Treaty obligations and principles and/or an implied contract. Following a stay, the Particulars of Claim were served on 4 November 2013.

The court considered whether the details in the claim form were sufficient to cover the claims in the Particulars of Claim. If they were not, then the claims in the Particulars of Claim would have been time barred. The court noted that it was clear from the claim form that a declaration that the Council was in breach of the Regulations, general EU and/or Treaty obligations and principles and/or an implied contract was sought. The judge noted that only brief details are required to describe the nature of the claim but also noted that the remedy sought needs to be spelt out. The court also noted that, in considering the wording in the claim form, it is legitimate to have regard to the Particulars of Claim and the correspondence and applications sent or served at around the time of the claim form. It may even be legitimate to look further back in time at communications between the parties. The court held that it was clear that the claim form related to information contained in correspondence between the parties.

Comment

The case highlights the importance of ensuring that the writ is not worded too restrictively and in particular that it summarises the nature of the claim and sets out the remedies sought clearly. The judge's comments clarify that it is sufficient to set out brief details to describe the nature of the claim.

2.2 When are property deals public works contracts?[2]

On 15 May 2014, Advocate General Wahl gave his opinion on the interpretation of the concept of "public works contracts" under the old Public Works Contracts Directive 93/97.

In August 2003, a project was tendered which involved a contract between the Commune of Bari and a private undertaking for the construction and future lease of a building. Under the contract, the contractor would agree to lease the buildings, which were to be constructed in accordance with contractual specifications, to the Commune of Bari for a period of 18 years. Bari was funded by the Italian Ministry of Justice and the Ministry had significant influence over the works through technical specifications. The European Court of Justice (**ECJ**) was asked to consider whether the contract was a public works contract or a lease. The distinction is important as leases are exempt from the procurement rules.

The Advocate General referred to the judgment of the ECJ in **Commission v Germany**[3] where the ECJ stated that it is the main purpose of a contract that determines the applicability of the relevant public procurement directive. The Advocate General concluded that in this case, construction was the main purpose of the contract and that the immediate and principal object of a contract for the construction of a building that has not yet been started cannot be considered a lease. An important factor in this case was that, while the Ministry of Justice was not procuring the works, it was funding them and had a significant influence over the specifications. Finally, the Advocate General noted that a lack of profit does not mean that there is no 'pecuniary interest'. An economic benefit may also be held to exist where it is provided that the contracting authority will hold a legal right over the use of the works.

1 Travis Perkins Trading Company Limited v Caerphilly County Council [2014] EWHC 1498.
2 Case C-213/13 Impresa Pizzarotti & SpA v Commune of Bari, Advocate General's Opinion, 15 May 2014.
3 Case C-536/07 [2009] ECR 664.

The Advocate General thus concluded that a contract for the lease of something in the future was equivalent to a public works contract under Directive 93/37.

Comment

Although the judgement relates to the old Public Works Directive, it continues to be of relevance today. The definition of "public works" in Directive 2004/18 focuses on the 'object' of a contract and whether the contracting authority has decisive influence on the type of design of the works (the requirement for a contracting authority to engage a person to procure works has been removed in Directive 2004/18). It is hoped that the judgment of the ECJ will provide further clarification on what amounts to a "decisive influence" by the contracting authority.

2.3 Award of contract between separate publicly-owned entities does not fall within in-house exception[4]

On 7 May 2014, the European Court of Justice (**ECJ**) ruled on a matter referred by the German court. It concerned the application of the "in-house exception" to the direct award of a contract by a German university (whose purchases of products and services are controlled by the City of Hamburg) to a separate company (partly owned and controlled by the City of Hamburg).

Under the in-house exception, the EU procurement rules will not apply where a public contracting authority exercises over a distinct entity a control that is similar to that which it exercises over its own departments.[5]

The ECJ was asked to consider whether a contract between a contracting authority and a contractor who is not linked by a relationship of control, but both of whom are under the control of the same body, which is a contracting authority, and carry out the essential part of their activities for that same body, is a "public contact" within the meaning of Directive 2004/18 and should therefore be subject to the procedures in that directive.

The ECJ ruled that there is no relationship of control between the university as the contracting authority and the contractor as the university holds no shares in the contractor and is not represented on its management bodies. The court therefore held that the in-house exception cannot apply to this case. The City of Hamburg did not exercise "similar control" over the university – rather the control only extended to part of its activity, namely procurement, and the university had a large degree of autonomy in education and reserved matters.

Comment

The case is a reminder that any exception to the application of public procurement rules will be interpreted strictly by the courts. It also provides a welcome further clarification on the application of the Teckal in-house exception which will be codified into the new procurement directive. The element of control remains a key element in the new directive and this case will therefore continue to provide helpful guidance under the new directive.

2.4 When does time start to run?[6]

Acquedotto Pugliese, an Italian public undertaking and a contracting entity under the Utilities Directive 2004/17, launched an open tendering procedure in 2011 for the award of a four year cleaning and disinfecting contract. A decision was made to award the contract to an ad hoc tendering consortium on 6 July 2011. One of the members of the consortium subsequently withdrew.

An unsuccessful bidder brought an action challenging the tender documentation of the contract award procedure, in particular:

- the decision to approve the alteration of the composition of the successful consortium; and
- the fact that the contracting authority failed to exclude a competing undertaking placed ahead of the claimant.

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[4] Case C-15/13 /Datenlotsen Informationssysteme GmbH v Technische Universität Harburg – Harburg judgment of 7 May 2014.
5 Case C-107/98 Teckal.
6 Case C-161/13, Idrodinamica Spurgo Velox srl v Acquedotto Pugliese SpA, judgment of 8 May 2014.

The European Court of Justice (**ECJ**) was asked to consider whether the 30-day limitation period starts to run from the date on which the person concerned became aware or ought to have become aware of the existence of irregularity or from the date of communication of the award decision. The ECJ held that the 30-day period for bringing an action must start to run again from the date on which the tenderer receives notification of the decision authorising the change in the consortium or the date on which it became aware of that decision. In this case, this was after the award decision but before the contract was signed. In relation to the second claim, the ECJ held that the claimant should have been in a position to raise a claim within 30 days of the original contract award decision.

Comment

The case highlights once again the precise time at which the limitation period starts to run, particularly in circumstances where a decision (in this case the decision by the contracting authority to allow a change in the composition of the consortium) is made after the award decision but before the contract has been entered into. The case confirms the existing law that time starts to run from the date of knowledge of the breach. Therefore, where the breach happens after the award decision, time will run from when the claimant knew or ought to have known of the later breach and not from the date of the original award decision.

2.5 Set aside applications: Adequacy of damages and the balance of convenience[7]

In September 2012, the Western Health and Social Care Trust (**Trust**) and the Department of Health, Social Services and Public Safety (**Department**) issued a notice in the Official Journal in relation to a restricted procedure for the award of a framework agreement. The framework agreement included a construction contract for the construction of the Omagh enhanced local hospital.

Sisk was successful at pre-qualification stage and subsequently submitted a tender. It was informed by the Department in October 2013 that it had not been successful and that McLaughlin and Harvey had been appointed as preferred bidder. Sisk was told that its total score had been 92.69 compared with the preferred bidder's score of 92.70. Sisk began court proceedings on 27 November 2013, alleging that the procurement procedure had breached the Public Contracts Regulations 2006, as amended (**Regulations**).

The Trust and the Department applied to end the suspension imposed by Regulation 47G of the Regulations which prevented the Trust from entering into the framework agreement with the successful tenderer. The court reiterated that the set aside application under Regulation 47H should be determined in accordance with the test for interim injunctions in the **American Cynamid case**[8] which required the following issues to be considered:

- Is there a serious question to be tried?
- If so, would damages be an adequate remedy for the party injured by the court's grant, or failure to grant, an injunction?
- If not, where does the balance of convenience lie?

In particular, the court noted the difficulty in assessing damages which relate not only to the issue of loss but also whether that loss should be discounted, and if so, by how much on the basis that the plaintiff's claim was for the loss of a chance. The court concluded that each case turns on its own facts and that the court must assess the difficulties in calculating damages. The court noted that, although it would usually be the case that, if damages are an adequate remedy, the claim for an interim injunction will fail, such an outcome is not guaranteed. It referred to the decision of the English High Court in Covanta[9], where the assessment of damages was particularly difficult, or where the assessment is by reference to the loss of chance. In these circumstances, an interim injunction may be granted even though damages might be capable of being an adequate remedy.

The court found that a number of the claims raised by Sisk (relating to errors in selecting the preferred bidder and alleged errors in scoring the bids) raised triable issues. It also considered that damages would be an adequate remedy for the plaintiff but not for the defendant contracting authority (despite the offer of a cross–undertaking in damages by the

7 John Sisk & Son Holdings Ltd v Western Health and Social Care Trust [2014] NIQB 56.
8 American Cynamid Co v Ethicon [1975] AC 396.
9 Covanta Energy Ltd v Merseyside Waste Disposal Authority [2013] EWHC 2922.

plaintiff) and that it would not be too difficult or impossible to quantify damages. The court made particular reference to the fact that Sisk was not the incumbent supplier and that the difference between the marks was very small and that therefore only a small change would lead to Sisk having been appointed as the preferred bidder.

The court concluded that the balance of convenience favours the public interest in the construction of the new hospital in an appropriate timescale. In so holding, the court considered the losses incurred in having to run an out of date hospital, the risk of loss of funding and the risk of withdrawal of the successful tenderer from the process which could lead to a collapse of the entire process. The court, therefore, made an order lifting the automatic suspension, thus allowing the Trust to enter into the framework agreement.

Comment

Recent case law in Northern Ireland has favoured the lifting of the automatic suspension. This case highlights that the decision of the court will turn on the particular facts of the case. In this case, the court highlighted the fact that the scores of the successful tenderer and the claimant were very close and the potential loss of funding. The case also highlights the need to provide detailed evidence at the set aside application as the court struck down a number of claims on the basis that insufficient evidence had been provided.

3. Procurement News Roundup

3.1 Electronic invoicing in public procurement

A new directive on electronic invoicing, which reduces the obstacles to entering the internal market, was approved on 14 April 2014 by the Council of the European Union.[10] The new directive aims to improve the cost and speed of the current process by advancing the use of new technology in public tenders and by creating a more compatible system for different e-invoicing systems operated across Member States.

3.2 ICT Standardisation

On 3 April 2014, the European Commission adopted a decision which allows contracting authorities across Europe to directly reference some of the most widely used ICT technical specification when procuring hardware, software and information technology products and services.[11] The Commission's aim is to encourage ICT standardisation and interoperability as well as to encourage competition in the supply of interoperable solutions and void situations where contracting authorities are "locked in" to certain ICT service providers due to ICT technical specifications.

The Commission has, in conjunction with the recently created multi-stakeholder platform for ICT standardisation (a group consisting of all major stakeholders in the sector including representatives from Member States, industry and civil society), identified six of the most widely used ICT technical specifications: Internet Protocol v6, Lightweight Directory Access Protocol v3, Domain Name System Security Extension, Domain Keys Identified Mail Signatures, ECMA Script – 402 International Specifications and Extensible Markup Language v1.0. It is understood that the Commission will announce additional common ICT technical specifications in the course of the next few months.

The standardised ICT technical specifications must be established in accordance with the principles of openness, fairness, objectivity and non-discrimination and can be used in addition to those developed by European, international or national standard developing organisation.

3.3 New model services contract for ICT services

The Crown Commercial Service and the Government Legal Service have developed a new Model Service Contract to be used by Government Departments and other contracting authorities for major services contracts. This new form of contract is to replace the OGC Model Service ICT Contract (version 2.3).

The Cabinet Office has advised that the new form of contract should only be used for procurement processes that involve

[10] Directive 2014/55/EU on electronic invoicing in public procurement: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0055

[11] 2014/188/EU: Commission Implementing Decision of 3 April 2014 on the identification of ICT technical specifications eligible for referencing in public procurement: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:JOL_2014_102_R_0008

a stage of formal negotiation, namely competitive dialogue or the negotiated procedure. However, it has been suggested that the new Model Service Contract could form the template for contracts on other lower value or more straight forward procurement procedures.

In terms of the procurement process, the new contract contains added protections for contracting authorities in the form of warranties from the supplier:

- in respect of the integrity of the information contained in the PQQ and ITT as well as any other information provided as part of the procurement process;
- regarding the financial model being a true and accurate reflection of forecast cost on profit margin; and
- regarding notification of tax non-compliance.

The new contract allows the supplier to appoint, subject to approval from the contracting authority, a "Remedial Adviser". A Remedial Adviser will be a third party expert who is appointed to resolve issues that have arisen between the supplier and the contracting authority. It is envisaged this new role will not only help to mitigate problems that arise on contracts but also to bring about improved performance of those contracts. In extreme cases, the Remedial Adviser's expertise could prevent a supplier from defaulting on the terms of the contract.

Other points to note about the new Model Service Contract are:

» due diligence: "allowable assumptions" have been incorporated;
» limitation of liability: cap on liability for the supplier has increased from 125% to 150%, however this is now an annual cap. The cap on the contracting authority has also increased to equate to the annual charge per annum;
» termination: supplier may terminate for non-payment of overdue charges which are not in dispute 40 working days after receipt of notice of non-payment (previously this was 90 days);
» supply chain rights: consent from the contracting authority is now only required for key subcontractors. The contracting authority may object to the appointment of subcontractors in certain circumstances;
» COTS Software: supplier may now licence its COTS software on their standard COTS terms;
» inclusion of an unlimited employee liabilities indemnify in favour of supplier;
» KPI drafting has been updated so that a contracting authority may withhold a proportionate amount of service charges until the relevant KPI failure has been rectified; and
» drafting to promote the use of SME suppliers and the anti-avoidance of tax.

A copy of the new Model Service Contract may be accessed at the Crown Commercial Service website: https://ccs.cabinetoffice.gov.uk/about-goverment-proceurement-service/contracting-value-model-services-contract.

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