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Procurement Update.

Spring 2016

Contents

1. Welcome

This procurement update focuses on recent case law of both the European and national courts on public procurement issues. There have been a number of interesting cases over the past 6 months. Of particular note is the judgment given by the Court of Session in Scotland granting the first declaration of ineffectiveness in the UK.

The new Public Contracts Regulations are starting to bed in. Following on from our previous update, we continue to look at guidance published by the Crown Commercial Service and European Commission on issues related to public procurement reform and the publication of the new procurement thresholds, applicable from 1 January 2016. The adoption of the Utilities Contracts and the Concession Contracts Regulations 2016 is imminent. More information will follow in our next update.
As always, please feel free to get in touch if you have any queries on any aspect of this update or indeed on any other procurement issue.

2. Summary of caselaw[1]

2.1 Are damages for a breach of the public procurement rules discretionary?

On 15 December 2015, the Court of Appeal handed down its judgment in an action for damages for breach of the public procurement rules.

The Nuclear Decommissioning Authority (Contracting Authority) issued a tender under the Public Contract Regulations 2006 (2006 Regulations) for services relating to a major nuclear decommissioning contract (the Contract). Energy Solutions EU Limited (Energy Solutions) formed part of a consortium called Reactor Site Solutions (RSS) which tendered for the Contract. On 31 March 2014 the Contracting Authority wrote to RSS advising them that their tender was unsuccessful and that they intended to award the Contract to another consortium. This letter started the clock on the ten day standstill period which was due to end on 14 April 2014.

Energy Solutions brought proceedings to challenge the procurement procedure in the High Court on 28 April 2014, outside the standstill period and after the Contract had been entered into. The High Court held that the award of damages was not discretionary. It did not consider whether the fact that Energy Solutions did not issue a claim form before the Contract had any bearing on the availability of damages.

Both parties brought appeals to challenge the High Court's ruling, as follows:

1. Energy Solutions argued that the High Court judge ought to have decided as a matter of English law that Energy Solutions could not be deprived of damages simply because it failed to issue proceedings in time to maintain the suspension of the award of the Contract.

2. The Contracting Authority claimed that the High Court erred in ruling that the award of damages was not discretionary if a breach of the 2006 Regulations is established.

Lord Justice Vos ruled that, in relation to the first issue, as a matter of English law, there is no legal principle allowing for a claimant to be deprived of damages for failing to apply for interim discretionary relief and that this could not be superseded by EU law to the detriment of the injured claimant. In making the decision, he noted that the standstill and court application regime is available as an option to the unsuccessful tenderer; it was not intended as a pre-condition to the availability of damages.

In relation to the second issue, Lord Justice Vos ruled that there was no discretion available to the Court when deciding upon a claim for damages under the 2006 Regulations. In reaching this conclusion, he considered that firstly, there was no requirement in English law for a breach of statutory duty to be shown to be sufficiently serious before damages could be awarded. Secondly, Lord Justice Vos noted that the requirement for a "direct causal link" between the breach and the loss sustained was much the same as the chain of causation requirement in English law discussed in the first issue raised.

Comment
This decision is likely to be welcomed by bidders in public procurement processes. It clarifies that an unsuccessful bidder does not have to issue proceedings during the standstill period to invoke the automatic suspension of a contract in order to avail of the remedy of damages. It also means that contracting authorities can proceed with the award of a contract and deal with a damages claim separately. Whilst this judgment was in relation to a procurement entered into under the 2006 Regulations, it is still relevant to procurements conducted under the new Public Contracts Regulations 2015 as the remedies regime has remained the same.

2.2 Can a contracting entity accept a substitute tender that has not been pre-qualified?[2]

On 25 November 2015, Advocate General Paolo Mengozzi handed down his opinion, on reference from the Danish Complaints Board for Public Procurement, on the circumstances in which a contracting entity may accept a substitute tender where one member of a consortium goes bankrupt prior to the award of the contract (or prior to the submission of tenders). The case relates to the utilities regime but is equally applicable to public contracts.

The consortium in question consisted of two members and, after one consortium member went bankrupt, the contracting entity permitted the remaining member of the consortium to submit a tender in its own right. The contracting entity subsequently awarded the contract to this consortium member. This decision was challenged by another tenderer on the basis that the successful tenderer had not prequalified, in its own right, to participate in the tender.

1 Energysolutions EU Ltd v Nuclear Decommissioning Authority [2015] EWCA Civ 1262, judgment of 15 December 2015.
2 Case C-396/14 MT Hojgaard A/S, Zublin A/S v Banedanmark, Advocate General's opinion of 25 November 2015.

In giving his opinion, Advocate General Mengozzi noted that the principle of equal treatment requires that tenderers must be treated equally, both when they formulate their tenders and when those tenders are being assessed by the contracting entity. However, he also noted that the application of the principle of equal treatment to public procurement procedures did not constitute an end in itself but must be viewed in light of the aim it is intended to achieve. Advocate General Mengozzi confirmed that the intended aim in this instance was to ensure the widest possible participation by tenderers in a call for tenders to ensure the contracting entity had the greatest choice possible.

Applying the principle to the case at hand, the Advocate General reasoned that, once the consortium was abolished, the successful tenderer became a legal person distinct from the consortium. The key question was whether there can be an exception to the principle that the tenderer who prequalifies for the contract must be the same tenderer who submits the tender. In order to answer this question, the Advocate General believed that the contracting entity should carry out an analysis to determine whether the change in circumstances means that tenderers can no longer be treated equally and whether the successful tenderer is given a competitive advantage.

In this instance, the Advocate General decided that it was ultimately a matter for the referring body, in this case the Danish Complaints Board for Public Procurement, to decide whether the principle of equal treatment had been breached and whether the successful tenderer had benefitted from a competitive advantage as a result of not prequalifying.

Comment
This opinion serves to remind contracting authorities and entities of the significance of the principle of equal treatment in public tendering procedures. We await the decision of the Court of Justice of the European Union with interest to see whether it sheds any further light on the ability of a contracting entity to accept a substitute tender where changes to the consortium have occurred during the procurement process.

2.3 How far can a contracting authority go in specifying a location requirement for a public contract?[3]

On 22 October 2015, the Court of Justice of the European Union (CJEU) handed down a judgment on a reference ruling from a Basque court regarding a location requirement in a tender for public health services.

On 31 January 2011 and 14 June 2011, the Health Department of the Basque Government (Contracting Authority) published two calls for tenders in relation to public health surgical services which were to be carried out in private health care establishments by public healthcare surgeons in order to reduce the waiting times for surgery. The call for tenders indicated that, in order to be eligible to tender, the private healthcare establishment must be located in Bilbao. The rationale behind this decision was due to the need for the services to be carried out with sufficient proximity to patients and their families, the availability of public transport and travelling time and the need to minimise the necessary travel time for medical staff.

Grupo Hospitalario Quirón (Complainant), which owns a private general hospital situated outside of Bilbao, challenged the location requirement. It argued that the requirement was contrary to the principles of equal treatment, freedom of access to public procurement procedures and free competition.

The CJEU acknowledged that the aim of the location requirement was to facilitate the need for the services to be carried out within sufficient proximity to patients and their families, the availability of public transport and the need to minimise the necessary travel time for medical staff. However, the CJEU stated that this requirement constituted a territorial constraint which had the effect of automatically excluding tenderers (including the complainant) despite the fact that they fulfil all of the other requirements set out in the tender documents.

The CJEU therefore held that the requirement was in breach of Article 23(2) of Directive 2004/18 as it prevented equal and non-discriminatory access to the two contracts in question to tenderers who did not have a private hospital situated within the municipality of Bilbao.

Comment
This case may be of particular interest to contracting authorities in Northern Ireland when considering location requirements for public contracts due to the proximity to the Republic of Ireland. It should serve as a reminder to contracting authorities of their obligation to ensure the requirements they set for public contracts are proportionate, non-discriminatory and treat all tenderers equally.

2.4 Can tenderers be required to submit declarations regarding compliance with a minimum hourly wage[4]?

On 17 November 2015, Advocate General Mengozzi gave an opinion on a reference from a German court on whether contracting authorities can require bidders to submit declarations that they will pay their staff a minimum wage.

In April 2013, Stadt Landau in der Pfalz (Contracting Authority) issued a call for tenders for a contract, divided into two lots, regarding postal services for the collection, carriage, and delivery of letters, parcels and packages (Contract). At the time of the advertisement, there was no national legal requirement in Germany to pay staff a minimum wage. However, a law of the region in which the Contracting Authority was located provided that public contracts may only be awarded to undertakings which, at the time of submitting their tender, undertake in writing to pay their staff a minimum wage for performing the service. The Contracting Authority therefore required bidders to submit an undertaking alongside their tender confirming that they would pay their staff a minimum wage when performing services under the Contract (Undertaking). If the Undertaking was not provided with the tender, the tenderer would be excluded from the process.

On 16 May 2013, one of the bidders (Bidder) told the Contracting Authority that they would not provide the Undertaking as they believed the declaration was contrary to public procurement law. The Bidder therefore submitted their tender without the Undertaking. On 25 June 2013, the Contracting Authority requested the Bidder submit the Undertaking within 14 days or else their tender would be rejected. The Bidder did not submit the Undertaking and was subsequently excluded from the tender process. The Bidder brought an appeal before the Public Procurement Board which was dismissed on 23 October 2013. The Bidder appealed to the Higher Regional Court who then referred the issue to the Court of Justice of the European Union (CJEU).

The Advocate General noted that it was necessary for Member States to be able to adopt provisions intended to regulate working conditions, such as minimum salary requirements. He also noted that it was permissible for contracting authorities to lay down special conditions[5] relating to the performance of a contract as long as the special conditions are in line with EU law and are indicated in the contract notice or the specifications. This, therefore, means that contracting authorities can exclude bidders from the tender process if they refuse to provide an undertaking to pay their employees a minimum salary when performing services under a contract.

Comment
The case is topical as the UK's government's 2015 budget introduced a National Living Wage. The case illustrates the importance of specifying special requirements in the contract notice and tender documents in line with the principle of transparency. However, it remains to be seen whether the CJEU will follow the opinion of the Advocate General.

2.5 Can public authorities be considered economic operators for the purposes of the public procurement rules?[6]

On 6 October 2015, the Court of Justice of the European Union (CJEU) handed down a ruling on a reference from a Spanish court on questions relating to the definition of an "economic operator" in Directive 2004/18. The CJEU held that Article 1(8) of Directive 2004/18 must be interpreted as meaning that the term "economic operator" includes public authorities. This means that they may participate in public tendering procedures if and to the extent that they are authorised to offer certain services in return for remuneration on a market.

The Maresme Health Consortium (Bidder) sought to participate in a tendering procedure for the award of nuclear magnetic resonance services for healthcare centres managed by the Corporació de Salut del Maresme I la Selva (Contracting Authority). As part of the tender, tenderers were required to provide a "classification" certificate establishing that they had the capacity to carry out the contract. During evaluation, the Contracting Authority found that the Bidder did not submit the certificate with their tender. When asked to provide the certificate, the Bidder instead provided an undertaking to allocate, for the purposes of the relevant contract, the resources of a commercial entity and also provided a declaration attesting to its status as a public entity. The Contracting Authority notified the Bidder that they would not be admitted to the procedure as they had not provided all of the necessary documentation required.

The Bidder appealed the Contracting Authority's decision by arguing that, due to its position as a public authority, the requirement for a business classification did not apply to it. The Bidder therefore requested to be admitted to the tendering procedure and for the procedure to be suspended. The Spanish court decided to refer a number of questions to the CJEU including whether, for the purposes of Directive 2004/18, public authorities must be regarded as public entities, and if they are to be regarded as public entities, whether they can be regarded as economic operators permitted to participate in public tenders?

The CJEU noted that Recital 4 of Directive 2004/18 explicitly acknowledges the possibility of a "body governed by public law" participating in a tender and that Article 1(8) of the Directive acknowledges that a "public entity" may have the status of an "economic

4 *Case C-115/14 RegioPost GmbH & Co KG v Stadt Landau, judgment of 17 November 2015.*
5 Article 26 of Directive 2004/18.
6 Case C-203/14 Consorci Sanitari del Maresme v Corporació de Salut del Maresme I la Selva, judgment of 6 October 2015.

operator". This demonstrates that Directive 2004/18 does not prohibit public authorities from participating in tender processes. If certain entities are authorised to offer services in return for remuneration on the market, Member States may not prevent those entities from participating in the tendering procedures for the award of public contracts, regardless of whether it is governed by public law or private law.

Comment
This decision is interesting as it demonstrates that contracting authorities can also act as economic operators in public procurements. It is worth noting that the CJEU confirmed that public authorities must already offer services on the market in return for remuneration. This suggests that a contracting authority cannot enter the commercial market for the first time via a public procurement procedure.

2.6 First order of ineffectiveness made[7]

On 1 December 2015, the Court of Session in Scotland granted the first ineffectiveness order in the UK.

In 2015, Inverclyde Council (Council) held a mini-competition under the Crown Commercial Services Framework for Street Lighting Services (Framework Agreement). Lightways (Contractors) Limited (Lightways) was not one of the suppliers admitted to the Framework Agreement for the lot in question (Lot 9) and was therefore unable to participate in the mini-competition. The contract was awarded to Amey Public Services LLP (Amey LLP) for a period of 24 months, with the option to extend.

Lightways challenged the award of this contract on the grounds that, inter alia, Amey LLP was not listed in the Framework Agreement as one of the suppliers for Lot 9. A company called Amey OW Limited (Amey OW) was, in fact, one of the listed suppliers for Lot 9. Whilst Amey OW was a company in the same group as Amey LLP, Amey LLP was not entitled to tender for the call-off contract. Lightways contended that, because Amey LLP was not a party listed on the Framework Agreement, the award of the contract was unlawful as it constituted a direct award without prior advertisement. Lightways sought a declaration of ineffectiveness.[8]

The Council accepted that the award of the contract had been made to Amey LLP in error and that it was in fact Amey OW which was a party to the Framework Agreement. The Council argued that the same offer would have been made to Amey OW and that the error was capable of rectification by novation of the contract from Amey LLP to Amey OW. The Council believed that it would be in breach of the principle of proportionality to hold the award of the contract unlawful and ineffective. Lightways argued that the award of the contract to Amey LLP was not merely a clerical error but rather a fundamental error of substance. Amey LLP and Amey OW are different entities with their own employees, assets and businesses. Therefore, any proposed rectification would result in a further breach of procurement law.

The court stated that there had been a breach of Regulation 19(3) of the Public Contracts (Scotland) Regulations 2012 in that the Council had awarded the contract to an economic operator that was not part of the Framework Agreement. The court did not believe that the principle of proportionality could be relied upon by a contracting authority which had failed to act within its statutory powers. The court believed that it could not be said that the Council intended to award the call-off contract to Amey OW or that there was a consensus between the Council and Amey OW that Amey OW would be awarded the call-off contract. The error made by the Council was not one of mis-designation but rather of proceeding on the (mistaken) basis that Amey LLP was a company within the Amey Group which was a party to the Framework Agreement. Therefore, the court concluded that the Council had no defence to the challenge and subsequently made an order of ineffectiveness.

Comment
This is the first declaration of ineffectiveness given by a UK court. Although this contract was covered by the Public Contracts (Scotland) Regulations 2012, the provisions in Regulation 19(3) in relation to frameworks are identical to the equivalent provisions in the Public Contracts Regulations 2006 (which would have applied to this contract had it been awarded in England, Wales or Northern Ireland). In addition, the provisions in relation to ineffectiveness, whilst not identical, are essentially the same. It is worth noting that the court has not yet determined the level of the financial penalty[9] payable by the Council or whether damages should be paid to Lightways. It is also worth noting that the Council was granted leave to appeal, however it is not yet clear how the Council intends to proceed.

2.7 High Court refuses to lift the automatic suspension of a contract[10]

The High Court has refused to lift the automatic suspension of the award of a contract for substance misuse services (**Contract**) by Sunderland City Council (**Council**).

The Contract was subject to the new "light touch" regime of the Public Contract Regulations 2015. It is important to note that the remedies regime applies to the award of these contracts in the same way if the value of the contract exceeds the higher threshold of £589,148.

7 Lightways (Contractors) Ltd v Inverclyde Council [2015] CSOH 169, judgment of 1 December 2015.
8 The remedy of ineffectiveness sets aside a contract prospectively. It is available in certain limited circumstances, including where a contract has been directly awarded without advertisement in breach of the Public Contracts Regulations 2006 or 2015.
9. Regulation 49(10)(a) of the Public Contracts (Scotland) Regulations 2012, under which this judgment was given, requires a court, when making a declaration of ineffectiveness, to impose a financial penalty. The equivalent provision of the Public Contracts Regulations 2015 is Regulation 102(1).
10 Counted4 Community Interest Company v Sunderland City Council [2015] EWHC 3898 (TCC), judgment of 18 December 2015.

The incumbent provider of the services, Counted4 Community Interest Company (**CICC**), is a not for profit company set up solely for the purpose of delivering these services to the Council. The Council awarded the Contract to Northumberland Tyne and Wear NHS Foundation Trust. CCIC, who were ranked 5th out of 6 tenderers, challenged this decision.
CCIC claimed that the Council had breached Regulation 24 of the Public Contracts Regulations 2015 (**Regulations**)[11] by failing to take measures to prevent, identify and remedy a conflict of interest and by failing to follow published awarded criteria/applying undisclosed award criteria and that this breach amounted to a manifest error.

The Council applied for the automatic suspension of the Contract to be lifted.

The court applied the American Cyanamid test in determining whether to lift the suspension, in the form of a two stage test:

- Identification of whether there was a serious issue to be tried; and
- Assessing the balance of convenience, involving consideration of the adequacy of damages.

Serious issue to be tried
In relation to the alleged conflict of interest, the court considered that the wording "other personal interests" in Regulation 24 is very broad and relates to conflicts other than those that are financial or economic. In this case, the alleged conflict related to an individual on the evaluation panel against whom CCIC had made numerous complaints during their time as the incumbent, which led to an internal investigation and which CCIC considered would compromise his impartiality and independence.

In relation to alleged errors or unfairness in the scoring, the court considered that CCIC's claim could not be considered hopeless or vexatious. The Council argued that CCIC would not be able to prove that any such errors had caused CCIC to suffer loss as, even if some errors were substantiated, it would not bridge the gap in the scoring. The court held that this was difficult to assess without full disclosure of all documents.

Therefore the court considered there was a serious issue to be tried.

Balance of convenience
The Council argued that there was public interest in putting the new contract in place without delay due to issues with the current service provision. CCIC argued that these issues had not been raised with them and that the loss of the contract would be devastating and irreversible for CCIC. The court held that the balance of convenience lay in favour of retaining the automatic suspension due to, inter alia, the Council's delay in the conduct of the procurement process and the fact that alleged grave risks to safety had not been raised with CCIC.

In relation to damages, the court considered that, although damages were quantifiable, they would not be an adequate remedy for CCIC because CCIC would lose its workforce to the successful tenderer as a result of TUPE. The court also found that the Council did not present evidence that it would suffer any loss as a result of maintaining the suspension, particularly as the contract with the successful tenderer was more expensive. The court required CCIC to give a cross-undertaking in damages to cover reasonable additional managerial costs incurred by the Council up to the trial.

The court therefore held that the balance of convenience lay in maintaining the automatic suspension.

Comment
This is the first case where an application to set aside an automatic suspension has been heard under the Public Contracts Regulations 2015 (although the provisions are largely the same as in the Public Contracts Regulations 2006). In the past, English courts appeared reluctant to maintain automatic suspensions however in recent years there have been a number of examples where the court has chosen to maintain the suspension (see, for example, Covanta[12], Edenred[13] and NATS[14]). It is difficult to see a clear trend and it appears the courts are assessing each application on a case by case basis. What is clear is that the courts are continuing to use the American Cyanamid test in considering set aside applications.

This is also the first time the court has considered the provisions on conflicts of interest in Regulation 24 and provides some helpful insight into the meaning of "other personal interests" i.e. that this covers interests which are not purely economic or financial.

11 Regulation 24 states
"(1) Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators;
(2) For the purposes of paragraph (1), the concept of conflicts of interest shall at least cover any situation where relevant staff members have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure."
12 Covanta Energy Ltd v Merseyside Waste Disposal Authority [2013] EWHC 2922 (TCC), judgment of 26 September 2013.
13 R (Edenred (UK Group) Limited) v HM Treasury and others [2014] EWHC 3555, judgment of 27 October 2014.
14 NATS (Services) Ltd v Gatwick Airport Ltd [2014] EWHC 3133 (TCC), judgment of 2 October 2014.

3 Procurement News Roundup

3.1 Crown Commercial Service Guidance on subcontracting provisions in the Public Contracts Regulations 2015

The Crown Commercial Service (CCS) has published a guidance note on the new subcontracting provisions in the Public Contracts Regulations 2015. In particular, the guidance sets out the key points, as follows:

- Where the contract will be performed at a facility under the control of the contracting authority, the contracting authority is obliged to require the main contractor to provide basic contact information on their immediate subcontractors.
  o For works and services contracts provided at contracting authorities' facilities under the direct supervision of the contracting authority, the contracting authority must require the main contractor to provide basic contact information on their immediate subcontractors involved in such works or services.
  o This information must be provided at the latest by the time the contract starts to be performed.
  o The contractor must provide the name of the subcontractor, their contact details and details of their legal representatives and notify the contracting authority of any changes.

- The contracting authority may ask the main contractor to provide basic contact information on their subcontractors and supply chain.

- The contracting authority has discretion to verify if there are grounds to exclude a subcontractor on either mandatory or discretionary grounds.
  o If a contracting authority does verify whether there are grounds for excluding subcontractors, it must require the main contractor to replace subcontractors where there are compulsory grounds for exclusion and may require replacement where there are non-compulsory grounds.

3.2 Revised thresholds from 1 January 2016 and new OJEU forms published [15]

Regulations[16] implementing revised thresholds entered into force on 1 January 2016.
The Commission has also published a communication setting out the corresponding values in the national currencies other than euros of these thresholds. The revised thresholds and their UK equivalent values are:

Public Contracts Regulations		
	Previous thresholds	**Revised threshold**
Supplies and Services (central government authorities)	**(€134,000) £111,676**	**(€135,000) £106,047**
Supplies and Services (all other contracting authorities)	**(€207,000) £172,514**	**(€209,000) £164,176**
Works Contracts (all bodies)	**(€5,186,000) £4,322,012**	**(€5,225,000) £4,104,394**
Light Touch Regime	**N/A**	**(€750,000) £589,148**
Utilities Contracts Regulations		
	Previous thresholds	**Revised threshold**
Supply and services contracts and design contracts (all bodies)	**(€414,000) £345,028**	**(€418,000) £328,352**
Works contracts (all bodies)	**(€5,186,000) £4,322,012**	**(€5,225,000) £4,104,394**
Light Touch Regime	**N/A**	**(€1,000,000) £785,530**
Concession Contracts Regulations		
	Previous threshold	**Revised threshold**
Works or services concession contracts (all bodies)	**N/A**	**(€5,225,000) £4,104,394**

It is worth noting that whilst the euro thresholds have increased, due to exchange rates, the sterling thresholds have actually reduced. This is likely to be disappointing to contracting authorities as it means that more contracts will be caught by the regime.

15 Directive 2009/81, Directive 2004/18 and Directive 2014/17.
16 Commission Delegated Regulation 2015/2170 amending Directive 2014/24, Commission Delegated Regulation 2015/2171 amending Directive 2014/25 and Commission Delegated Regulation 2015/2172 amending Directive 2014/23.

The new OJEU forms have also been published which have been updated to reflect the position under the Public Contracts Regulations 2015. The new forms include forms for notice of modification of a contract under Regulation 72, forms for the advertisement and award of concession contracts and for contracts awarded via the "light-touch" regime. The new forms are available via the SIMAP website .

3.3 European Commission adopts European Single Procurement Document[17]

On 5 January 2016, the European Commission adopted the new European Single Procurement Document (ESPD). The ESPD will replace the current system, which can differ drastically between Member States, and is intended to considerably reduce the administrative burden for companies, particularly small and medium-sized enterprises. The introduction of the ESPD is hoped to simplify participation in public procurement procedures for buyers and suppliers and to facilitate cross-border public procurement. The ESPD allows contracting authorities to use the ESPD service to define the to-be-evaluated exclusion and selection criteria, pre-complete the ESPD and provide it in a structured way to potential bidders. Tenderers can then use the service to electronically self-declare that they meet the necessary requirements without the obligation to attach any certificates. Only the successful tenderer will need to submit all the documentation.

In order to facilitate the application of the ESPD, the European Commission is currently developing a free "ESPD Service", a web-based system, designed to create and edit the ESPD. In order to facilitate cross-border bidding, the ESPD Service is linked to e-Certis, a tool that helps clarify what kind of certificates and attestations are required by procurers in their own or other countries.

Contracting authorities are obliged to accept the ESPD from 26 January 2016.

3.4 E-learning module created to help public procurers spot bid-rigging[18]

The Competition and Markets Authority and Crown Commercial Service (CCS) have created an e-learning module available through the CCS hub which is aimed at enabling central government procurers to identify and prevent attempts to win contracts through anti-competitive conduct.

Bid rigging is the process by which undertakings establish agreements between themselves which have as their object or effect the prevention, restriction or distortion of competition within the internal market. Bid-rigging is a serious infringement of competition law, which can lead to fines and liability in damages for companies involved, as well as possible criminal sanctions. The purpose of the training is to help public procurers gain an awareness of the kinds of activities and behaviours they should look out for, how they can mitigate risks and where they can get help if they suspect bid-rigging may have occurred.

3.5 Online machine translation service available for all TED notices[19]

From 15 January 2016, an online machine translation service is available, free of charge, for all public procurement notices published in Tenders Electronic Daily (TED). The service will be available in all 24 official EU languages.

This service is aimed at increasing transparency in public procurement opportunities, as language has been identified as one of the main barriers to cross border bidding. The machine translation service should make it easier for companies and suppliers to participate in cross-border tenders throughout the EU. The service should also benefit bidders from non-EU countries with whom the EU has public procurement commitments through international agreements.

Automatic translations can be requested for any public procurement notice on TED and will be made available shortly after the request is sent.

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17 Commission notice MEX/16/4
18 https://www.gov.uk/government/news/public-procurers-learn-how-to-spot-bid-rigging

19 European Commission – Article (Published 15/01/16).