CARSON McDOWELL

Procurement Update.

Summer 2016

Contents

1. Welcome

2. Summary of caselaw

2.1 Can a contracting entity accept a substitute tender that has not been pre-qualified?
2.2 Court of Appeal rules that loan by local authority to sports stadium does not constitute State aid.
2.3 Scottish Court of Session refuses to grant application to lift automatic suspension.
2.4 Can ERDF funding be clawed back where a contracting authority fails to comply with domestic procurement law?

3. Procurement News Roundup

3.1 Competition and Markets Authority and Crown Commercial Service release e-learning tool to target bid rigging.

1. Welcome

This procurement update focuses on recent case law of both the European and national courts on public procurement issues. We also look at some recent Crown Commercial Service guidance on bid rigging in public procurement.

The Public Contracts Regulations 2015 have been in place for 18 months now. The Utilities Contracts Regulations 2016 and Concessions Contracts Regulations 2016 apply to contracts awarded from 18 April 2016 and it will be interesting to see how these bed in, in particular in relation to concession contracts.

Whilst the result of the 23 June referendum on the UK's membership of the European Union (EU) resulted in a majority voting to leave the EU, the UK is still a member of the EU and the European directives regulating public, utilities and concessions procurements continue to apply in the same way. The UK must formally serve a notice on the EU, pursuant to Article 50 of the Treaty on the European Union, that it wants to exit the EU (the so-called "Article 50 notice"). From the date the Article 50 notice has been served, the UK has two years in which to negotiate its future relationship with the EU. (Note that the two years can be extended with the unanimous consent of all the remaining EU Member States). During the two years (or any extended period), the UK remains a full member of the EU. What happens thereafter will depend on the kind of relationship which the UK will negotiate with the EU. For example, if the UK becomes a member of the European Economic Area, the procurement directives will continue to apply in the same way as before. Regardless of which relationship emerges from the negotiations, it is important to note that the procurement directives are implemented into UK law in the form of the Public Contracts, Utilities and Concessions Regulations which will continue to apply until such time as they are amended or repealed by the UK Government. We will continue to keep you informed of any updates.

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

2.1 Can a contracting entity accept a substitute tender that has not been pre-qualified?[1]

We previously discussed the opinion of Advocate General Mengozzi 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 Court of Justice of the European Union (CJEU) has now given its judgment in this case, which largely follows what was set out in the opinion.

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.

The CJEU considered that the principles of equal treatment and transparency mean that tenderers must be in a position of equality when they formulate their tenders and when the tenders are assessed by the contracting entity (or contracting authority, as the case may be). In particular, the principle of equal treatment requires all tenderers to be afforded equality of opportunity when formulating their tenders and implies that competing tenderers must be subject to the same conditions. In allowing one member of a consortium to continue as a tenderer in its own right, the contracting authority must ensure this takes place in conditions which do not infringe the principle of equal treatment of all tenderers.

The CJEU found that the principle of equal treatment, read together with Article 51 of Directive 2004/17/EU relating to selection of tenderers, did not mean a contracting entity is in breach of that principle in allowing one member of a consortium to continue in a tender process following the bankruptcy of its consortium partner provided:

- That the remaining consortium member satisfies the contracting entity's requirements alone; and
- The continued participation of the consortium member does not put any other tenderers at a competitive disadvantage.

Comment
This case is interesting for bidders going forward at a time of economic uncertainty where there may be increased likelihood of economic operators going bankrupt during procurement processes. This demonstrates that a contracting authority can accept another economic operator into the procurement process provided the conditions outlined above are met. However, in practice, it may be difficult for contracting authorities to determine whether these conditions are met which may lead to reluctance on the part of risk averse contracting authorities to allow these changes to be made.

2.2 Court of Appeal rules that loan by local authority to sports stadium does not constitute State aid.[2]

The Court of Appeal has ruled that a loan by Coventry City Council (Council) to Arena Coventry Limited (ACL), the company operating the Ricoh Stadium (in which the Council was a 50% stakeholder) does not constitute illegal State aid.

The circumstances requiring the grant of the loan arose after Coventry City Football Club (CCFC), which held a licence to occupy the arena and was contracted to pay rent to ACL, defaulted on loan repayments which resulted in ACL finding itself in financial difficulties.

The Council granted a £14.4 million loan to ACL, which was to be repaid over 41 years. This was challenged by the owners of CCFC (SISU) who alleged the loan was not one which would be made by another prudent investor on similar commercial terms.

The High Court considered the market economy investor principle (MEIP) test and concluded that the Council had been acting to protect its commercial interests and that ACL had not been granted a selective advantage. The MEIP test involves consideration of whether a private investor in comparable circumstances would have provided the same loan if it was operating under normal market conditions. Each case will turn on its own facts. In this case, the High Court considered, in particular, the amount of the loan and the security; the term; the interest rate and rate of return; and the commercial justification for the loan.

The Court of Appeal upheld the decision of the High Court and noted, in particular, that the High Court had correctly applied the MEIP test. The Court of Appeal also confirmed that public authorities have a wide degree of discretion when deciding whether to make an investment.

1 Case C-396/14 MT Hojgaard A/S, Zublin A/S v Banedanmark
2 R (Sky Blue Sports & Leisure Ltd & Ors) v Coventry City Council [2016] EWCA Civ 453

Comment
This case should be welcomed by contracting authorities considering investment in local businesses or ventures. However, in such a case, any investment made will still have to comply with the MEIP test which involves a complex assessment of the individual facts of an investment.

2.3 Scottish Court of Session refuses to grant application to lift automatic suspension.[3]

Aberdeenshire Council (Council) conducted a procurement process for the provision of sheriff officer services. The procurement was subject to the Public Contracts (Scotland) Regulations 2012 (2012 Regulations). The incumbent provider, Scott & Co, was notified that it had been not awarded the contract and issued proceedings against the Council for breach of the 2012 Regulations. The Council subsequently applied to have the automatic suspension on the award of the contract lifted.

Scott & Co argued that the Council had used undisclosed award criteria and weightings in its evaluation of tenders, which resulted in a breach of the principle of transparency. Scott & Co further argued that there had been manifest errors in the Council's evaluation of its bid by ignoring vital information it provided in its tender submission and at a site visit.

In considering whether to lift the suspension, the court considered the strength of Scott & Co's case, the balance of convenience and whether damages would be an adequate remedy. In relation to the first argument, the court found that Scott & Co had a weak prima facie case, particularly as the issues identified were things the court thought a reasonably well-informed and normally diligent tenderer would have considered. The court did find however that Scott & Co had a prima facie case in relation to its second ground as there was a clear dispute as to what had occurred at the site visit.

The court considered that, whilst it was not in the public interest for there to be a long period of uncertainty regarding the contract, it is in the public interest that the award of the contract should not be made in breach of the 2012 Regulations. The court noted that the consequences for the Council and the successful tenderer of the prohibition continuing would be less severe than the consequences for Scott & Co if the prohibition was lifted. The court accepted that the setting aside of the contract would be a more satisfactory remedy for Scott & Co.

Comment
Whilst this case appears to signal a departure from the Scottish courts' general reluctance to continue automatic suspensions, the key factor here was that an early hearing was scheduled (within two weeks). This case is also a further demonstration of the factors courts will consider when deciding whether or not to lift an automatic suspension.

2.4 Can ERDF funding be clawed back where a contracting authority fails to comply with domestic procurement law?[4]

On request for a preliminary ruling from the Appeal Court of Bacau, Romania, the CJEU considered two sets of proceedings regarding the validity of measures requiring two local authorities to repay part of grants received from the European Regional Development Fund (ERDF).

Both authorities entered into funding agreements with the Ministry for Regional Development and Tourism (Ministry). The first authority's agreement related to the refurbishment and extension of a school. The authority conducted a tender process which resulted in the award of a contract for audit services which was below the EU threshold. The second authority's agreement related to the refurbishment of a municipal road. This authority conducted a tender procedure which led to the award of a works contract, also below the EU threshold.

The Ministry considered that both tender procedures breached national public procurement law and imposed a penalty in the sum of 5% of the amount of the contracts in question. Both authorities brought an action seeking to annul the penalties.

The CJEU was asked to consider whether failure to comply with the national procurement regime was an "irregularity" as defined within the European regulations on the protection of the EU's financial interests and ERDF funding. In this regard, the CJEU found that such failure may constitute an "irregularity" if the breach has, or would have, the effect of prejudicing the general budget of the European Union by charging an unjustified item of expenditure.

The CJEU also held that the purpose of the financial corrections Member States must make if they detect irregularities is to correct an advantage which has been wrongly received by the economic operator concerned. This is therefore not a penalty but a consequence of a finding that the conditions required to obtain the advantage have not been observed, rendering the advantage wrongly received.

3 Scott & Co (Scotland) LLP v Aberdeenshire Council [2016] CSOH 64
4 Jude ul Neam (C 260/14), Jude ul Bac u (C 261/14) v Ministerul Dezvolt rii Regionale i Administra iei Publice

Comment
This case highlights the obligation on public bodies to comply with EU procurement laws when awarding contracts which are backed by EU funding and demonstrates that, where necessary, the CJEU will take action to protect the financial interests of the EU.

3 Procurement News Roundup

3.1 Competition and Markets Authority and Crown Commercial Service release e-learning tool to target bid rigging.[5]

The Competition and Markets Authority (CMA) and Crown Commercial Service (CCS) have developed a tool to help procurers and supply chain professionals understand why bid rigging is harmful, learn how to spot tell-tale signs that suggest a bid may be illegal, deal with suspect bids and know where to go for further help.

The tool is being made available to members of the Chartered Institute of Procurement and Supply and the Local Government Association. The CMA has also written an open letter to its members[6] and has produced a 60-second summary.[7]

Bid rigging is a form of cartel where businesses collude when tendering for contracts. Bid rigging is a serious breach of competition law which drives up the price of a tender.

The CMA's open letter and the 60-second-summary highlight the following suspicious bidding patterns which contracting authorities should look out for:

- Bids received at the same time or containing similar or unusual wording;
- Different bids with identical pricing;
- Bids containing less detail than expected;
- The likely bidder failing to submit a bid;
- Bids that drop on the entry of a new or infrequent bidder;
- The successful bidder later subcontracting work to a supplier that submitted a higher bid;
- Expected discounts suddenly vanishing or other last minute changes;
- Suspiciously high bids without logical cost differences (e.g. delivery distances); and/or
- A bidder that betrays discussions with others or has knowledge of previous bids.

We are experienced in advising public and private sector clients on competition law. Please feel free to contact of member of our team if you have any questions or concerns in relation to bid rigging.

Declan Magee
Partner

+44 (0)28 9034 8827
declan.magee@carson-mcdowell.com

Dorit McCann
Partner

+44 (0)28 9034 8816
dorit.mccann@carson-mcdowell.com

Niamh McGuckin
Solicitor

+44 (0)28 9034 8817
niamh.mcguckin@carson-mcdowell.com

CARSON McDOWELL

5 https://www.gov.uk/government/news/procurement-tool-targets-bid-rigging-cheats
6 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/529978/Open_letter_to_procurement_professionals.pdf
7 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/378097/Bid_rigging_-_advice_on_procurement.pdf