

## Procurement update

January 2012

In this update we touch on a variety of current issues in procurement law including the role of environmental considerations in public procurement and the shape of public procurement for 2012. We also consider recent UK and EU case law.

### The ECJ rules on the application of the negotiated procedure without notice

#### Background

- On 27 October 2011, the ECJ handed down its judgment (which is only available in Greek and French) on an action brought by the European Commission against Greece.
- The Court ruled on the use of the negotiated procedure without notice to include additional services in a contract.
- The ruling follows enforcement action by the Commission after Greece failed to implement the Commission's original decision. This demonstrates the Commission's role as a proactive enforcer of procurement law.

#### Facts

The action concerned the use of the negotiated procedure without notice by four Greek municipalities to add further town and country planning services to existing contracts.

Directive 2004/18/EC includes a mechanism (in articles 20 and 31 (4)) for new services to be added to existing contracts. However, authorities seeking to rely on this provision must satisfy a strict test requiring that the new services (i) were unforeseen at the time of the original contract and (ii) either: for technical or economic reasons cannot be carried out by another operator, without major inconvenience to the authority; or, are strictly necessary to the later performance of the contract.

#### Key points of the judgment

- The requirements for a negotiated procedure without notice must, as the ECJ has previously held, be interpreted strictly.
- Contracting authorities seeking to rely on the procedure must be able to demonstrate to the court that unforeseen circumstances genuinely exist and provide a persuasive explanation as to each element of the test set out in the Directive.
- Otherwise there will be a failure to ensure transparency and equal treatment as required by the Directive and the Treaty on the Functioning of the European Union.

### Commission guidance on green public procurement

The Commission has published the second edition of its guidance on environmental or 'green' public procurement ("GPP") 'Buying Green'. The guidance is not legally binding but is intended to help authorities plan and implement green procurement. GPP is a process whereby public authorities seek to procure goods, services and works with a reduced environmental impact throughout their life cycle.

#### Key points

The Guidance considers that GPP can legitimately influence each stage of the procurement process. Key suggestions include:

- the use of energy performance contracting when creating a business case;
- defining technical specifications by reference to European, international or national standards or by reference to eco-labels;
- specifying particular materials and production methods in so far as these are related to the subject of the contract;
- excluding certain bidders who have failed to comply with national environmental legislation; and
- incorporating environmental aspects into the evaluation of tenders on the basis of the most economically advantageous tender.

#### Comment

GPP is clearly a useful tool for reducing carbon emissions and contributing more widely to environmental policy objectives. However, contracting authorities must ensure that they apply the advice set out in the Guidance with some caution as the use of GPP within the existing legal framework is not straightforward and EU procurement law continues to develop in this area.

For example, the overarching principles of non-discrimination mean that whilst technical specifications may be defined by reference to eco-labels, a bidder cannot be required to be registered under an eco-label (see for example, the opinion of the Advocate General discussed below). Authorities must also carefully consider whether it is more appropriate to assess environmental considerations at selection stage or award stage.

Buying Green also usefully reminds readers of the wider environmental legislation directed at particular sectors (such as Directive 2009/33/EC on the promotion of clean and energy efficient road transport vehicles, which HM Government implemented into UK law through the Cleaner Road Transport Vehicles Regulations 2011 (2011/1631)) and which will impact certain 'categories' of UK procurement.

It remains to be seen how the revised public procurement modernisation package currently being drafted by the Commission will reflect the GPP objectives.

## The ECJ sets out the distinction between a public service contract and a public service concession

### Background

- The ECJ has ruled on whether a contract for the provision of bus services in Latvia is a '*public services concession*'.
- The case concerns the Utilities Directive, 2004/17/EC.
- The ruling follows the opinion of the advocate general, discussed in our September 2011 update.<sup>1</sup>

### Facts

A regional Latvian authority awarded what it regarded as a service 'concession' for local bus services, following a tender. The consideration under the contract was provided in the form of the right to exploit the services and compensation for any losses incurred in connection with the operation of the services. The level of losses was limited by public law and the agreement's provisions.

Two unsuccessful tenderers obtained an interim injunction preventing the signature of the agreement on the basis that the agreement was in fact a public services contract and had been improperly tendered. When the agreement was signed in breach of the injunction, the challengers applied to the Latvian High Court for the agreement to be declared invalid. The ECJ was subsequently asked whether the agreement at hand was a public service contract or a public service concession.

### Key points of the judgment

- A public service contract involves consideration which is paid directly by the contracting authority to the service provider whereas the consideration for the provision of services under a concession agreement consists in the right to exploit the service.
- For an agreement to be classified as a service concession, the concession holder must adopt at least 'a significant share' of the operational risk.
- Where there are legislative provisions which ensure a service provider is reimbursed by the contracting authority for operating losses and certain pieces

of capital expenditure, an agreement is likely to be considered as a service contract and must therefore comply with the procedural requirements of the Directive as well as the wider TFEU principles.

## All Change in Government Procurement Policy

Cabinet Office Minister Francis Maude announced that central government procurements would in future be managed on the basis that, far from being unlawful under public procurement law, reaching out to the supply-side and engaging in effective pre-procurement market testing would become the norm. Chancellor George Osborne echoed this announcement in his Autumn Statement.

Some of us have long argued for just that approach.

A fear of appearing to favour particular suppliers or of breaching the civil service code has held too many procurement officers back from effective, long term supplier management. In future Departments will be expected to publish their procurement plans so that suppliers will get the 'heads up' they need and can be better prepared for the formal award procedure.

The announcement also acknowledges the need to explode a number of myths that have surrounded public procurement in the UK for some time. Properly designed and run, public procurements can be highly flexible and dynamic and can allow the supply side to showcase their innovation.

Members of our team have experience of designing innovative flexible and 'lean' procurements and can provide practical advice and support on meeting the new policy objectives.

## The General Court considers the legality of a requirement specifying a deadline for posting tenders

### Introduction

- The General Court of the European Union has handed down a judgment (which is only available in French) on a procurement conducted by the ECJ.
- As the ECJ is not a signatory of the TFEU, it is not bound by Directive 2004/18/EC.
- Instead, the ECJ (along with other EU organs) must comply with Regulation 1605/2002 governing the award of contracts financed wholly or partially from the EU budget.

### Facts

Computer Task Group ("CTG") tendered for a framework agreement to provide IT, call centre and hardware management support to the ECJ. A corrigendum to the original invitation to tender required bids to be sent by 12.00 (midday) on 29 January 2010. CTG's tender was post-marked as being sent at 12.44 on 29 January 2010 and was therefore rejected by the tender opening board.

Norma-A SIA: C-348/10

<sup>1</sup> [http://www.burges-salmon.com/Practices/commercial/Publications/Procurement\\_Law\\_Update\\_summer2011.pdf](http://www.burges-salmon.com/Practices/commercial/Publications/Procurement_Law_Update_summer2011.pdf)

On 9 February 2010, CTG challenged their exclusion and the award of the contract on the basis that: (i) the use of a deadline for submitting bids in addition to a final submission date infringed the principles of equal treatment and non-discrimination; (ii) the ECJ had failed to respond to a request for information sent by CTG four days before the final submission date; and (iii) the ECJ had failed to inform CTG of the grounds on which their tender was rejected and the name of the successful bidder.

### Key points of the judgment

- The legislation governing procurement by the ECJ does not prohibit the inclusion of both a deadline for sending bids and a submission date. Bidders must adhere to both requirements.
- An EU organ conducting a procurement must reply to an information request received no later than five days before the submission date. There is no obligation to reply to a request which is received with less than five days remaining before the submission date.
- A bidder who requests further information regarding the rejection of their tender must include a request for the information and not merely raise objections to the procedure.

*Computer Task Group Luxembourg v ECJ T-170/10*

## The Scottish Court of Session provides guidance on challenging below threshold procurements

### Introduction

- The Scottish Court of Session has ruled on the remedies available when challenging below threshold procurements.
- The decision of Scottish Courts do not bind the English Courts although they can be used as interpretative aids.

### Facts

In April 2009, Sidey submitted a tender to carry out the replacement of kitchens and bathrooms in council houses. The total value of the contract was £2,500,000 so below the threshold at which the Council had to comply with the Public Contracts (Scotland) Regulations. However, the Council voluntarily chose to publish a contract notice on the Public Contracts Scotland website and conduct a competitive tender process.

On 19 June 2009, the Council decided to award the contract to Pyramid and on the same day, a letter was faxed to Sidey informing them of the award decision. However, the fax was sent to the wrong number and Sidey only received the letter after the fax was resent on 29 June. The Council wrote to the successful tenderer on 2 July confirming that their tender had been accepted. Sidey subsequently applied for judicial review of the award decision.

### Key points of the judgment

- The appropriate forum to challenge a below threshold procurement, which is not of cross-border interest, is by judicial review applying domestic law.
- Courts will assess the level of cross-border interest based on the nature and value of the contract and the approach of the authority's employees when designing the procurement.
- Judicial review applicants may argue that a failure to adhere to the evaluation procedures set out in a tender document is a breach of their legitimate expectations and / or that the public authority acted irrationally in departing from the tender document.

*Sidey Limited v Clackmannanshire Council [2011] CSOH 194*

## New thresholds for the application of procurement legislation

On 5 December, the Commission published updated threshold values. The revised thresholds will apply from 1 January 2012.

Application of the Public Contracts Regulations 2006 (as amended)		
	Supply/Services	Works
Central Government	£113,057	£4,348,350
Other contracting authorities	£173,934	£4,348,350
Small lots	£69,574	£810,580

Application of the Utilities Contracts Regulations 2006 (as amended)		
	Supply/Services	Works
All Utilities	£347,868	£4,348,350
Small lots	£69,574	£810,580

Application of the Defence and Security Public Contracts Regulations 2011		
	Supply/Services	Works
All procurers	£347,868	£4,348,350
Small lots	£69,574	£810,580

## Advocate General provides guidance on eco-label requirements

### Key points

- This is an important opinion on the incorporation of environmental and social objectives into the award of public contracts.
- This is a useful example of how the Commission's guidance on green procurement can be used in practice.
- An Advocate General's opinion is not binding on the courts but can be persuasive.

### Facts

In 29 October 2009, the Commission announced that it had sent the Netherlands a reasoned opinion regarding a completed tender for the supply and management of coffee machines, conducted by the province of Noord-Holland.

The Commission expressed concern over how environmental and social objectives had been included in the tenders, particularly:

1. a **technical specification** requiring bidders to supply tea and coffee bearing named organic and fair trade labels;
2. **selection criteria** which asked bidders to demonstrate sustainable purchasing policies and social responsibility; and
3. **award criteria**, which granted additional points to tenders offering sugar and milk bearing named organic and fair trade labels.

### Key points of the opinion

- contracting authorities may design **technical specifications**, which refer to eco-labels but must accept bids with equivalent accreditations or, that otherwise satisfy the requirements to achieve such accreditations.
- **selection criteria** may assess sustainable purchasing and social responsibility of bidders but requirements must be precise.
- A **requirement** to hold a named eco-label may not be used as **award criteria** although a contracting authority may require compliance with the specifications of named eco-labels.

## Cabinet Office announces a return to the status quo for the accelerated restricted procedure

The Cabinet Office has confirmed that the relaxation of the rules on the use of the accelerated restricted procedure, as an emergency measure during the financial crisis was withdrawn on 31 December 2011.

The relaxation was introduced by the European Commission in 2009 to ensure that contracting authorities could maintain service continuity in the event of a contractor insolvency.

The accelerated restricted procedure is once again only available in situations where urgency renders impracticable the time limits for the restricted procedure.

### STOP PRESS

**On 20 December 2011, the European Commission published draft directives on the modernisation of the public procurement rules. We will release an update outlining the key proposals and incorporating the reaction of the UK Government, in January 2012.**

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