

## Procurement update

October 2011

In this update we consider the recent rash of Northern Ireland cases (with some familiar names returning) on transparency of criteria. We also have another look at wider EU developments and UK procurement policy initiatives.

### McLaughlin & Harvey v Department of Finance and Personnel [2011] NICA 60

#### Summary

- The Court of Appeal in Northern Ireland has rejected the Department's appeal against the original decision of the High Court to set aside the award of an £800 million construction framework.
- The Department had applied 39 'topics' to the evaluation of bids which the Court determined were sub-criteria of a kind that, on the evidence, could have affected the way in which the respondent prepared its bid.
- This decision follows the earlier appeal in *Henry Brothers (Magherafelt)* in which the Court of Appeal in NI similarly rejected a request to refer questions to the ECJ.

#### Facts and Background

A consortium of building contractors was unsuccessful in its bid for a place on a major social infrastructure construction framework. The consortium subsequently successfully applied for the framework to be set aside on the grounds that the Department had applied 39 award 'topics' in relation to the headline award criteria. The Department had not previously disclosed those topics or the weightings applied to them. The Department appealed.

#### Key Issues:

The main issue in this appeal is whether the process for the selection of the persons to enter the Framework Agreement was in contravention of the principles of *transparency and equal treatment* contrary to Regulation 4(3) of the 2006 Regulations. In order to determine that issue the Court said that it is necessary to deal with the following questions.

- Are the 39 topics in the evaluation document sub-criteria or 'sub-headings' to which the AT I<sup>1</sup> tests apply?
- If so, were they sufficiently brought to the attention of the tenderers so as to satisfy the requirements of transparency?
- If so, does the application of those sub-criteria contravene any of the three tests established by the ECJ in AT I?

The Court of Appeal agreed with the learned trial judge that the 39 'topics' were indeed *sub-criteria* as they were dealing with different aspects of the 'quality' particulars.

The test set out in AT I remains the correct approach to this issue but authorities must be mindful of the context in which AT I sits, namely the need to satisfy the principle of *transparency*.

On the facts of this appeal, the Department had not met the AT I test and had therefore failed to achieve the degree of transparency required. The Court clarified that this required tenderers to be 'reasonably informed' of sub-criteria by the authority.

### European Dynamics v European Commission Case T-461/08

#### Summary

- A Tenderer challenged the award of a contract after the authority failed to inform it of its award decision.
- The General Court also considered whether the European Investment Bank was subject to the procurement directives.

#### Facts

Due to an administrative error, the European Investment Bank (EIB) failed to inform European Dynamics (ED) (no stranger to the European courts) that its tender for the provision of an information management portal had been unsuccessful. European Dynamics subsequently sought annulment of the contract and the award of damages.

It argued that by failing to inform them of their decision the EIB had breached the principles of transparency, equal treatment and its duty under the Finance Regulation to state reasons. It further claimed that one of the award criteria breached the proportionality principle; that a substantial alteration to the contract had taken place, and that errors had been committed in applying the award criteria weighting.

#### Key points of the judgment

- A failure to inform a bidder of an award decision infringes their right to an effective remedy and may lead to a contract being annulled.
- Criteria which assess a tenderer's ability to perform a contract as opposed to the quality of the services offered are not valid award criteria but must be used as selection criteria.

<sup>1</sup>AT I EAC v ACTV Venezia [2005] ECR I - 10109.

- A post-evaluation alteration to the financial aspects of a bid is capable of infringing the principles of fairness, transparency and non-discrimination.
- On the facts there had been a breach of those principles flowing from the changed weightings and the award decision was annulled. ED could not however prove a causal link between the breach and any financial loss so its claim for damages failed. It did however recover its costs from the EIB.
- The case underscores the importance to bidders of having a strong evidential basis for each allegation in its claim. It is not sufficient to leave the Court to draw inferences (on damages claims in particular).

## First4skills Ltd v Department for Employment and Learning [2011] NIQB 59

### Summary

- The High Court of Northern Ireland was asked to consider whether a contracting authority, which had failed to overturn an automatic suspension of a procurement for one challenger, could apply to overturn an automatic suspension brought about by a second claim.

### Facts and Grounds

The plaintiff First4Skills and another, unnamed, bidder both unsuccessfully tendered to provide training services to the Department for Employment and Learning. Both bidders launched separate actions challenging the award with the effect of automatically suspending contract signature. After the Department unsuccessfully applied to overturn one automatic suspension, a further application was made to overturn the second automatic suspension.

### Key points of the judgment:

- Once an automatic suspension of a contract has been upheld by a court, the contracting authority is unable to execute the document with any party.
- As a consequence, any attempt to overturn an automatic suspension granted under alternative proceedings will be unsuccessful.

## Commission announces Infringement Actions against three member states

On 29 September 2011, the European Commission announced it is taking infringement action against Germany, Italy and the Netherlands for breaches of the public procurement rules.

### Germany

The Commission concluded that the sale of a public body's shareholding in a waste PPP to a private company constituted a new contract award, given the involvement of the new owner in the operational management of the contracts. Public contracts must be (re)opened to competition if amended in a way which is materially different in character from the original

contract. The Commission therefore concluded that the contract should be opened up to a new competitive tendering process in accordance with EU public procurement rules.

### Italy

The Commission concluded that the direct award by an Italian authority of IT contracts to a company in which the authority held a majority shareholding is a breach of the Directive. The existence of a private company shareholder meant that the legal requirements for in-house awards (Teckal) were not satisfied as the Region could not exercise a sufficient level of control over the company.

### Netherlands

The Commission concluded that the Netherlands had failed to fulfil its obligations under the public procurement rules by allowing the two contracting authorities concerned to directly award public contracts to economic operators, worth more than EUR15 million per year, without holding open and competitive pan-EU tendering procedures. The contracts related to the processing and transporting of used paper.

## Commission Staff Working Paper on EU Procurement Law application to Public-Public Contract Relations

The Commission has published a new working paper which comments on the extent to which cooperation between contracting authorities falls outside of the scope of EU public procurement law.

The paper opens by stating that the procurement regulations will apply where two distinct undertakings have entered into a contract for pecuniary interest. In principle this includes co-operation between contracting authorities. However, certain forms of co-operation between public bodies are capable (depending on the circumstances) of falling outside the Regulations. These are outlined below

- "In-house" or Teckal functions whereby a contracting authority(ies) enters into a contract with a third party, over which it exercises a degree of control similar to that which it exercises over its own department and where the third party carries out the essential part of its activities with the controlling authority.
- "Non-institutionalised" ('horizontal') co-operation whereby authorities enter into a joint arrangement (without setting-up a separate entity) jointly to ensure the execution of a public task which all the cooperation partners ordinarily have to perform individually. Private sector parties are prohibited from participating in the capital and there must be no financial transfer between the parties save for the reimbursement of costs.
- "Redistribution of competences between public authorities" where a contracting authority will not have to comply with procurement rules where it has transferred the official authority to undertake a particular activity to a new body (financed by the transferring body) so that the newly created body exercises the competence independently and on its own responsibility.

- “Non-contractual” attribution of task whereby an entity carries out an activity on behalf of another contracting authority on account of its obligations under national legislation. In this situation, the contracting authority will not have to comply with procurement law.
- “Exclusive rights” where a contracting authority must procure through another contracting authority who has by law been granted certain exclusive rights to carry out a particular function. However, the authority in possession of the exclusive rights will still be required to comply with the procurement regulations.
- “Joint or central purchasing arrangements” where central purchasing bodies procure on behalf of two or more contracting authorities, the relationship between the individual contracting authorities and the central purchasing body will not be subject to procurement law. However, procurements by the central purchasing body, will be subject to procurement law.

## Central Government Policy – ‘Efficiency and Reform

The Cabinet Office continues to keep public procurement centre stage in the push for efficiency and reform of public services.

Minister for the Cabinet Office, Francis Maude announced this month :

*“Government ICT drives the delivery of public services, from government web services for the submission of tax returns to enabling our armed forces to operate in Afghanistan. This government is committed to delivering a better service to the taxpayer on government ICT projects.*

*Today’s Strategic Implementation Plan sets out how we will do this. It gives a detailed breakdown of how the reforms this government is making to ICT projects are going to be delivered. In August we announced that we had already saved the public purse £300 million by applying greater scrutiny to our ICT expenditure. And now we are going even further and save even more money, while delivering higher standards for government ICT.*

*Today’s Strategic Implementation Plan includes specific delivery dates for each aspect of the strategy and an overview of how the strategy will be implemented with further details for each of the 19 delivery areas. It will be followed in the coming weeks by four sub-strategies which will detail the commitment being made on key elements of the ICT strategy, including Cloud Computing and ICT Capability. “*

Earlier in the Summer the Efficiency and Reform Group (ERG) also announced that the following savings had been achieved

- £400 million saved by taking stronger control of marketing spend;
- reduced spend through the Central Office of Information on relevant categories by 80 per cent;
- £360 million saved by centralising spend on common goods and services; and
- £800 million saved from renegotiating deals with some of the largest suppliers to government, equivalent to 6 per cent of a full year of spend with those suppliers.

To help government departments, agencies and other public bodies achieve greater efficiency and effectiveness in their procurements we are working with a number of them to devise ‘lean’ procurements that cut out unnecessary process.

We are also helping a number of clients develop and apply more robust contract management strategies to ensure they achieve VfM from existing supply relationships.

For further information please contact:



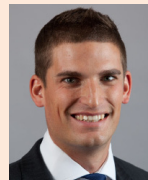
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