



Indigo Services (UK) Limited v The Colchester Institute Corporation

Summary

- The court has clarified how a contracting authority may discharge the suspension of a contract award.
- The contracting authority is now responsible for demonstrating that their interests in permitting the award outweigh the prejudice caused to the tenderer.

Background

The Remedies Directive gives unsuccessful bidders the power to prevent the signature of a contract by filing and serving a claim form with the court during the standstill period. This case is the first to consider how the court will go about removing such a suspension.

Facts and grounds for challenge

The case concerned the provision of cleaning services to two campuses of the Colchester Institute. Indigo was the incumbent provider on one of the sites but after finishing third in the tender, filed and served a claim form automatically suspending the award.

Indigo challenged irregularities in:

- the contract notice and PQQ;
- the provision of information on how to challenge the procurement; and
- the wording and application of the scoring methodology.

Key points of the judgment

- The court accepted that Indigo had a ground for complaint, which could not be adequately compensated by damages but still lifted the suspension on the basis that education is a key service and if the sites were not cleaned they may have to close.
- Collateral contracts with incumbent operators may become more commonplace in order to mitigate the adverse effects of an award suspension.

- Tenderers should give significant thought before serving claim, which results in the automatic suspension of an award as if they are ultimately unsuccessful at trial, they may be liable to the contracting authority for damages arising out of the suspension.
- Successful tenderers may wish to consider inserting indemnities in contracts to protect them from any losses arising out of a suspended contract award.

The Halo Trust v Secretary of State for International Development

Summary

- The public interest in allowing a Government Department to continue its lawful policy, is a relevant consideration in deciding whether to lift an automatic suspension preventing the award of a contract.
- The court also considered challenges on the basis of award criteria and standstill periods in relation to a call-off contract.

Facts and grounds for challenge

The Halo Trust was one of three appointees to a framework agreement for landmine clearance projects operated by the Department for International Development ("DFID"). On 20 December 2010, the Halo Trust applied to the court preventing the award of a call-off contract to another member of the framework. DFID subsequently applied to have the suspension lifted.

Key points of the judgment

- A contracting authority is entitled to rely upon its policies when designing award criteria, provided there is sufficient linkage to the subject matter of the contract.
- There is no restriction on the factors that may be taken into account in determining the most economically advantageous tender, provided the contracting authority acts within the law.

- A member of a framework contract cannot rely on its scores from the award of the original framework to challenge its scoring for the award of a subsequent call-off.
- A contracting authority is not generally required to comply with the requirements to notify unsuccessful bidders of the winner or for a standstill period when awarding a call-off contract.

Brent London Borough Council and others v Risk Management Partners

Summary

- This is a long awaited decision from the Supreme Court and will be seen by local authorities as a very welcome boost to their efforts to share services using innovative models. The decision considers various vires issues as well but we have limited our commentary to the procurement law issues.
- Contracting authorities who jointly create a body for the purposes of satisfying a supply need can make a direct award to this body, subject to certain conditions on control and function being satisfied.

Background

The Teckal exemption permits the direct award of public contracts by contracting authorities to a distinct body over which the contracting authority exercises a level of control similar to that which exercises over an in-house department (the "Control Test") and the body carries out the essential part of its activities with the controlling authority/ies (the "Function Test").

Facts

In February 2007, the London Borough of Brent ("Brent") invited tenders for seven lots of insurance services. In March 2007, the tender for six of the lots was abandoned and a direct award made to London Authorities Mutual Limited, a body established by a group of London local authorities to provide insurance services to its participating members and affiliates.

Risk Management Partners ("RMP") had submitted tenders for all lots and successfully challenged the award in the High Court and on subsequent appeal to the Court of Appeal. Brent appealed to the Supreme Court.

Key points of the judgment

- The Public Contracts Regulations (the "Regulations") do not prohibit the award of contracts to in-house bodies or to legally distinct bodies who fall within the Teckal exemption.
- The Control Test can be satisfied on the basis of collective control of all the member authorities. It is immaterial that no single contracting authority does exert the necessary degree of control.

- The representation and voting rights of member authorities are crucial in determining whether the Control Test has been satisfied.
- Any board formed for this purpose may be a contracting authority for the purposes of the Regulations and must publish tenders for all relevant contracts.

Lancashire County Council v Environmental Waste Controls Limited

Summary

- If a court concludes that a tender was evaluated honestly and in accordance with the disclosed criteria, it is very difficult to argue that the process was tainted by an evaluator who subconsciously took account of an irrelevant consideration.

Background

It is well established that contracting authorities must separate selection criteria, which are used to shortlist bidders at PQQ state but not considered at award state, and award criteria, which are used to determine the winning bidder. This case considered whether an evaluator can sub-consciously be influenced by selection criteria at the award stage.

Facts

On 7 December 2007, Lancashire County Council ("LCC") awarded a contract for the management of household waste management sites to SITA. Environmental Waste Controls Limited ("EWC") finished second after their significantly lower tender raised affordability concerns.

EWC successfully argued before the High Court that despite the tender being conducted appropriately, there had been a breach of the fundamental principles of fairness, transparency and non-discrimination. The High Court held that the evaluators had subconsciously taken account of selection criteria relating to EWC's financial standing, at the contract award stage.

Key points of the judgment

- There is a risk of an evaluator being innocently influenced by an irrelevant consideration, giving rise to a ground for challenge.
- Evaluators should be advised in writing to ignore selection criteria considerations and consciously exclude them whilst evaluating tenders.
- Witnesses will be cross-examined in these cases and must be judged to be "honest".

Commission v Ireland Case C-226/09

The European Court of Justice (ECJ) has concluded that the modification of award criteria weightings in the tender for a Part B services contract after an initial review of the bids, may breach the general principles of equal treatment and transparency. However, on the specific facts, the general principles were not breached by setting the weightings after the bids were submitted.

This case follows a similar line of ECJ cases emphasising the importance of setting clear criteria, scorings and weightings as early as possible. Situations in which alterations to published methodology are acceptable will be few and far between.

Cabinet Office consults on time limits for bringing procurement proceedings

On 24 November, the Cabinet Office published a consultation document seeking views on options for amending the statutory time limit for challenging public procurements. This followed the judgment of the European Court of Justice in the Uniplex case, which held that the requirement in the Regulations to bring proceedings promptly was too imprecise and does not comply with EU law. The consultation made the following three proposals:

Option 1: A 10/15 day period running from the date the applicant knew or could have known of the Decision. The length

of time will depend on whether the award was communicated electronically or by post;

Option 2: The same as option 1 but with a longer period than 10/15 days;

Option 3: The same as option 1 but with a discretion to allow challenges brought after 10/15 days, subject to a specified backstop date, if it was in the interests of justice to do so.

Comment

In choosing which option to adopt the CO will need to balance the needs of contracting authorities and successful bidders for certainty against the need to allow unsuccessful bidders a fair amount of time in which to bring genuine challenges. The consultation closed in January and we await the results.

Commission consultation on the modernisation of the public procurement regime

The Commission has published its Green Paper on this topic and invites views on a number of questions it poses, looking at possible ways of modernising the regime. They range from questions on the definition of 'a works contract' to wider issues of strategic procurements in response to new challenges. The deadline for responses is 18 April 2011.



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