



## Procurement Law Update

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The past few months have seen a number of developments, legal and political, which will have a real impact on procurement practice.

The courts have been particularly active and we now have the first judgment on the application of the remedy of *ineffectiveness* in the recent Eurostar case<sup>1</sup>.

The Coalition Government is also making its mark on UK procurement law by confirming the restructuring of the OGC and Buying Solutions and publishing its response to the European Commission's proposed reforms to the public procurement regime.

We hope you find this update useful. If you would like to discuss any of the issues further, please contact a member of the team using the contact details below.

### Mermec UK Ltd v Network Rail [2011] EWHC 1847

#### Summary

- The court has confirmed that it will take a strict approach to the application of the three-month time limit within which unsuccessful bidders must bring a challenge.
- The three-month time limit starts once the challenger is aware of the facts amounting to a breach not at the point where it believes it has a strong and certain claim.

#### Introduction

This judgment is a further development on the ECJ's decision in Uniplex, which ruled that the UK time limits for bringing a procurement challenge were incompatible with EU Law's requirements for certainty. As the law stands, a challenger must serve the claim form on the contracting authority within three months of becoming aware of the grounds for challenge.

#### Facts and grounds

In July 2010, Network Rail issued tenders for the provision of a high-speed track maintenance regime. Mermec submitted a tender and on 23 September, were informed via email that they had been unsuccessful. The Standstill Letter sent to Mermec included their scores for each of the criteria and the scores of the successful bidders.

Mermec wrote to Network Rail on 30 September expressing their dissatisfaction with the outcome, and requested a meeting to discuss the scoring system used. On 22 December (just within the three month period) a claim form was issued on behalf of Mermec but it was not served on Network Rail until 30 December. Mermec alleged irregularities in the scoring of their bid when compared with other bidders and that the Standstill Letter issued to them failed to comply with the terms of the Utilities Contract Regulations.

Network Rail applied for summary judgment on the basis that the challenge had been brought outside the three month limitation period.

#### Key points of the judgment

- The limitation period commences when the basic facts supporting any complaint are clear.
- A challenger cannot wait until they have a strong and certain claim but must commence proceedings as soon as possible;
- It is not sufficient for the claim form to be issued within three months it must also be served within that period.

### Evropaiki Dynamiki v EMSA Case C 252/10 P and J. Varney & Sons Waste Management v Herts County Council [2011] EWCA Civ 708

#### Summary

- The European Court of Justice and Court of Appeal have ruled on the extent to which contracting authorities can introduce sub-criteria and weightings after tenders have been received.
- Both courts confirmed that this is permissible provided the tenders have not at that point been opened and provided also that the three-part test originally set out in ATI<sup>2</sup> is satisfied.

#### Evropaiki Dynamiki: Facts and Grounds

In July 2004, EMSA launched two calls for tender one to SafeSeaNet Validation and a marine casualty database. European Dynamics tendered unsuccessfully and applied to the General

<sup>1</sup> See our case specific briefing at [http://www.burges-salmon.com/Practices/commercial/Publications/Procurement\\_Alert\\_when\\_is\\_ineffectiveness\\_not\\_effective.pdf](http://www.burges-salmon.com/Practices/commercial/Publications/Procurement_Alert_when_is_ineffectiveness_not_effective.pdf)

<sup>2</sup> ATI EAC Srl e Viaggi di Maio Snc and Others v ACTV Venezia SpA and Others C-331/04

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Court for the annulment of both awards. The court annulled one award on the basis that EMSA had accepted a submission submitted out of time but upheld the other. European Dynamics appealed this decision to the Court of Justice.

The main argument submitted by European Dynamics was that EMSA had introduced new sub-criteria with weightings during evaluation, which were not identified in the original tender documents.

#### **J. Varney & Sons Waste Management: Facts and Grounds**

Varney unsuccessfully tendered for the operation of household waste recycling centres. The contract had been awarded on the basis of two award criteria, price (65%) and customer satisfaction (35%). Customer satisfaction was assessed on the basis of tenderers' responses to a number of 'Return Schedules' appended to the tender documents. No weightings were given for the return schedules.

Varney challenged the award decision on the basis that either, the Return Schedules were award criteria and the failure to identify this and include their weightings in the tender was a breach of the Public Contract Regulations 2006 or in the alternative, the Return Schedules were 'sub-criteria' and the failure to identify this and include their weightings was a breach of the principles of fairness and transparency.

#### **Key points of these judgments**

- If a contracting authority describes the award criteria and their weighting, and the sub-criteria, in the tender documents, there is no obligation to allocate weightings to the sub-criteria provided:
- the decision has not altered the criteria previously set out in the tender documents;
- the decision has not introduced new elements, which would have effected the content of a tenderer's bid;
- the decision was not taken on the basis of considerations likely to discriminate against one of the tenderers.
- However, it is best practice for contracting authorities to finalise and disclose sub-criteria and weightings (or at least a range of weightings) prior to going out to tender, particularly for sub-criteria.
- In Varney, the Court of Appeal criticised the approach to defining award criteria set out in Lettings International v Newham as overly burdensome. It remains to be seen whether those comments will lead to new practices emerging. The ATI decision appears to remain the most authoritative source on this issue.

## **European Ombudsman finds fault in Commission Procurement**

### **Summary**

- The European Ombudsman (the "Ombudsman") has upheld a complaint regarding a tender process run by the European Commission.

- The Ombudsman does not have the same powers as courts regarding damages or ineffectiveness but can make recommendations on best practice.

### **Facts and grounds**

In August 2009, the European Commission's Liaison Office in Kosovo (ECLO) issued a procurement notice for services. However, the winning consortium was excluded after it failed to satisfy the post-award requirements that all of its members should be 'established' in a European Union Member State.

The consortium argued that whilst one of its members was incorporated in the Isle of Man, (which is not a Member State) it was established in the Republic of Ireland and the tender documents were ambiguous on this point as they had referred variously to "establishment", "nationality", "registration" / "registered office" without distinction and without any definitions. As the tender was cancelled, the consortium brought its complaint to the European Ombudsman.

#### **Key points of the decision**

- Contracting authorities must express tender requirements in such a way that they allow reasonably well-informed and diligent tenderers to understand and interpret the requirements in the same way.
- As the EU does not have a self-contained company law it is important to use consistent terminology (preferably with defined terms) as tenderers will not always interpret terms in the same way.

## **Advocate General gives opinion on the definition of a 'services contract'**

### **Summary**

- The difference between a 'services contract' and a 'public service concession' has been considered by the Advocate General.
- The distinction is important as a contracting authority tendering a public service concession is not required to comply with the Public Contract Regulations in full.
- An Advocate General's opinion is not binding but can be persuasive.

### **Facts**

A regional Latvian authority awarded 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 contractual provisions.

Two unsuccessful tenderers obtained an interim injunction preventing the signature of the contract on the basis that the contract was in fact a public services contract and had been improperly tendered. When the contract was signed in breach of the injunction, the challengers applied

<sup>3</sup> See our case specific briefing [http://www.burges-salmon.com/Practices/commercial/public\\_procurement\\_and\\_state\\_aid/Publications/Post\\_lettings\\_where\\_are\\_we\\_now.pdf](http://www.burges-salmon.com/Practices/commercial/public_procurement_and_state_aid/Publications/Post_lettings_where_are_we_now.pdf)

to the Latvian High Court for the contract to be declared invalid. The ECJ was subsequently asked whether the agreement at hand was a public services contract or a public services concession.

#### Key points of the opinion

- Direct remuneration from a contracting authority alone does not imply the existence of a service contract.
- The key difference between a public service contract and a concession is who assumes the risk.
- Where the risk to the contractor is limited legally and/or contractually, the contracting authority still bears the ultimate risk and the agreement will be considered as a public service contract.

### UK submits response to the Commission's proposed reforms of the procurement regime

On 27 January 2011, the Commission published its Green Paper on proposed reforms to the EU public procurement regime. On 25 July 2011, the Cabinet Office published the UK Government's response, which summarised the responses to the Cabinet Office's own consultation. Some of the highlights of the response are set out below.

#### *Nature of the procurement rules*

The Cabinet Office supported raising the thresholds and incorporating an indexation provision to ensure only contracts which are likely to be of sufficient value to generate cross-border interest will be caught by Procurement Regulations. The response also rejected calls for extending the full scope of the rules to currently excluded contracts and contracts for Part B services.

#### *Modernising the procurement procedures*

The overarching message from this section was the need to simplify the existing procedures and to broaden access to exceptional procedures. Suggestions include extending the use of qualification systems beyond utilities, formalising the wider use of the 'accelerated restricted' which was introduced during the financial crisis, and permitting the negotiated procedure to be used in all procurements.

In a nod to the Government's "Big Society" initiative, the response proposes that direct awards to employee owned mutuals should be permitted for contracts of three years duration to help them develop experience of public sector tendering.

#### *Utilities*

Perhaps the most radical proposal is the removal of private utilities from the application of the public procurement rules and a consideration of the relevance of a separate Utilities Directive.

#### *Creating a more accessible European Procurement Market*

The UK government highlights its commitment to making public procurement more accessible to SMEs for example, by wider publication of procurement opportunities and subdividing contracts into smaller lots, suitable for SMEs where appropriate. However, a minimum quota for SMEs was considered as contrary to transparency

obligations. An additional proposal is that only short-listed candidates and winning bidders should be required to submit and verify supporting evidence regarding selection criteria.

#### Key points

- The response raises a number of interesting and sensible points regarding the simplification of procedures and accessibility of public procurement contracts.
- The proposals regarding utilities and employee owned mutuals are more radical and arguably less relevant to other EU Member States so their future relevance is less clear.
- The reforms are still at an early stage and it will be a number of years before new regulations are introduced.

### Conclusion of Buying Solutions strategic review announced

On 1 July 2011, the Cabinet Office confirmed that a number of changes will be made to Buying Solutions to enable it to better support the Government in procurement.

The changes include confirmation of the new title of "Government Procurement Service" and a move to Liverpool in late 2011 to reduce overheads.

The new service will also be at the forefront of the new Government eMarketplace, which will enable departments to save money by easily accessing centrally negotiated deals.

### Defence and Security Public Contracts Regulations 2011 published

On 2 August the **Defence and Security Public Contracts Regulations 2011** (SI 2011/1848)<sup>4</sup> were published. They implement into UK law the new regime set out in Directive 2009/81 on the coordination of procedures for the award of public contracts 'in the field of defence and security' (OJ 2009 L 216/76).

The Regulations apply to the procurement of military equipment (such as arms, munitions and war material) and associated goods, services and works, and the procurement of sensitive security equipment and associated goods, services and works (where the contract contains, involves or requires national security classified information).

MOD first consulted on the implementation in December 2009 and announced the policy outcomes resulting from that first consultation and published a draft of the Regulations. Their general approach has been to implement the provisions of Directive 2009/81 to achieve consistency with equivalent provisions in the Public Contracts Regulations 2006 (as amended).

The Defence and Security Public Contracts Regulations 2011 come into force on 21 August 2011 (as required by Directive 2009/81) and will apply to relevant procurement procedures beginning on or after that date. It will be interesting to see to what extent the policy objective of supporting the EU defence and security market succeeds.

<sup>4</sup> [http://www.legislation.gov.uk/ukSI/2011/1848/pdfs/ukSI\\_20111848\\_en.pdf](http://www.legislation.gov.uk/ukSI/2011/1848/pdfs/ukSI_20111848_en.pdf)

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