



In this update we touch on a variety of current issues in procurement law including the introduction of new recommendations on the use of PQQs, how suppliers can report incidences of poor procurement practices and our usual round-up of UK and EU case-law.

### High Court considers grounds for challenge of a service concession

*Photo-Me International Plc v Network Rail Infrastructure [2011] EWHC 3168 (QB)*

#### Background

- This case concerned the rights of action available to a bidder challenging a procurement for a service concession.
- Public entities are not required to comply with procurement legislation when procuring service concessions.
- The judgment concerned an application to strike-out a claim so it only considers whether the claims have a realistic prospect of success at full trial. However, it provides interesting commentary on the application of the rules.

#### Facts

Photo-me International (PMI) was the holder of a 10 year service concession contract to install and operate photo-booths on stations owned by Network Rail (NR). When the agreement came up for renewal, NR commenced a competitive tender for a new 5 year contract. PMI and Camden Management Services (CMS) were the only bidders.

The first round of tendering was abandoned after complaints from PMI. Following completion of a second round of tendering, the contract was awarded to CMS. PMI challenged this award relying principally on a breach of the EU Treaty Principles and the existence of an implied contractual relationship between themselves and NR.

#### Key points of the judgment

- A contracting authority must procure a service concession in accordance with the EU Treaty Principles of fairness transparency and non-discrimination.
- Where a tender process falls outside procurement legislation and EU law, a contract requiring all tenders to be considered on their merits may sometimes be implied between the contractor and the bidders.

- In certain circumstances, bidders may be owed a duty to score bids objectively and fairly with skill and care. A breach of this duty may lead to a claim against the contracting authority for negligence.
- The Court confirmed that the Public Sector Directive, in contrast to the Utilities Directive is not "activity based".

Burges Salmon LLP acted for PMI.

### Cabinet Office publishes guidance on the scope and remit of the public procurement mystery shopper scheme

The Cabinet Office introduced the mystery shopper scheme in 2011 in order to provide SME suppliers with a route to provide feedback about any concerns regarding procurement practice by contracting authorities. The scheme was part of a package of measures introduced by the Coalition to encourage greater participation by SMEs in public procurement.

On 9 February, new guidance was published on how the scheme will operate. It confirms the criteria that the Cabinet Office will apply when deciding whether or not to accept feedback. These include evidence of endemic poor practice, approaches which conflict with best practice guidance and failures to make fair/prompt payments. Feedback will not be accepted if formal proceedings have commenced or where legal proceedings are contemplated.

If the Cabinet Office believes feedback raises an issue that needs to be addressed, it has the power to instruct the contracting authority on remedying a problem and to make wider recommendations to Government Departments or issue general guidance. However, the guidance emphasises that the Cabinet Office will not replace the role of a contracting authority's legal advisers and it does not have the power to instruct a competition to be delayed or suspended (although it can make recommendations along these lines).

The scheme is a useful route for SMEs to raise procurement concerns informally and without having to resort to legal advice. If adopted by suppliers, it will also act as a useful tool for the Cabinet Office to gather live information on the implementation of the Regulations. However, based on the limited options of redress available to the Cabinet Office it is unclear whether aggrieved suppliers will consider the scheme's use worthwhile.

A full copy of the guidance is available at [http://www.cabinetoffice.gov.uk/sites/default/files/resources/new\\_Scope\\_and\\_Remit\\_of\\_the\\_Mystery\\_Shopper\\_Scheme.pdf](http://www.cabinetoffice.gov.uk/sites/default/files/resources/new_Scope_and_Remit_of_the_Mystery_Shopper_Scheme.pdf).

## High Court decides Eurostar is not subject to procurement law

*Alstom Transport v Eurostar International Ltd [2012] EWHC 28 (Ch)*

### Background

- This is the latest instalment in the long running litigation concerning the challenge by Alstom to the procurement by Eurostar of a new generation fleet of very high speed trains from Siemens.
- The High Court was asked to give judgment on whether Eurostar was a Utility for the purposes of the Utilities Contracts Regulations or a contracting authority for the purposes of the Public Contracts Regulations.
- If Eurostar successfully defended these points, Alstom's causes of action would be limited to potential implied contractual claims.

### Facts

In October 2010, Alstom challenged the award to Siemens of a contract to supply Eurostar with a new generation of rolling stock. After failing in an application for an injunction to prevent the signature of the contract, Alstom pursued a claim against Eurostar for breach of the Utilities Contracts Regulations and for breach of an alleged implied tender contract.

However, throughout the litigation, Eurostar has maintained that it was not a utility for the purposes of the Utilities Contract Regulations 2006. As Alstom's principal grounds for challenge depend upon Eurostar being subject to the Utilities Contracts Regulations, the High Court opted to decide the matter as a preliminary issue. It also considered and ruled upon the definition of Contracting Authority under the Public Contracts Regulations 2006 (to which the Utilities Contracts Regulations cross refer).

### Key points of the judgment

- Eurostar, as an open access operator of a rail service which is not subject to legal conditions regarding the routes and frequencies it operates, does not carry out a relevant activity for the purpose of procurement legislation so is not a Utility.
- Eurostar has not been granted any special or exclusive rights, required to demonstrate that an entity is a Utility.
- Eurostar is engaged in a commercial or industrial activity and is independently managed and consequently is not a contracting authority.

Burges Salmon LLP acts for Eurostar.

## New Cabinet Office guidance published on the use of PQQs

CAs part of a package of measures designed to encourage greater participation by SMEs in public procurement, the Cabinet Office has issued new guidance on the use of PQQs. The guidance is only binding on central government departments but all contracting authorities are encouraged to adopt it.

The guidance confirms that PQQs or other pre-tender selection procedures should not be used to pre-qualify bidders for procurements below the EU thresholds.<sup>1</sup> Contracting authorities will still be able to apply the statutory mandatory pass/fail criteria relating to previous convictions for dishonesty and other related offences and the discretionary pass/fail criteria to assess the financial standing and technical capabilities of bidders. These will be assessed as part of the evaluation stage.

The new guidance also includes a revised standard-form PQQ for above threshold procurements.

A full copy of the policy note is available here <http://www.cabinetoffice.gov.uk/sites/default/files/resources/PPN-01-12-Use-of-PQQ.pdf>

The new standard form PQQ for central government department procuring above threshold procurements is available here:

<http://www.cabinetoffice.gov.uk/sites/default/files/resources/Annex-A-Core-PQQ-questions.pdf>

## The Scottish Court of Session overturns the automatic suspension of a contract award

*Clinical Solutions International Limited (Pursuer) v (1) NHS24 and (2) Capgemini UK Plc (Defender)*

### Background

- Under public procurement rules, a contracting authority is prevented from entering into a contract if it becomes aware that an aggrieved bidder has issued proceedings.
- Here, the court considered a contracting authority's application to overturn an automatic suspension.
- The decision of Scottish Courts do not bind the English Courts although they can be used as interpretative aids.

### Facts

Clinical Solution International Limited (CSIL) was unsuccessful in a tender to provide software and other services for NHS 24's telephone and online medical advice services, despite being the incumbent provider.

CSIL subsequently challenged the award, thereby automatically suspending the procurement and preventing NHS 24 from entering into contracts with the successful bidders. NHS 24 applied to have the automatic suspension set aside.

<sup>1</sup> Please see our previous update for the revised public procurement thresholds [http://www.burges-salmon.com/Practices/commercial/Publications/Procurement\\_Law\\_Update.pdf](http://www.burges-salmon.com/Practices/commercial/Publications/Procurement_Law_Update.pdf)

### Key points of the judgment

- The case confirms the general approach the courts will take in relation to the American Cyanamid principles.
- In deciding whether to lift the automatic suspension, the judge considered (i) whether the “balance of convenience” fell in favour of maintaining the suspension and (ii) whether suspension was in the public interest.
- The court places considerable weight on the strength of the challenger’s case when assessing the “balance of convenience” and public interest.
- The disruption of public health services is unlikely to be in the general public’s best interests where a challenger has only weak grounds for challenge.

### Reform of the public procurement rules continues

As reported in our previous Alert<sup>2</sup>, the institutions of the EU are in the process of reforming the rules on public procurement.

Following the publication of the draft proposals by the European Commission, the Council of the European Union has published a series of working papers (prepared by the Commission) to inform discussions at a meeting of the Working Group on Public Procurement.

The Working Papers highlight the key changes, which the Commission proposes to make to the current legislation. Each document discusses a different “cluster” of the proposals for example, flexibilisation of procedures and strategic use of public procurement.

The papers will be examined by the working groups as part of their development of the proposals into final forms of legislation.

Members of our procurement team are participating in the Procurement Lawyers Association working groups, analysing and responding to the Commission’s proposals.

### Northern Ireland Court sets aside award decision

*Resource (NI) v Northern Ireland Courts and Tribunals Service [2011] NIQB 121*

#### Background

- A court has the power to set aside an authority’s award decision in the event of a successful challenge.
- Where a contract award decision is set aside, bids must be re-scored or a new tender started.

- The services in question were Part B services and therefore the challenge was brought on the basis of a breach of the principles of fairness, transparency and non-discrimination, other than the full details of the Regulations.

#### Facts

These proceedings concern a long-running procurement by the Northern Ireland Courts and Tribunal Service (NICTS) for security and ancillary services. An initial procurement was started in 2006 before being aborted at preferred bidder stage.

After a bidder brought unsuccessful proceedings in respect of the first procurement, a second procurement was started in December 2010. After an award decision was taken in favour of G4SUK, Resource (NI) (the incumbent service provider) started proceedings thereby automatically suspending the award process until the case had been resolved by the courts.

Resource (NI) argued that NICTS had erred in its application of the award criteria and taken impermissible additional information into account.

### Key points of the judgment

- Contracting authorities must evaluate submissions in accordance with the statement of requirements and must not give a bidder credit for additional information.
- The function of a court in a procurement challenge is to review a decision not to recast it. Therefore, it does not have the power to order that a contract should be awarded to a previously unsuccessful bidder.

*Clinical Solutions International Limited (Pursuer) v (1) NHS24 and (2) Capgemini UK Plc (Defender)*

### A guide to practical procurement in Central Government

Following the Cabinet Office’s exploration of “lean procurement”, we have written a report on the practical implications for central government procurement and the need for collaborative solutions. The report is available on our website and although it primarily focuses on central government procurement, we hope it will be useful for other authorities.

[http://www.burges-salmon.com/Practices/commercial/Publications/Implementing\\_Lean\\_Sourcing\\_a\\_Collaborative\\_Solution.pdf](http://www.burges-salmon.com/Practices/commercial/Publications/Implementing_Lean_Sourcing_a_Collaborative_Solution.pdf)

<sup>2</sup> [http://www.burges-salmon.com/Practices/commercial/Publications/Commission\\_publishes\\_first\\_proposals\\_for\\_new\\_procurement\\_directives.pdf](http://www.burges-salmon.com/Practices/commercial/Publications/Commission_publishes_first_proposals_for_new_procurement_directives.pdf)

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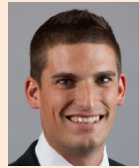
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