

FTB PUBLIC PROCUREMENT LAW UPDATE

PUBLIC PROCUREMENT CASE LAW UPDATE

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Public procurement law is developing rapidly with a constant stream of new cases. This short presentation seeks to deal with some of the recent judicial decisions. The decisions raise issues regarding:

- Time limits
- Application of the public procurement regime
- Disclosure
- Development agreements
- Material change in contract terms
- Proportionality
- Injunctive relief

Time Limits

Uniplex (UK) Ltd v NHS Business Services Authority (C-406/08)

The year kicked off with the long awaited decision of the ECJ in Uniplex on 28 January 2010. The Uniplex case raised the issue of whether the time limit for bringing proceedings alleging a breach of procurement rules should be calculated from the date on which the tenderer knew or ought to have known that the procurement procedure and contract award infringed EC public procurement law, or from the date of breach itself.

The Public Contracts Regulations and the Utilities Contracts Regulations state that such proceedings are to be brought promptly and, in any event, within three months of the date when the grounds for bringing the proceedings first arose, unless the court considers that there is good reason to extend the period.

The ECJ held that:

- the effectiveness of the remedy could not be guaranteed unless the limitation period in respect of an application for a declaration of an infringement of procurement law did not start to run until the time when the applicant knew or ought to have known of the alleged infringement;
- The requirement to bring proceedings promptly, which leaves the Court with discretion to dismiss an application even where the three month time limit has

not yet expired, is inconsistent with EU law as it is not sufficiently certain and prevents claimants from knowing the exact time limits for bringing a claim.

Implications

Contracting authorities in defending procurement challenges are no longer able to argue that a claim was not brought promptly or that it was out of time having regard to the date of the actual breach.

Sita UK Ltd v Greater Manchester Waste Disposal Authority [2010] EWHC 680 (Ch)

This important judgement striking out proceedings seeking damages for breach of the public procurement regime is the first time the High Court has had to grapple with the implications of Uniplex.

The Court decided that SITA had been too late in starting proceedings and struck out the claim, refusing to exercise its discretion to extend the procurement limitation period.

The decision considers in detail at the revised limitation period following Uniplex and focusses on the issue of SITA's "knowledge" of the alleged procurement breach, as evidenced by the pre-litigation correspondence between the parties.

SITA issued proceedings in late August 2009. The Court held that SITA knew or was in a position to know that there was a prima facie infringement on or shortly after 8 April 2009. The time limit expired on or shortly after 7 July 2009.

The claim was therefore out of time. The Court refused to exercise its discretion to extend time holding that such extensions should not be lightly given having regard to the purpose of the time limits in the first place. The purpose of a short limitation period had been imposed in the interests of good public administration so that authorities know as soon as possible whether one of their procurements is being challenged having regard to the significant disruption which the mere existence of such a claim can cause to public finances. The Court did not consider that SITA's reasons for delay which included the need to obtain the approval of various internal boards justified the extension of time.

Implications

For contracting authorities:

The more transparent it is about its decisions the earlier it will be able to contend that time started ticking in respect to any challenge.

For tenderers:

Care needs to be exercised in respect of pre litigation correspondence and the seeking of exhaustive disclosure before making a claim or it may be alleged that the contents of such correspondence indicated knowledge and started the clock for the purposes of the time limits

Application of Procurement Regime

R. (on the application of Chandler) v Secretary of State for Children, Schools and Families
[2009] EWCA Civ 1011

This decision considers the question of whether the Secretary of State's decision to approve UCL's expression of interest to sponsor an academy should have been subject to the public procurement regime.

The issues before the Court of Appeal were:

- Does the public procurement regime apply to the expression of interest by UCL?
- Does the claimant have the required standing to contend that the public procurement regime is applicable?

The first issue revolved around whether the expression of interest was a "public works contract". The Court of Appeal held that it was not as UCL was not receiving any pecuniary interest but only reimbursement of costs and neither could it be said that the offer was "on the market" as there was no intention to make a profit.

In respect of the second issue the Court held that it could be possible for an individual who is affected in an identifiable way by a body's non-compliance with the public procurement regime to have sufficient standing to bring a judicial review, even if they are not an "economic operator". However, they would need to demonstrate "sufficient interest" and performance of the competitive tendering procedure under the Directive "might have led to a different outcome that would have a direct impact on him".

Sidey Ltd -v- Clackmannanshire Council and Pyramid Joinery & Construction Ltd [2010 CSIH 37]

This recent decision of the Inner House (the Scottish civil appeal court) reversed the decision of the lower court and clarifies an important issue regarding the application of European procurement rules. The essential points are that:

- Where a contract is below the relevant threshold value, then any aggrieved tenderer has one remedy in litigation – they must present a petition for judicial review to the Court. In such cases, the statutory remedies provided by the regulations for over threshold contracts will not be available.
- This is the position even if the contracting authority chooses to undertake a procurement exercise that, in all respects other than being under the threshold, follows the procedures set out in the procurement regulations.

Disclosure

Croft House Care Ltd v Durham CC [2010] EWHC 909 (TCC)

This recent decision demonstrates that the fact that documents within the procurement procedure may contain confidential information is not in itself a reason for not disclosing such documents and making them available for inspection.

The Claimant contended that there had been breaches of the Public Contracts Regulations 2006 during the procurement procedure and sought disclosure of various documents. The local authority sought to resist two types of documents from being disclosed.

- (i) commercially sensitive material provided by tenderers concerning the method statement and statement of technical capacity;
- (ii) and documents which contained information which would prejudice its ability to re-run the procurement were that to be necessary

The Court held that:

- The fact that documents might contain confidential information was not, in itself, a reason for not providing such documents on disclosure and inspection. The court had to balance the right to confidentiality with the need for the claims to be disposed of fairly,
- The ultimate test was whether disclosure and inspection was necessary for disposing fairly of the proceedings. In this case the information sought went directly to the pleaded case put forward by the Claimant and in balancing the right of third parties to confidentiality against the necessity for the documents to be provided for the purpose of a fair trial, the Court considered that there was no doubt that such material should be provided.
- The local authority's interests in having an effective competition for the provision of services had to be balanced with the need for there to be fair competition and the need for the Claimant to be able to pursue a remedy. Whilst the local authority had identified potential problems in re-running the procurement process, it had not shown that the disclosure of material to the Claimant would give rise to such insurmountable difficulties that there would be no practical way of carrying out a fair procurement process in the future.

Development Agreements

Helmut Muller v Bundesanstalt für Immobilienaufgaben (C-451/08)

This decision of the ECJ has sought to clarify and reign in its ruling in *Auroux v Roanne*. In that case the ECJ had ruled that a French local authority scheme to develop a new leisure centre was a public works contract to which the EU public procurement regime applied. This was despite the fact that the authority would not acquire ownership of the leisure centre or that it would not execute the works itself. In addition it was held that the fact that the developer itself would apply the directive's competitive procedures when awarding the sub-contracts for work did not remove the need to put the contract out to tender

The decision in *Muller* clarifies, amongst other matters, that:

- The procurement regime only applies where the authority has defined the works in a way that goes beyond the mere exercise of planning powers

- The works must be carried out for the authority's direct economic benefit
- The "requirements specified by the contracting authority" in the definition of a public works contract should be interpreted to mean that "the authority must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design. The mere fact that the public authority, in the exercise of its urban-planning powers, examines certain building plans presented to it, or takes a decision applying its powers in that sphere, does not satisfy the obligation that there be 'requirements specified by the contracting authority'."

The law on development agreements continues to evolve. Although Muller seeks to limit Auroux there are a number of areas still unresolved particularly as to the interpretation of "direct economic benefit" and in respect of the type of work the issue of what constitutes a "decisive influence on its design".

Material change in contract

Case C-91/08 Wall AG v City of Frankfurt, judgment of 13 April 2010

In this case the City of Frankfurt put out a tender for the award of a service concession contract relating to the operation, maintenance, servicing and cleaning of 11 municipal lavatories. The fees for the use of the facilities constituted the consideration for the works. The successful tenderer had mentioned Wall AG as a designated sub-contractor. The tenderer changed sub contractors with the agreement of the contracting authority.

Wall AG sought damages stating that there had been a substantial change of contract which required that a new award procedure was necessary.

The ECJ ruled that:

- Although services concession awards do not fall under the procurement rules they are nonetheless subject to the general Treaty principles of equal treatment and non-discrimination and the obligation of transparency.
- Therefore, replacement of a specified subcontractor may require a new award procedure to restore transparency if the national court determines this constitutes a change to one of the essential terms of the services concession contract.

Other recent decisions

Injunctive remedies

Apcoa Parking (UK) Ltd v City of Westminster (High Court) [2010] EWHC 943

Aggrieved tenderers need to demonstrate that the balance of convenience means that an injunction should be granted and that other remedies will not be adequate.

Legitimate expectation/proportionality

Azam & Co v Legal Services Commission (High Court)[2010] EWHC 960

The Public Contracts Regulations 2006 do not require a contracting authority to expressly inform existing providers of the deadline for submissions when the contract or framework



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agreement is re-tendered. Furthermore, the principle of proportionality does not automatically require a contracting authority to grant an extension to a tenderer that fails to submit a tender on time.

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