

Procurement 2009 James Goudie QC

INTRODUCTION

1. In current economic circumstances there may be an increased risk of challenge to procurement decisions. In particular there may be more damages claims. Nonetheless, parties to existing works, services and supplies contracts may wish to vary the terms of their contracts; parties to current procurements may wish to abandon the exercise or vary the award criteria; and parties may wish to try to go ahead with a proposal but try to avoid the procurement regime altogether.

CONTRACTUAL VARIATIONS

2. When will contractual variations be regarded as a fresh contract award, for procurement purposes, entailing a further procurement exercise? If there is a novation and a substituted contractual party will this mean that there is a new contract?

3. Changes to a contractual arrangement will not necessarily attract the procurement regime. In Presstext Nachrichtenagentur GmbH v Austria, Case C-454/06, Judgment 19 June 2008 (“Presstext”) the ECJ held that the terms “awarding” and “awarded” in the Directives must be interpreted as not covering an adjustment of an initial agreement to accommodate changed external circumstances.

4. The ECJ (paragraph 34) expressed the basic principle as follows:-

“In order to ensure transparency of procedures and equal treatment of tenderers, amendments to the provisions of a public contract during the currency of the contract

constitute a new award of a contract within the meaning of Directive 92/50 when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract.”

5. The ECJ said (paragraphs 35-37) that, for this purpose, an amendment to a public contract may be regarded as “material” when :-

- (1) It introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted;
- (2) It extends the scope of the contract considerably to encompass eg services not initially covered; or
- (3) It changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.

6. There were three amendments in Presstext itself:-

- (1) Change of contractual partner;
- (2) Price change; and
- (3) Change in relation to termination.

7. These amendments were held not to be material in that case, either individually or cumulatively. As regards the change of contractual partner, the ECJ held that the terms “awarding” and “awarded” in the Directive do not cover a situation where services supplied to

the contracting authority by the initial service provider are transferred to another service provider established as a limited liability company, in circumstances where the initial service provider is the sole shareholder in the new provider, controls and gives instructions to the new provider, and continues to assume responsibility for compliance with the contractual obligations. A new contract award will therefore not necessarily be deemed to occur where a contract is novated to a new contractor which is a member of the same corporate group as, and closely controlled by, the original party.

8. The ECJ in Pressetext made clear (paragraph 60) that amending a price condition, in the absence of express authority to do so under the terms of the contract, “might well infringe the principles of transparency and equal treatment as between tenderers”. The question (paragraph 61) is whether there is an amendment to “the essential conditions” of the initial agreement. This may well be the case if a price change is more than minimal and is not pursuant to a stipulation in the initial agreement.

9. Care must, however, be taken in relation to flexibility clauses. If they are too broad or uncertain or insufficiently transparent they will not be permissible: see R (Law Society) v Legal Services Commission [2008] 2 WLR 803 (Court of Appeal).

AWARD CRITERIA

10. In general award criteria cannot be varied or interpreted differently during the procurement process, certainly in the case of the open and restricted procedures. In any event, including in the case of competitive dialogue, the criteria must be disclosed to all tenderers, in advance of the Pre Qualification Questionnaire so far as who is invited to tender is concerned, and in advance of tenders so far as to whom the tender will be awarded is concerned. This includes sub-criteria, weightings and marking schemes, if such are adopted.

11. The requirements of equality of treatment and transparency have been emphasized in the leading ECJ cases, such as Case C-532/06 Lianakis (2008) ECR1, and applied by the High Court in Letting International Ltd v Newham LBC [2008] EWHC 1583 (QB), (2008) LGR 908, on the procurement of housing services and in a series of cases in Northern Ireland, including MacLaughlin & Harvey v Department for Finance and Personnel (No 2) (2008) NIQB 91 and No (3) (2008) NIQB 122, in relation to framework agreements, and Federal Security Services Ltd v The Northern Ireland Court Service (2009) NIQB 19, making the points (paragraph 58) that a contract award may be unlawful in circumstances where an ambiguous instruction has misled a tenderer, and that what may be required is to abort the competition and initiate a fresh one, giving reasons for the discontinuance.

12. On the other hand, there are limitations on what should or can be disclosed. The ECJ stressed in Varec SA v Belgium (2008) 2 CMLR 24, in the context of review procedures, that:-

- (1) It is important that contracting authorities do not release information relating to contract-award procedures which could be used to distort competition; and
- (2) Given that contract-award procedures were founded on a relationship of trust between the contracting authorities and participating economic operators, contracting authorities are obliged to respect fully the confidential nature of any information furnished to them and have the discretion to withhold certain information from an eliminated tenderer where its release would prejudice the legitimate commercial interests of particular undertakings or might prejudice fair competition.

13. See also the landmark decision of the Information Tribunal, on 18 November 2008, in Department of Health v Information Commissioner, as to the applicability or otherwise of the

confidential information and trade secrets exceptions in respectively Sections 41 and 43 of the Freedom of Information Act 2000 in relation to a concluded commercial contract. Parts of the DoH's contract with the private sector contractor were ordered to be disclosed.

EXEMPTIONS

14. The public procurement regime does not apply when an authority decides to provide services "in-house". Moreover, the regime does not apply when there is a contract but that is between the authority and its wholly owned company. That is the Teckal exemption, based on the decision of the ECJ in Teckal, and the subject matter of a series of subsequent ECJ cases, including Coditel Brabant v Commune d'Uccle, Case C-324/07, ("Coditel Brabant").

15. There are two conditions both of which must be satisfied in order for Teckal to apply, and both of which are interpreted strictly. First, the authority must exercise over the company a control which is similar to that which it exercises over its own departments.

16. There must not be even minority participation actual or prospective by a private undertaking. There must be no independence with regard to decision making. The authority must retain decisive influence over both strategic objectives and significant decisions.

17. Secondly, the company must carry out the essential part of its activities with the controlling authority.

18. However, an important feature of the Teckal exemption is that it is not confined to a situation which is "in-house" a single authority. Both conditions are capable of being satisfied in the case of a multiplicity of authorities.

19. The situation where more than one local authority is involved has been addressed in:-

- (1) R (Risk Management Partners) Limited v Brent LBC (2008) LGR 331 (“the LAML vires case”), concerned both with Section 2 of the Local Government Act 2000 and with Section 111(1) of the Local Government Act 1972; and
- (2) Risk Management Partners Ltd v Brent LBC (2008) LGR 429 (“the LAML procurement case”);

both subject to appeals in which hearings took place 16-19 March 2009 inclusive and in which Judgment has been reserved by the Court of Appeal.

20. After the LAML procurement case, in which Judgment at first instance was given on 22 May 2008, in Coditel Brabant the Advocate-General's Opinion was given on 4 June 2008; and the ECJ itself gave Judgment on 13 November 2008.

21. The case concerned the award by a public authority, without calling for competition, of a public service concession to an inter-municipal cooperative society, of which all the members were public authorities, where those public authorities exercised over that cooperative society control similar to that exercised over their own departments and where that society carried out the essential part of its activities with those public authorities. This was held not to be precluded.

22. Advocate General Trstenjac, at paragraph 89 of her Opinion stated, in relation to the first Teckal condition, that control exercised by local authorities over a jointly held company, whose members are representatives of the local authorities, by means of decisions adopted by the majority of those members, must be considered a control similar to that exercised by each local authority over its own departments. At paragraph 63 she had said that, generally, the delegation of public interest tasks to a body set up in cooperation with other local

authorities, without any private sector involvement, should in principle be considered as not needing to be the subject of a call for competitive tenders.

23. This general rule can be departed from, but only in the case of special circumstances which show that the market orientation and degree of autonomy of the joint local authority body in question has gone beyond the limits of joint local authority cooperation aimed at satisfying public general interest needs (paragraphs 66/67 and 75). The mere fact that services are offered on a commercial basis and thus in competition with private sector providers is not a relevant factor for the purposes of the Teckal exemption (paragraph 79).

24. Importantly, at paragraphs 82-84, the Advocate-General demonstrates that in order for the first Teckal condition to be satisfied individual control does not have to be exercised over the entity. Otherwise cooperation between local authorities would in practice be rendered impossible. Local authorities wishing to cooperate with one another do not have to outsource to third party market operators essential services they provide in the public interest. Should the first Teckal condition be construed as preventing this, it would mean giving undue weight to competition aims at the expense of proper local authority autonomy.

25. The Judgment of the ECJ itself in Coditel Brabant is broadly to the same effect as the Opinion of the Advocate-General and focusses especially on the first Teckal condition. The ECJ reiterated that:-

- (1) In order to determine whether a (concession-granting) public authority exercises a control similar to that which it exercises__over its own departments, it is necessary to take account of all the legislative provisions and relevant circumstances: paragraph 28;

- (2) The control must enable the authority to exercise a decisive influence over both the strategic objectives and significant decisions of the entity: *ibid*;
- (3) Where a private undertaking holds a share of the capital of the entity, this precludes the necessary degree of control: paragraph 30;
- (4) On the other hand, the fact that the (concession-granting) public authority holds, alone or together with other public authorities, all of the share capital, tends to indicate, generally, but not conclusively, that that contracting authority exercises over the entity a control similar to that which it exercises over its own departments: paragraph 31;
- (5) The fact that a decision-making body is composed of representatives of the public authorities shows that the body is under the control of the public authorities: paragraph 34;
- (6) If the governing body enjoys wide powers, then the question arises as to whether the entity has become market oriented and gained a degree of independence which would render tenuous the control exercised by the public authorities affiliated to it: paragraphs 35-36; and
- (7) That will not, however, be the case if the object and *raison d'être* is the pursuit of the municipal interest and the entity does not pursue any interest which is distinct from that of the public authorities affiliated to it: paragraph 38.

26. At paragraph 41 the ECJ concluded:-

"It follows from the foregoing that, subject to verification of the facts by the referring court as regards the degree of independence enjoyed by the inter-municipal

cooperative society in question, in circumstances such as those of the case before the referring court, the control exercised, via the statutory bodies, by the public authorities belonging to such an inter-municipal cooperative society over that society's decisions may be regarded as enabling those authorities to exercise over that cooperative society control similar to that exercised over their own departments.”

27. The ECJ then addressed the question whether, where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is necessary, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for that control to be exercised individually by each of those public authorities or whether it can be exercised jointly by them, decisions being taken by a majority, as the case may be.

28. The ECJ said:-

“44 First, it should be pointed out that, according to the case-law of the Court, where several public authorities control a concessionaire, the condition relating to the essential part of that entity's activities may be met if account is taken of the activities which that entity carries out with all those authorities ...

45 It would be consistent with the reasoning underlying that case-law to consider that the condition as to the control exercised by the public authorities may also be satisfied if account is taken of the control exercised jointly over the concessionaire by the controlling public authorities.”

“51 As regards collective decision-making bodies, the procedure which is used for adopting decisions – such as, inter alia, adoption by majority – is of no importance.”

“54 Consequently, the answer to Question 3 must be that, where a public authority joins an inter-communal cooperative of which all the members are public authorities in order to transfer to that cooperative society the management of a public service, it is possible, in order for the control which those member authorities exercise over the cooperative to be regarded as similar to that which they exercise over their own departments, for it to be exercised jointly by those authorities, decisions being taken by a majority, as the case may be.”

CHANDLER

29. In Chandler v Camden LBC [2009] EWHC 219 (Admin) a parent challenged Camden’s decision to support proposals by UCL to establish an Academy and claimed that the procurement regime applied to a decision by the Secretary of State to enter into a funding agreement for the Academy. The High Court held that Camden had acted lawfully and was not required to conduct a competition before deciding to support proposals by UCL whereby it would establish an Academy. The High Court also held that the public procurement regime did not apply to the funding agreement for the proposed Academy.

30. The High Court further ruled that the claimant did not have any or any sufficient interest so as to give her appropriate standing to raise the particular EC challenge, whether by judicial review or otherwise. The Public Contracts Regulations create a distinct legal regime that confers private law rights only upon economic operators. Moreover, when the complaint is that the procurement regime has not been complied with, that is not a complaint which can be made by way of judicial review.

COMMISSION v GERMANY

31. The Opinion of Advocate General Mazak on 19 February 2009 in Case C-480/06, Commission v Germany, considered a 20 year waste disposal services contract between district councils and the City of Hamburg, which was proposing to construct a waste incineration plant. The contract was not the subject of a call for tenders. Four grounds were advanced by the districts in support of their case that tenders had not been required.

32. First, it was argued that the contract in dispute was an example of co-operation between State bodies, and thus concerned only internal relationships of the organisation of the State in the performance of public tasks. This argument was rejected.

33. The procurement regime is in general (para 28), applicable in the case where a contracting authority plans to conclude a contract for pecuniary interest with an entity which is legally distinct from it, whether or not that entity is itself a contracting authority. Likewise, the regime applies both where a contract is awarded for the purposes of fulfilling the task of meeting needs in the general interest and where it is unrelated to that task.

34. Secondly, it was urged that there was no contract within the meaning of the Services Directive, ie that the Teckal exemption applied. This argument was rejected. The control condition was not satisfied (para 45).

35. Thirdly, it was argued that there was a technical reason which justified resort to the negotiated procedure without prior publication of a contract notice, namely that the City had a guaranteed site for the construction of a waste incineration plant, no other site was available for the construction of such a plant in the Hamburg Metropolitan Region, and the existing plants did not have enough available capacity. This argument was rejected. There was (paragraph 53) no absolute necessity to award the contract to Hamburg.

36. Fourthly, it was urged that, in accordance with Article 86(2) EC, it was not necessary to initiate an open or restricted procedure, given that such a procedure would have prevented the districts and the City refuse disposal services from carrying out their duties. This argument was rejected. The contract in dispute was not the only means of enabling the performance of the duties of the districts in relation to waste disposal (para 61).

THE LINGERING PAST

37. No longer hot off the press, but still a hot topic: what is the effect of the ECJ decision in Jean Auxoux v Comune de Roanne, Case C-220/05, (2007) All E.R. (EC) 918 on development agreements and Section 106 agreements? R v Brent LBC, ex p O'Malley (1998) Admin L.R. 265 (Court of Appeal) is dead; but Gestion Hotelera Internacional, Case C-331/92, (1994) ECR1-1329, remains very much alive: see Commission v Italy, Case C-4512/04, Judgment of 21 February 2008, and not merely in my view in relation to the distinction between works and services contracts. If the main object of the project is land disposal and/or acquisition there should not be a public works contract. Moreover, land ownership may affect whether the "exclusive rights" exception from advertisement is applicable.

THE FUTURE

38. The new Remedies Directive, 2007/66/EC, primarily codifying the Alcate! Judgment, on standstill periods, but also making provision for signed contracts to be "rendered ineffective", will come into effect in the UK in November/December 2009.

39. Issues in relation to time limits for challenges arise in the LAML procurement case; and there are references before the ECJ on this and other topics, including C-406/08,

Uniplex, and C-456/08, Commission v Ireland, on time limits, and Case C-451/08, Helmut Mueller GmbH, on when a development contract counts as a works contract.

A REMINDER

40. The ECJ in Secap SpA v Comune di Torino (2008) 2 CMLR 56 reiterated that the strict special procedures prescribed by the Directives co-ordinating public procurement procedures apply only to contracts whose value exceeds the threshold expressly laid down in each of those Directives. However, such contracts are not excluded from the scope of Community law. Contracting authorities remain bound to comply with fundamental Treaty principles, including the principle of non-discrimination on the ground of nationality. However, that obligation would arise only in relation to contracts which were likely to be of cross-border interest. It is for the national court to determine whether the contracts in question give rise to a cross-border interest which engages the fundamental principles and rules of Community law.

41. This approach applies not only to contracts below the relevant threshold. It also covers concession contracts and Part B services contracts.

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