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Procurement Law Newsletter

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11KBW Procurement Group

James Goudie QC	Jane Oldham	Jonathan Moffett	Joanne Clement	Tom Cross
Tim Kerr QC	Charles Bourne	Deok Joo Rhee	Holly Stout	Christopher Knight
Nigel Giffin QC	Akhlaq Choudhury	Julian Milford	Patrick Halliday	Heather Emmerson
Clive Lewis QC	Jason Coppel	Ben Hooper	David Bedenham	Edward Capewell
Peter Oldham QC	Karen Steyn	James Cornwall	Rachel Kamm	Joseph Barrett
Paul Nicholls QC	Andrew Sharland	Marcus Pilgerstorfer	Amy Rogers	

Editors: Jason Coppel, Patrick Halliday and Joseph Barrett.

We welcome feedback, which can be sent to Jason.Coppel@11kbw.com, Patrick.Halliday@11kbw.com or Joseph.Barrett@11kbw.com.

11 King's Bench Walk
Temple London EC4Y 7EQ

t. 020 7632 8500
f. 020 7583 9123

e. clerksroom@11kbw.com
w. www.11kbw.com

DX: 368 LDE
tw: @11KBW

Chigwell (Shepherds Bush) limited v ASRA Greater London Housing Association Limited [2012] EWHC 2746 (QB)**; Amey LG Ltd v Scottish Ministers** [2012] CSOH 181**; Glasgow Rent Deposit & Support Scheme v Glasgow City Council** [2012] CSOH 199

The continuing difficulty of maintaining automatic stays under the PCR 2006.

Findings

Both the PCR 2006 and their Scottish equivalents provide for an automatic stay if proceedings are issued (and in the case of Scottish proceedings served) challenging a contract award. The contracting authority can apply to have the stay set aside. But what principles will the Court apply in determining the application?

In England, it is well-established that the Court will consider the factors relevant to a standard injunction application: (i) is there a serious issue to be tried, (ii) are damages an adequate remedy, and (iii) the balance of convenience: **Exel Europe Ltd** [2010] EWHC 3332 (TCC) at §28. The public interest should also be taken into account: **ALSTOM Transport** [2010] EWHC 2747 (Ch) at §80.

In **Chigwell**, the Claimant issued proceedings after failing to win a contract for the repair of housing stock. The Defendant contended that damages were an adequate remedy and that continuing the stay would be contrary to the public interest. Haddon-Cave J concluded that there was a significant public interest issue because if the stay was continued there would be a risk of disruption to the repairs in the run up to winter; and that damages were likely to be an adequate remedy.

The Scottish approach is similar in that the Court will consider whether the pursuer has a *prima facie* case and then the balance of convenience and the public interest: **Amey** at §38. In **Amey**, the contractor's bid for the maintenance of a road network had priced the majority of core items at just one penny. Unsurprisingly, the bid was rejected (after inquiries) as abnormally low. On the application to set aside the automatic stay, the Court considered that the manifest error claim was weak at best, and that in such applications the Court has to take account of the probable consequences of the order on all interests and the public interest: §54. If not set aside the stay would have a severe impact on the successful contractors, and on the public interest given the need to avoid delay and uncertainty.

In **Glasgow Rent Deposit**, a housing provider challenged the authority's refusal of its bid. The Court found that there was no *prima facie* case, that damages were an adequate remedy and that the balance of convenience favoured setting aside. Continuation of the stay would be contrary to the public interest, because it would adversely affect services to the homeless.

Commentary

- These cases continue the trend whereby the courts are readily setting aside automatic stays because of public interest concerns and because damages are regarded as an adequate remedy. Interestingly, it was specifically argued in the **Glasgow Rent Deposit** case that if the public interest in avoiding disruption to such public contracts always takes precedence (save in extreme cases) then the protection afforded to contractors is undermined. However, the Court's response was to point to the adequacy of damages as a remedy. No doubt that was small comfort to the charity in that case which was at risk of having to "shut up shop" as a result of losing the bid.
- The lesson for contractors is that if seeking to maintain an automatic stay, any argument as to inadequacy of damages as a remedy will have to be particularly strong (and involve more than just the fact that it is difficult to assess loss of chance) before there is a realistic prospect of success in preserving an automatic stay in the face of an application to set aside.

Akhlaq Choudhury

Azienda Sanitaria Locale di Lecce, Università del Salento v Ordine degli Ingegneri della Provincia di Lecce

[2012] EUECJ C-159/11

CJEU revisits and distinguishes the Hamburg Waste case; and contradicts Chandler by ruling that simple reimbursement of costs constitutes "pecuniary interest".

Findings

A local health authority commissioned a university to carry out a study of the vulnerability of the authority's hospitals to earthquake damage. The contract terms permitted the university to bring in private sector expert subcontractors to perform some of the work. The consideration to be paid by the health authority would not exceed the cost to the university of performing the service. Professional bodies contended that the contract should have been put out to tender.

"Pecuniary interest"

On a reference for a preliminary ruling, the CJEU held that a contract cannot fall outside the EU procurement regime merely because remuneration is limited to reimbursement of the expenditure incurred to provide the agreed service. Directive 2004/18 applies only to contracts for "pecuniary interest", but simple reimbursement amounts to pecuniary interest (§29).

The Hamburg Waste exemption

The parties agreed that the **Teckal** exemption did not apply because the health authority did not exercise control over the university. However the public bodies relied on the exemption recognised in **Commission v Germany**, Case C-480/06, [2009] ECR I-4747 (the "**Hamburg Waste**" case). That exemption applies only where (i) the contract's effect is to "establish cooperation between public entities with the aim of ensuring that a public task that they all have to perform is carried out"; (ii) the contract is concluded exclusively by public entities, without the participation of a private party; (iii) no private provider of services is placed in a position of advantage vis-à-vis competitors; and (iv) implementation of the cooperation is governed solely by considerations and requirements relating to the pursuit of objectives in the public interest (see §§34 to 35 in **Azienda Sanitaria**).

Here, the CJEU held, subject to checking by the referring court, that condition (i) was not met because a significant part of the contract works comprised "activities usually carried out by engineers and architects and which, even though they have an academic foundation, do not however constitute academic research" (§37); and condition (iii) was not met because the contract terms permitted private contractors to be instructed without competition (§38).

Commentary

- The finding that mere reimbursement of costs, with no profit element, constitutes "pecuniary interest" contradicts the Court of Appeal's decision in **R (Chandler) v Camden LBC** [2009] EWCA Civ 1011 at §52. The domestic courts, up to the level of the Court of Appeal, were formerly bound by **Chandler**. They should now follow **Azienda Sanitaria** on this point.

- It was difficult to extract a precise *ratio decidendi* from the **Hamburg Waste** decision itself. By listing the factors required for the **Hamburg Waste** exemption to apply, the CJEU has helped to clarify the scope of that exemption.

Patrick Halliday

Forposta SA v Poczta Polska SA

[2012] EUECJ C-465/11

First CJEU guidance on the scope of 'grave professional misconduct' under the PCR 2006.

Background and Findings

As is well known, the PCR 2006 provide a discretionary ground of exclusion where a bidder has committed an act of 'grave professional misconduct'. Bidders can be required to provide information to enable an authority to assess whether grave professional misconduct is made out and exclusion may be proven by 'any means' that the authority can demonstrate.

In an increasing number of cases, campaign groups or third parties have sought to persuade authorities to exclude bidders on the ground that they, or entities 'connected with' them, are alleged to have committed acts of (what is said to be) grave professional misconduct.

One issue that obviously arises in this context is *whose* acts are relevant: can a bidder be excluded because of the acts of other group companies or connected parties? The language and structure of the PCR 2006 suggest that inquiry is confined to the bidder alone. However, there could be limited circumstances in which the Court *would* consider the conduct of other parties e.g. the type of case that might justify piercing the corporate veil.

What is 'grave professional misconduct'? In **Forposta SA** the CJEU has very recently, for the first time, provided some assistance on this issue.

Polish law provided that a bidder could be excluded if, within the 3 years prior to the relevant tender, a contract between it and the public authority had been terminated for reasons for which the bidder was responsible and more than 5% of the contract's value was outstanding at termination. A bidder challenged its exclusion on the ground that Polish law was inconsistent with Article 45(2)(d) of Directive 2004/18. The CJEU agreed. It said that grave professional misconduct: 'refers more to the breach of principles relating to ethics, dignity and professional conscientiousness. Such a breach gives rise to professional liability on the part of the person who committed it through, inter alia, the opening of disciplinary proceedings by the competent professional bodies. Accordingly, it is those bodies or courts which would decide whether there has been grave professional misconduct and not the contracting authority'.

Commentary

- First, the misconduct in question must be 'professional'. This suggests that general allegations of wrong-doing will not suffice unless they arise in a professional context. This may exclude certain serious allegations. It may not be enough, therefore, to complain of a bidder's commercial practices or dealings.
- Second, in deciding whether there has been professional misconduct it is necessary to have regard to the rules of the relevant profession. A key question may be the response of any professional regulatory body. If such a body has considered and dismissed an allegation there would appear to be no basis for exclusion. If no relevant complaint of misconduct had been made, the authority would need to consider whether the professional body would have regarded the action as misconduct. If the matter had been reported to the professional body but no action had been taken, that might be an indication that there was no relevant misconduct.
- Third, the misconduct must be 'grave'. It is not enough that the misconduct is 'professional'.
- Fourth, even if there is grave professional misconduct, the contracting authority still has a discretion whether to exclude. Relevant matters would be the severity of the misconduct, when it occurred and what steps the contractor has taken subsequently.

Paul Nicholls QC

The Public Services (Social Value) Act 2012

Added value? An analysis of the extent to which the Public Services (Social Value) Act 2012 will change the approach to procurement exercises.

Section 1(1) of the Public Services (Social Value) Act 2012 ("PSSVA") requires public authorities proposing to procure the provision of services, or the provision of services together with the purchase or hire of goods or the carrying out of works, to comply with three obligations before starting the procurement process (section 1(2)).

Firstly, the authority must consider how what is proposed to be procured might improve the economic, social and environmental well-being of the area in which the authority primarily exercises its functions. Second, the authority must consider how, in conducting the process of procurement, it might act with a view to securing that improvement, considering only matters that are relevant to what is proposed to be procured and the extent to which it is proportionate to take those matters into account. Third, the authority must consider whether to undertake any consultation in relation to either of these two questions (see sections 1(3),(6) and (7)). In the event of an urgent need to arrange a procurement exercise, the requirements can be disregarded if it impractical to consider them (section 1(8)).

The Cabinet Office has issued a procurement policy note (Information Note 10/12 of 20 December 2012) explaining the effect of the Act and drawing attention to the need to obtain "best value", rather than simply the best price. The note emphasises that some commissioners are missing opportunities to secure both the best price and meet the wider needs of the community and sets out helpful guidance as to how commissioners should approach the obligations in the PSSVA.

Comment

It has long been permissible, as a matter of procurement law, for commissioners to give effect to economic, social and environmental considerations in the framing of contract award criteria (provided that these are linked to the subject matter of the contract and do not discriminate, in particular, on grounds of nationality: see *Concordia Bus Finland* [2002] ECR I-7213) and in drawing up the terms of the contract (provided again that there is no discrimination between tenderers: *Gebroeders Beentjes* [1988] ECR 4636).

In that sense, the PSSVA complements rather than radically alters existing law on procurement processes. Its real impact is likely to be in *requiring* commissioners to focus on broader social, economic and environmental considerations in the early stages of a procurement process. The effect of this ought to be to encourage competition for contracts from local organisations, in particular, charities and the voluntary sector, consistent with the Government's aspirations for the "Big Society"

The PSSVA supplements the equality duty contained in the Equality Act 2010 and the duty of Best Value in the Local Government Act 1999, which already bear upon the judgment of commissioners at the pre-procurement stage. It should be noted, however, that the PSSVA is narrower in scope than these Acts, and narrower than the Public Contracts Regulations, because its terms are confined to the procurement of services.

However, the potential for challenges under the PSSVA, based on failure to have "due regard" to the non-commercial considerations, should not be overlooked. The development of the case law in the context of the "due regard" duty under the EA 2010 is a warning sign that obligations on authorities to have regard to particular matters should be taken seriously (see Joseph Barrett's article on R (RB) v Devon County Council [2012] EWHC 3597 in the December Newsletter). To mitigate this risk, authorities would be well-advised to update contract procedure rules, procurement policies and template reports to members so as to include reference to the PSSVA, in order to ensure both that consideration is given to the relevant issues at the appropriate time and also that such consideration is recorded.

Heather Emmerson

Montpellier Estates Ltd v

Leeds City Council

[2013] EWHC 166 (QB)

There was no breach of transparency or equal treatment in developing a public sector comparator in parallel with a competitive procurement to: (i) assess value for money; and (ii) serve as a fall-back solution if value for money was not secured.

Findings

This was a big case: the claim for damages was for in excess of £40m, Leeds City Council's ("**LCC**") legal costs are thought to have exceeded £4m, the trial lasted almost two months and the judgment of Supperstone J runs to some 469 paragraphs. Montpellier Estates Ltd ("**MEL**") alleged fraud and dishonesty against 8 of LCC's members, officers and advisers.

In 2007, LCC began a procurement for the development of a new arena. MEL submitted a bid using its own 10-acre site. By February 2008, LCC was concerned that the procurement might fail to produce a satisfactory bid. Consequently, it began work to develop an alternative (non-hypothetical) 'public sector comparator' ("**PSC**") proposal that could be used to test whether bids provided value for money and would provide an alternative if no acceptable bid was received. Bidders were then requested to submit 'best commercial offers' which would be compared with the PSC to decide whether the procurement should continue or be abandoned and replaced with the PSC. LCC eventually abandoned the procurement, having decided that none of the bids provided value for money, and decided to implement the PSC proposal.

MEL alleged that LCC had unlawfully concealed a plan to implement the PSC proposal and had improperly used the PSC as a 'competitor' in the procurement. MEL claimed that: (i) LCC made a number of fraudulent misrepresentations which had induced MEL to enter and remain engaged in the procurement longer than it otherwise would have ("**the deceit claim**"); and (ii) this conduct was also a breach of the PCR 2006, in particular the duties of transparency and equal treatment ("**the procurement claim**").

The deceit claim

Supperstone J preferred the factual evidence of LCC: §§340-346. MEL failed to establish that any of the alleged representations were dishonest and so the claim could not succeed. The judge concluded that LCC had not made any decision to implement, or even prefer, the PSC proposal over the private sector bids until *after* it determined that the procurement should be abandoned because the bids did not provide value for money: §§382 and 390.

The procurement claim

There was no breach of transparency in developing the PSC proposal: (i) to test value for money; and (ii) to serve as a fall-back option if a satisfactory bid was not received, in parallel with the procurement, where the bidders were aware of that fact: §444. Transparency did not require further detailed disclosure of the parameters of the PSC: §443. LCC acted in good faith in continuing the procurement until it became clear that the bids would not provide value for money: §§390 and 445. The PSC was not treated by LCC as being in competition with the private sector bids in the procurement: §452. LCC's decision to vary the structure of the procurement by seeking 'best commercial offers' for comparison with the PSC did not breach the principle of equality of treatment or constitute a fundamental change: §451.

The judgment also addresses various points on limitation (§§420-435), the (old) requirement for a statutory letter before action (§§413-419), a manifest error scoring challenge (§§453-458) and an alternative claim in implied contract (§§463-467).

Commentary

– A reminder, if required, of the evidential difficulty in making good claims of fraud/dishonesty.

- Further affirmation of the wide discretion to abandon procurements, cf. the *dicta* of Eady J in the interim proceedings which had been read by some as hinting that this case might identify a limit on the discretion: [2010] EWHC 1543 (QB) at §§41-43.
- The judgment endorses the practice of contracting authorities running actual (non-hypothetical) public sector alternatives or comparators in parallel with competitive procurements under the PCR 2006 in order to determine whether bids are acceptable and to serve as an alternative in the event it is decided the procurement should be terminated.
- The implied contract claim had survived a strike-out challenge on the grounds that there was conflicting authority but the final outcome confirms that the weight of authority is now firmly against there being any implied contract governing the conduct of a tender process to which the PCR 2006 apply.

Joseph Barrett