

FOCUS ON... PROCUREMENT LAW

A CHANGING CLIMATE



In recent years more disappointed bidders have challenged contract award decisions by using procurement law, argues **Garth Lindrup**.

Among the signs of the coming of age of any set of rules are higher levels of expectation that they will be observed and a greater willingness to seek redress when they are not. Measured in these terms, there is plenty of evidence that the European public (and utilities) procurement rules have matured in the last few years.

Some of this evidence is necessarily anecdotal. Legal advisers specialising in procurement law report a significant rise in the instructions received from disgruntled bidders with issues about the way this or that process was conducted. A growing proportion of these instructions is now graduating into full-blown High Court proceedings. Increasingly, it seems,

doubts about the commercial wisdom of suing customers are vanishing in the light of perceived failings in the decision-making process.

How has this 'climate change' come about? As suggested, expectations of compliance are undoubtedly higher than they were even five years ago, let alone ten. When the stakes are also very high, in terms of wasted bid costs and/or lost profits, the picture is complete and it is time to talk to the lawyers.

The weapon of choice for the disgruntled bidder (and arguably, the only effective remedy in procurement cases) is the interim injunction. Damages claims are fraught with all kinds of difficulties for

most bidders in most situations. However, an interim injunction is only available for so long as the contract has not yet been entered into. The so-called Alcatel standstill period (from the case in which the principle was established) allows little time for a formal challenge to be mounted from a standing start. However, for the bidder whose case is already prepared, the start of the standstill period is the prompt to give the requisite notice of challenge.

This shift towards a challenge culture will be welcomed by the European Commission (EC) in its efforts to police the procurement rules, rooted as they are in principles enshrined in the original Treaty of Rome. The Commission has in recent years stepped up its interventions in unlawful procurement activity and, although necessarily constrained by limited resources, the possibility of it opening formal enquiries in relation to a particular project can never be fully discounted.

In 2007 the Commission was given a double boost to its enforcement agenda and in particular its efforts to stamp out direct awards; that is to say, public contracts awarded without advertisement and competition. Direct awards are viewed both by the Commission and the European Court of Justice (ECJ) as the most serious infringement of the public procurement rules. In July 2007, a long-running case against Germany over directly awarded contracts culminated in a ruling by the Court to the effect that the contracts concerned should be brought to an end. Two local authorities had awarded long-term waste contracts without advertisement or competition, taking advantage of a provision in the original Remedies Directive which limited the available remedies for breach of the procurement rules to damages once a contract had been signed.

The ECJ confirmed that where the contract had been awarded in breach of the procurement rules this provision gave way to a higher requirement in the Treaty itself to bring the infringement to an end. The pressure brought to bear on the parties involved ultimately paid off, and although the payment of fines to the Commission was avoided, it is unclear how much compensation had to be paid to the contractors.

The second boost came in the shape of the new Remedies Directive adopted in November 2007. This requires the UK and other Member States of the EU to make it possible for suppliers to challenge such direct awards and in effect to have the contracts overturned, where the opportunity was not properly advertised. Member States have until December 2009 to implement the requirements of the Directive and the Office of Government Commerce is expected to produce a draft of the new provisions during the course of 2008.

How the broad concepts of the new Directive will be translated into UK law will be of interest not only to lawyers but also to service providers themselves. While few would disagree that flagrant disregard of the rules merits a tough response, there may be consequences not immediately foreseen.

The expedient of the contract extension, for example, is likely to be caught. Contracts which have run their course and for one reason or another are extended or allowed to run on, pending the formulation

or implementation of a fresh procurement strategy, may be at risk of challenge, where such extensions by time are not covered by an express option mentioned in the Official Journal of the European Union (OJEU). While short-term extensions are unlikely to attract the attention and resource of the EC, the market is likely to be handed a stick to wave at the customer when its patience runs out.

Lateral extensions, or enlargements of scope, may also, if unadvertised, amount to direct awards for the purposes of the new types of remedy. The degree to which changes may be made either to a bidder's proposals or to the customer's requirements, after the competitive bidding process has been concluded, is one of the most difficult areas of procurement law and provides a fertile

source of income for specialist counsel. There are no clear guidelines and often it will fall to the project team to attempt tricky assessments, in both qualitative and quantitative terms, of the

individual and cumulative impact of such changes, in order to determine whether a reopening of the competition is required. Crumbs of comfort may be found in cases such as London Underground, where some of the changes had been driven by external events (9/11, for example) and by advances in technology since the competition closed.

Ripple effects from the new remedies regime may also be felt in other corners of procurement law. Reliance upon the 'sole provider' exception or indeed any other ground for using the Negotiated procedure without advertisement will require added caution. Under the sole provider exception it is permissible to proceed without advertisement "when, for technical or artistic reasons or for reasons connected with the protection of exclusive rights, the public contract may be awarded only to a particular economic operation".

Practical application of this exception is not confined to situations in which prior intellectual property rights may drive an ICT or other requirement in a particular direction. It has also surfaced in the context of urban regeneration schemes in which sizeable chunks of land are already in the hands of a developer.

Reliance on the sole provider exception can rarely be considered safe. One of the

local authorities in the German case failed to persuade the Commission that it applied in relation to their particular waste disposal requirements.

Where the stakes are high enough, competitors on the outside may well look to the possibility of overturning a contract quietly concluded on the sole provider ground. When the new rules are in place, funders may be expected to be doubly nervous about backing contracts awarded on this footing or on any of the statutory grounds for direct award, when the chances are that the Court's interpretation of those grounds will not be wide enough. ☐



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In summary...

- The European Commission has stepped up its interventions in unlawful procurement activity, and the possibility of it opening formal enquiries in relation to a particular project can never be fully discounted
- The new Remedies Directive was adopted in November 2007, requiring the UK and other EU Member States to make it possible for suppliers to challenge direct awards, and in effect to have contracts overturned where the opportunity was not properly advertised
- Ripple effects from the new remedies regime may also be felt in other corners of procurement law; reliance upon the 'sole provider' exception or indeed any other ground for using the Negotiated procedure without advertisement will require added caution

Further information

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