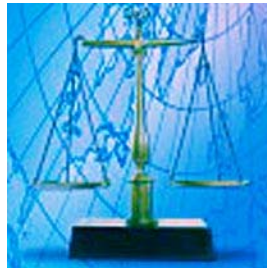




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PROCUREMENT TEAM E-ALERT



In this edition of our regular updating service, there are 4 areas of procurement law to update, and some exciting team news:

- 1 Remedies Directive
- 2 Disclosure under the Freedom of Information Act
- 3 CPV Code changes
- 4 Threshold Changes
- 5 Team news

1 Remedies Directive

One of the hottest topics of 2007, in the field of public and utilities procurement, has been the sanctity (or otherwise) of the signed contract. Until 2007, few doubted that, once signed, a contract awarded by a public body or utility was inviolable, even where concluded in breach of the procurement rules. After a European Court of Justice decision in the summer and the adoption of the new Remedies Directive on 15 November, contracts awarded without any prior advertisement or competition will no longer be safe. These so called "direct awards" are considered by the European Court to be the most serious breach of procurement law. Under the new Directive, the Courts will be given power to render such contracts "ineffective". Where there are "overriding reasons relating to a general interest" for allowing such a contract to stand, alternative sanctions must be applied, such as shortening the term of the contract and/or imposing fines.

The application for ineffectiveness must be filed within 30 days after a contract award notice is published. If no such notice has been published, businesses which would have been interested in bidding for the contract will have up to six months after contract signature to file an application for ineffectiveness.

Similar sanctions will be available where the public body or utility has failed to comply with the standstill requirement. Currently, there is no express penalty or sanction in the regulations for non-compliance with Alcatel.

The Directive brings Part B services within the standstill requirement. In the case of framework agreements, a specific review mechanism will be required in relation to contracts awarded in the mini-competitions. Member states may elect to adopt the standstill requirement or some form of post contract review procedure.

The UK has until November 2009 to amend the existing regulations or adopt a whole new set of regulations in order to give effect to the requirements of the Remedies Directive. At this stage, it remains unclear how the UK authorities will seek to realise the ineffectiveness concept in English legal terms. A further note will be issued when the consultation process begins.

2 Disclosure under the Freedom of Information Act

A recent decision from the Scottish Information Commissioner (SIC) illustrates the danger of the Freedom of Information (Fol) legislation to the commercially sensitive content of Project Agreements and is also an example of how not to deal with the Information Commissioners. It is not binding on the UK Information Commissioner (who has Fol responsibility for all of the UK except Scotland), but it is persuasive and could encourage more Fol applicants.

The SIC ordered the Health Board to disclose the entire contract of a £1.2 billion hospital deal. The authority had claimed that the agreement was subject to confidentiality obligations to the contractor. However, in doing so, the authority failed to conduct its own assessment of the possible exemptions, and merely repeated the views of the contractor. The SIC had asked for precise details of the specific information believed to fall within the scope of the exemption but instead, the authority provided broad statements.



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There was clearly a breakdown in communication, as the SIC felt obliged to issue 2 information notices against the authority. The authority is reported to have decided not to appeal against the decision.

The Government is also consulting on extending FoI to cover private sector organisations carrying out public duties. A copy of a link to the consultation document is attached.

<http://www.justice.gov.uk/publications/cp2707.htm>

3 CPV Code changes

The European Commission has adopted a Regulation that updates the Common Procurement Vocabulary (CPV), which is the EU-wide classification system for public procurement contracts. The new system will be more user-friendly and will take into account recent developments in technology, making it easier for businesses and SMEs to sell their products and services to public authorities across the EU. Every day, public procurement business opportunities worth almost €1 billion are added to the Tenders Electronic Daily (TED) database (<http://ted.europa.eu>), where all calls for tender in the EU are published. The CPV helps all EU businesses to easily identify these contracts irrespective of the original language of the tender notice, thereby increasing competition, efficiency and transparency.

4 Threshold Changes

It was announced last week that the financial thresholds for the application of the procurement rules will be revised downwards with effect from 1 January 2008. The new figures are as follows :

Utilities Directive		
	Current Threshold	Revised Threshold
Supply and services contracts	EUR 422,000	EUR 412,000
Works contracts	EUR 5,278,000	EUR 5,150,000
Design contests	EUR 422,000	EUR 422,000

Public Sector Directive		
	Current Threshold	Revised Threshold
Supply and services contracts and design contests (awarded by central government authorities listed in Annex IV and covered by the GPA)	EUR 137,000	EUR 133,000
Supply and services contracts and design contests (awarded by other contracting authorities) and subsidised services contracts.	EUR 211,000	EUR 206,000
Works contracts, subsidised works contracts and works concession contracts.	EUR 5,278,000	EUR 5,150,000



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5 Team news

We also wanted to share with you our good news. In the recent Chambers UK 2008 Guide to law firms, public procurement featured for the first time. We are pleased to report that the Addleshaw Goddard team was ranked in the first tier nationally, alongside only 3 other firms.

For further information please contact:

[Jonathan Davey](#) (Manchester) 0161 934 6349, [Garth Lindrup](#) (Manchester) 0161 934 6242,
[Mark Clough](#) (London) 020 7880 5865 or [Ruth Davies](#) (Manchester) 0161 934 6447
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