

UK Public Procurement Law Digest

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MORRISON | FOERSTER

Morrison & Foerster (UK) LLP

CityPoint

One Ropemaker Street

London EC2Y 9AW

Tel: +44 (0)20 7920 4000

Fax: +44 (0)20 7496 8500

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New Public Procurement Remedies in the UK

UK central and local government bodies, and utilities, need to be ready for the increased scrutiny to which their internal processes and procedures will be subjected under the new public procurement remedies regime which came into force on 20 December 2009. Some of the new rules will change the dynamic between authority, winning bidder and losing bidders in public contract awards.

1. What is the development?

On 20 December 2009, the Public Contracts (Amendment) Regulations 2009¹ and the Utilities Contracts (Amendment) Regulations 2009² entered into force. These two Regulations, which amend the Public Contracts Regulations 2006 (“PCR”) and the Utilities Contracts Regulations 2006 (“UCR”) respectively, implement Directive 2007/66/EC of 11 December 2007 (“**New Remedies Directive**”),³ which is designed to improve the effectiveness of review procedures concerning the award of public contracts. In a previous update, we provided an overview of the draft amendments to the remedies regime proposed by the UK Office of Government Commerce.⁴ In this update, we provide an overview of the new regime and explain the key implications for contracting authorities, winning bidders and losing bidders.

2. Why is this development important?

These amendments implement a comprehensive overhaul of the existing remedies regime set out in PCR and UCR. Some of these changes have a profound consequence for bidders and contracting authorities alike. Contracting authorities in particular need to ensure that their internal processes and procedures are ready for the increased scrutiny to which they will be subject under the new regime.

Most importantly:

- a public body can no longer assume that the courts in the UK are limited to awarding only damages in respect of an improperly concluded contract;
- the set-aside of contracts has become mandatory in certain cases of impropriety;
- public bodies now face the prospect of being fined for breach of the procurement rules, or having the term of an improperly awarded contract shortened; and
- a contracting authority will now be compelled to suspend its procurement process where an aggrieved bidder challenges the contracting authority’s decision.

These are welcome changes for the bidders on public contracts; but bidders should note that, despite the extensive powers granted to the courts under the new remedies regime, bidders will still need to act promptly and within a very tight time limit, especially if they wish to apply for the more draconian remedies granted to the courts under the new regime.

¹ SI No. 2009/2992

² SI No. 2009/3100

³ See Official Journal of the European Union OJ L 335/31, 20 December 2007.

⁴ See our May 2009 update: [Remedies Directive](#)

Contracting authorities that wish to minimise their exposure to the potentially onerous consequences of the new regime will be well advised to ensure that they adhere strictly to procedural formalities of the procurement rules and, more importantly, to ensure that they comply with the fundamental requirements to treat all bidders equally and in a non-discriminatory way, and maintain as much transparency as possible in their dealings with bidders.

3. What are the changes introduced by this development?

As a result of the amendments made pursuant to the New Remedies Directive, the way in which aggrieved bidders may challenge a contracting authority's decision under PCR and UCR, and the ultimate redress that aggrieved bidders may seek from the courts under PCR and UCR, have changed in a number of important ways.

3.1 The previous remedies regime

Previously, once a contracting authority decided to whom it intended to award a contract or framework agreement, it had to notify all of the bidders (including the unsuccessful ones) of its decision using "*the most rapid means of communication practicable*", and then allow at least 10 days to elapse before it actually concluded the contract or framework agreement.

The purpose of this 10-day standstill period was to allow the aggrieved bidder(s) to challenge the contracting authority's decision to not award the contract or framework agreement to him or her. However, the 10-day standstill period did not apply to all contract awards and, notably, it did not apply to award of specific contracts under a framework agreement.

Once informed of the contracting authority's decision, an aggrieved bidder was entitled to request in writing an explanation for the decision from the contracting authority, and the contracting authority had to respond to such request within 15 days of the receipt of request, unless such request was received by midnight at the end of the second working day of the 10-day standstill period, in which case the contracting authority had to respond at least three working days before the end of the 10-day standstill period; and if it couldn't do so, the 10-day standstill period had to be extended to allow for the delay.

After it received the explanation from the contracting authority, if it was dissatisfied with the explanation, an aggrieved bidder could challenge the contracting authority's decision in the High Court, on the ground that the contracting authority had breached its statutory duty to comply with the procurement rules. However, in most cases, such challenge had to be launched within three months from the date when the grounds for challenge first arose, and crucially, prior to the recent amendment, the law provided that "*the Court does not have power to order any remedy other than an award of damages... if the contract in relation to which the breach occurred has been entered into*".

Under certain circumstances, particularly in respect of framework agreements, a court could still take the view that it was entitled to grant to an aggrieved bidder a remedy that went beyond the award of mere damages, including the setting aside of an already-awarded framework agreement,⁵ but generally speaking, under the previous remedies regime, an aggrieved bidder had very little time within which to prepare and mount a legal challenge, and if it did not act promptly, it could not expect to receive any meaningful remedy.

⁵ For further discussion on this point, see our January 2009 update [Framework Agreements](#)

3.2 The new remedies regime after 20 December 2009

3.2.1 The applicability of the New Regime

In respect of both utilities and non-utilities procurement, the new regime only applies to procurements that are initiated on or after 20 December 2009.

Specific contracts awarded under a framework agreement (or a dynamic purchasing system) are excluded from the scope of the new regime if the underlying framework agreement (or a dynamic purchasing system) was:

- concluded/established before 20 December 2009; or
- concluded/established after 20 December 2009, but the underlying procurement was initiated before 20 December 2009.

3.2.2 Standstill Period and Contract Award Notice

Once a contracting authority decides to whom it intends to award a contract or framework agreement, it still has to notify all of the bidders (including the unsuccessful ones) of its decision using “*the most rapid means of communication practicable*”, and the standstill period remains unchanged at 10 days if the notice is sent by e-mail or fax, but there is also a new, longer standstill period of up to 15 days that will apply in circumstances where a contract authority elects to send the notice by any other means.⁶

Under the new regime, the requirement on notification is also more front-loaded than before. Previously, there was no requirement to include in the contract award notice the reasons for the decision or the relative advantages of the winning bid; aggrieved bidders had to request them separately from the contracting authorities after the notices were received. Now, under the new regime, the notice must include more information up-front, and must set out the reasons for the decision, the relative scores, and the characteristics as well as relative advantages of the winning bid.⁷ It is in this area where contracting authorities may trip up: there are no firm guidelines on exactly how much information must be given, so contracting authorities who seek to summarise rather than provide all information may expose themselves to claims.

In addition, when a contracting authority sends such notice, it will now have to include in the notice an exact statement of the standstill period by specifying when the standstill period is expected to end, or specifying the date before which the contracting authority will not enter into a contract or conclude a framework agreement.⁸ This is another new requirement, which all contracting authorities will need to be aware of to avoid the possibility of a contract award being jeopardised through exposure to a procedural breach.

⁶ See Regulation 32A of PCR, as amended (also see Regulation 33A of UCR, as amended).

⁷ Compare Regulation 32(2)(b) of PCR, as amended, against Regulation 32(2)(b) of PCR prior to the amendment (also compare Regulation 33(2)(b) of UCR, as amended, against Regulation 33(2)(b) of UCR prior to the amendment).

⁸ See Regulation 32(2) of PCR, as amended (also see Regulation 33(2) of UCR, as amended).

What this means for...**Contracting authority**

Use e-mail — but then who relies on fax/post nowadays? Work out the dates exactly, and take clear legal advice. Be very clear about all the reasons for the decision. Overall, remember that breach of the standstill rules is now an important component of the new set-aside remedy, so a breach here can have major consequences.

Winning bidder

Consider requiring the right to sign-off or approve the standstill notice. Beware all activity during standstill — ramping up resources during standstill, or caving in to demands of the contracting authority to begin work during standstill, will lead to greater exposure to risk than before.

Losing bidder

More information, more quickly. No need to file supplementary requests to get the “real” reasons. Potential to exploit uncertainty around how much information is required to be given.

3.2.3 Mandatory suspension of contract-making

If a losing bidder commences legal proceedings in respect of a contracting authority’s award decision, the contracting authority is not allowed to enter into the contract in question until an interim order lifting the ban is granted by the court (such an order is granted only under certain circumstances), or the proceedings in question are determined, discontinued or otherwise disposed of and the court makes no order to keep the ban in place (*e.g.* pending an appeal).⁹ This is a new requirement under the new regime.

Here, it should be noted an aggrieved bidder who wishes to prevent the contracting authority from entering into the contract upon expiry of the standstill period must serve the claim form on the contracting authority as soon as practicable, as proceedings are deemed to be “commenced” for the purposes of the aforementioned rule only where the claim form is actually served on the contracting authority.¹⁰ No longer can one simply issue (but not serve) a “protective” claim form to stop time running.

What this means for...**Contracting authority**

Probably more of a potential head-ache than the set-aside remedy. Little that authorities can do to prevent claims designed to waste time or disrupt projects. Be prepared and have lawyers on stand-by to apply quickly to strike out frivolous claims or apply for court’s permission to proceed despite the claim.

Winning bidder

Consider requiring the authority to disclose all losing bidder correspondence and include winning bidder in process of defending the claim. Winning bidder will have no contract at this stage, remember, so consider agreeing separately the basis for participation. Given the nature of the remedy, even an interim ITP (instruction to proceed) on the contract in question probably needs court permission.

Losing bidder

The right to issue proceedings always existed and is not new, but the “automaticness” of the freeze on contract signing shifts the balance of power and increases likelihood of use of this remedy. Formalities for other injunctions (*e.g.*, cross-undertaking in damages) not required. Much less to lose than applying for set-aside.

⁹ See Regulation 47G of PCR, as amended (also see Regulation 45G of UCR, as amended).

¹⁰ See Regulation 47G(3) of PCR, as amended (also see Regulation 45G(3) of UCR, as amended).

3.2.4 Ineffectiveness

Where the contract in question has not been entered into, the remedies available to an aggrieved bidder under the new regime are no different from the remedies that used to be available under the previous regime; *i.e.*, a court can still “*order the setting aside of the decision or action concerned*”, “*order the contracting authority to amend any document*”, or “*award damages to an economic operator which has suffered loss or damage as a consequence of the breach*”.¹¹

The most significant feature of the new regime is the availability of mandatory declaration of ineffectiveness or “set-aside” as a remedy after the contract in question has been entered into. Under the previous regime, both PCR and UCR specifically stated that a court did not have the power to order any remedy other than an award of damages if the contract in question had been entered into.¹² On the other hand, under the new regime, where one of the three grounds for ineffectiveness exists, the court *must* declare a contract or a framework agreement as ineffective and set it aside even if the contract or framework agreement in question has been entered into.¹³

The three grounds that could trigger ineffectiveness are as follows:

- the award was made without prior advertisement, despite the requirement for a prior advertisement;¹⁴
- the award was made in breach of one of the primary provisions of the procurement rules (*i.e.*, a traditional breach, such as failure to treat all bidders equally and in a non-discriminatory fashion), and such primary breach is accompanied by a secondary breach of standstill period¹⁵ or mandatory suspension of contract-making,¹⁶ which secondary breach deprives the bidder of “*the possibility of starting proceedings [in respect of the primary breach] or pursuing them to a proper conclusion, before contract was entered into*”¹⁷; or
- the award was for a specific contract under a framework or dynamic purchasing system, and such award was made in breach of the rules governing the award of specific contract (*e.g.* failure to hold a mini-competition under a framework where required or to adhere to the rules that specifically apply to such mini-competition¹⁸) and the estimated value of the specific contract in question exceeds the relevant threshold.¹⁹

¹¹ Compare Regulation 47I of PCR, as amended, against Regulation 47(8) of PCR prior to the recent amendment (also compare Regulation 45I of UCR, as amended, against Regulation 45(6) prior to the recent amendment). Also note that in respect of procurement by a utility, the court continues to retain the power to award to an aggrieved bidder “*damages amounting to its costs in preparing its tender and in participating in the procedure leading to the award of the contract or its costs of participating in the procedure leading to the award of the contract*”, if it can be shown that the aggrieved bidder had “*a real chance of being awarded the contract*” but for the breach of procurement rules by the utility concerned (compare Regulation 45I(3) of UCR, as amended, against Regulation 45(8) of UCR prior to amendment).

¹² See Regulation 45(7) of PCR prior to the amendment, as well as Regulation 47(9) of UCR prior to the amendment.

¹³ See Regulation 47J(2)(a) of PCR, as amended (also see Regulation 45J(2)(a) of UCR, as amended).

¹⁴ See Regulation 47K(2) of PCR, as amended (also see Regulation 45K(2) of UCR, as amended).

¹⁵ See Section 3.2.2 above.

¹⁶ See Section 3.2.3 above.

¹⁷ See Regulation 47K(5) of PCR, as amended (also see Regulation 45K(5) of UCR, as amended).

¹⁸ See Regulations 19(7)(b), 19(8), and 19(9) of PCR, as amended. Note that UCR contains no provision which mirrors any of these, as Regulation 18(2) of UCR allows utilities to bypass the mini-competition stage where the underlying framework was properly awarded in compliance with the other provisions of UCR.

¹⁹ See Regulation 47K(6) of PCR, as amended (also see Regulation 45K(6) of UCR, as amended). The applicable threshold here is the same as the threshold which determines whether or not a regulated procurement is required. Note

Note that, whilst in ordinary civil proceedings a claimant is required to serve the claim form only on the defendant(s) who are named in the claim form, under the new regime, the bidder must “*as soon as practicable, send a copy of the claim form to each person, other than the contracting authority, who is a party to the contract in question*” where an aggrieved bidder: (a) seeks ineffectiveness as a remedy; or (b) claims that the contracting authority breached the standstill requirement, or the contracting authority entered into a contract when the contract award should have been suspended and the contract in question “*has not been fully performed*”.²⁰

What this means for...

Contracting authority and Winning Bidder

Worrying uncertainty. Especially note that the first ground could include a “direct award” undertaken via a change to an existing contract through re-negotiation, which alters the original economic balance between the incumbent and the authority – see *pressetext*.²¹

Losing bidder

It’s not a slam-dunk but at least it’s a real remedy at last. Previously, the only practical remedy was to pursue damages, which in most cases would not be worth the cost/risk/damage to reputation involved. The onus is on the losing bidder to prove that a breach has occurred.

3.2.5 Consequences of Ineffectiveness

Where a contract is declared ineffective, the court will ordinarily be obliged to set aside the contract in question. However, the court does have the discretion not to set aside a contract even in circumstances where a declaration of ineffectiveness ought to be made. Nevertheless, this discretion can be invoked only where “*the Court is satisfied that overriding reasons relating to a general interest require that the effects of the contract should be maintained*”.²²

In deciding whether or not such an “overriding reason” exists, a court is entitled to take into account “*economic interests in the effectiveness of the contract*” but only where “*in exceptional circumstances ineffectiveness would lead to disproportionate consequences*”,²³ and it is also made explicit that costs resulting from the delay of contract execution, costs resulting from holding a fresh procurement, costs resulting from the appointment of a different bidder, as well as “*costs of legal obligations resulting from the ineffectiveness*” cannot constitute such an “overriding reason”.²⁴ Thus, the mere fact that it will be very expensive to cancel a contract will clearly not, without more, be sufficient to defeat a declaration of ineffectiveness which may otherwise be made.

Where a declaration of ineffectiveness is made, the contract affected won’t become cancelled retrospectively — only the future obligations of the contract in question will become annulled.²⁵ In order to deal with the potentially far-reaching consequences of ineffectiveness, the court is empowered to make

that from 1 January 2010, a new set of lower threshold values prescribed by EC Regulation No. 1177/2009 of 30 November 2009 applies.

²⁰ See Regulations 47F(2) and (3) of PCR, as amended (also see Regulations 45F(2) and (3) of UCR, as amended).

²¹ The decision of the European Court of Justice in the case of *pressetext Nachrichtenagentur GmbH v Republik Österreich (Bund) and others* (Case C-454/06) provides an importance guidance on when a proposed contract “variation” triggers the requirement for a new procurement exercise. For further discussion on *pressetext*, see our January 2009 update [Amending an Existing Contract](#).

²² See Regulation 47L(1) of PCR, as amended (also see Regulation 45L(1) of UCR, as amended).

²³ See Regulation 47L(2) of PCR, as amended (also see Regulation 45L(2) of UCR, as amended).

²⁴ See Regulations 47L(3) and 47L(4) of PCR, as amended (also see Regulations 45L(3) and 45L(4) of UCR, as amended).

²⁵ See Regulation 47M(1) of PCR, as amended (also see Regulation 45M(1) of UCR, as amended).

“any order that it thinks appropriate”, for example by making an order for restitution or compensation, “so as to achieve an outcome which the Court considers to be just in all the circumstances”.²⁶

Therefore, in respect of any contract to which the new regime applies, in order to avoid giving hostage to fortune, a contracting authority and the successful bidder(s) ought to consider how to address the potential consequences of a declaration of ineffectiveness within the contract. This is, in fact, encouraged under the new regime. Where the contracting authority and the successful bidder have made, at any time before the declaration of ineffectiveness, a contractual arrangement “for the purpose of regulating their mutual rights and obligations in the event of such a declaration being made”, a court cannot make an order which conflicts such an arrangement.²⁷ However, in accepting or offering specific terms and conditions dealing with the consequences of a declaration of ineffectiveness, a contracting authority will still need to take care to avoid falling foul of the fundamental requirements of equality, non-discrimination, and transparency.

Where a framework agreement is declared to be ineffective, this does not automatically render the specific contracts awarded under such framework ineffective as well. Where a given framework agreement is declared to be ineffective, the court must treat each specific contract separately and make a separate determination as to ineffectiveness — and the court will be required to do so only where the aggrieved bidder specifically asks for a declaration of ineffectiveness in respect of each of such specific contracts.²⁸

In addition to the foregoing, where a court finds that grounds for ineffectiveness exist, the court *must*:

- impose a financial penalty in addition to ineffectiveness, where the contract in question is declared ineffective;²⁹ and
- impose a financial penalty and/or shorten the duration of the contract, if the court exercises its discretion not to set aside a contract even where it would otherwise be required to do so.³⁰

This is another novel and potentially significant feature of the new regime because, in the worst case scenario, a contracting authority would face not just the prospect of having the illegally awarded contract set aside, but also having to pay a potentially unlimited sum by way of a penalty.

Where a penalty is to be imposed, the court must impose a penalty that is “effective, proportionate and dissuasive”, by taking in to account various factors, including the culpability of the contracting authority, the seriousness of the breach, and where relevant, the extent to which a contract is allowed to exist despite the existence of grounds for ineffectiveness³¹.

Note that, as with situations where contracts are set aside, the court has power to make “any order that it thinks appropriate for addressing the consequences of the shortening of the duration of the contract”.³²

²⁶ See Regulations 47M(3) and 47M(4) of PCR, as amended (also see Regulations 45M(3) and 45M(4) of UCR, as amended).

²⁷ Except where the arrangement in question is inconsistent with the fact that a contract cannot be retrospectively set aside, or the fact that the court is otherwise entitled to make any order that it sees fit; see Regulations 47M(5) and 47M(6) of PCR, as amended (also see Regulations 45M(5) and 45M(6) of UCR, as amended).

²⁸ See Regulation 47O of PCR, as amended (also see Regulation 45O of UCR, as amended).

²⁹ See Regulation 47N(1) of PCR, as amended (also see Regulation 45N(1) of UCR, as amended).

³⁰ See Regulations 47N(2) and 47N(3) of PCR, as amended (also see Regulations 45N(2) and 45N(3) of UCR, as amended).

³¹ See Regulations 47N(4) and 47N(5) of PCR, as amended (also see Regulations 45N(4) and 45N(5) of UCR, as amended).

³² See Regulation 47N(10) of PCR, as amended (also see Regulation 45N(10) of UCR, as amended).

What this means for...**Contracting authority**

Don't panic. The three grounds of set-aside are quite limited and there should be ways to deal with each one so as to mitigate or eliminate the risk. In theory, real risks should only exist in extreme cases (*i.e.*, flagrant breach). Look to implement transitional provisions dealing with consequences of set-aside. Where proceedings are issued, address the grounds on which claim is made and identify overriding reasons why the contract should not be set-aside.

Winning bidder

Insist that the authority includes, in the contract, provisions dealing with the potential consequences of a declaration of ineffectiveness. Consider: authority warranties/indemnities on procedural compliance; right to participate (on indemnified basis) in litigation; "termination consequences" clause akin to break option compensation.

Losing bidder

Don't get carried away by the remedy: you still need to prove at least one significant breach of the rules and overcome the authority's arguments as to whether there is an overriding interest in letting the contract proceed.

3.2.6 Time Limits

The general rule for aggrieved bidders seeking formally to challenge a contracting authority's decision remains the same as before. Thus, in most cases, legal challenges still have to be brought "*promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose*",³³ although the court continues to have discretion to extend this time limit if "*there is a good reason for doing so*".³⁴

Important 2010 Update: In light of the ECJ judgment in Case C-406/08 Uniplex (UK) Ltd v NHS Business Services Authority (see February 2010 update), there is no longer a requirement to act "promptly". This has now been formally made law in the UK, with effect from 1 October 2011, by the Public Procurement (Miscellaneous Amendments) Regulations 2011 (the "2011 Amendments"). See separate Digest entry.

However, where an aggrieved bidder seeks to obtain ineffectiveness/set-aside as a remedy, the basic rule is that the bidder, in most cases, has 6 months to bring legal proceedings. But this 6-month limitation period is subject to a large exception under the new regime,³⁵ which exception is likely to become the norm in future contract award procedures: that the time for applying for set-aside is reduced to 30 days if the authority also either publishes a contract award notice in the Official Journal, or serves on the losing bidders a secondary or voluntary award notice.

In order to trigger the reduced 30-day limitation period, the contracting authority must give not just a notice of the fact that it has decided to make an award, but also a summary of the reasons which a bidder would have been entitled to receive if it were to specifically request a debrief following the announcement of the award.³⁶ Thus, if a contracting authority wishes to benefit from the reduced 30-day limitation period, the contracting authority must:

³³ See Regulation 47D(2) of PCR, as amended (also see Regulation 45D(2) of UCR, as amended). Note that the new regime makes it clear that "*promptly*" here does not mean that proceedings have to be brought during the standstill period (see Regulation 47D(3) of PCR and Regulation 45D(3) of UCR, as amended)

³⁴ See Regulation 47D(4) of PCR, as amended (also see Regulation 45D(4) of UCR, as amended).

³⁵ See Regulation 47E of PCR, as amended (also see Regulation 45E of UCR, as amended).

³⁶ See Regulation 47E(2)(a) of PCR, as amended (also see Regulation 45E(2)(a) of UCR, as amended).

- first issue a contract award notice which includes more information up-front by setting out the reasons for the decision, the relative scores, and the characteristics as well as relative advantages of the winning bid; and
- subsequently issue a supplementary notice setting out a summary of: (i) the reasons which were originally set out in the contract award notice; and (ii) any additional information which was not originally included in the contract award notice (*i.e.* additional information which bidders would have been entitled to, had they asked for a debrief). Such a supplementary notice is easier to get right than the original contract award notice because it requires only a “summary” of the reasons for the decision, not a complete justification.³⁷

If the award was made in circumstances where no prior advertisement was required (*e.g.*, use of negotiated procedure without prior advertisement), the contracting authority will be able to rely on the 30-day limitation period only if the contract award notice includes “*a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice*”.³⁸

Contracting authorities and winning bidders will obviously prefer the certainty of the shorter 30-day limitation period as opposed to the 6-month limitation period. They may choose to submit an OJEU award notice very quickly after the contract award decision or serve such a voluntary notice — either of which would trigger the shorter 30-day limitation period. They may then delay signing the contract until after expiry of that 30-days limitation period, or sign the contract but impose a condition precedent on its effectiveness that the 30 days expires with no procurement challenge having been made.

What this means for...

<i>Contracting authority</i>	Consider always whether to take action to reduce the set-aside remedy application period to 30 days — and whether the contract can be put on hold during that time. Consider a rapid OJEU contract award notice or voluntary award notice.
<i>Winning bidder</i>	Prompt the authority to take risk mitigation actions. But don’t forget about “unwind” contract provisions just in case.
<i>Losing bidder</i>	Watch out for authority taking steps to shorten application period. If it does, does it have something to hide or is it just being cautious? Adjust speed of response accordingly.

Morrison & Foerster
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³⁷ Here, one should bear in mind that if a contracting authority has properly complied with the enhanced award notification requirement under the new regime, most, if not all, of such reasons would have already been given when the contracting authority first announces the final outcome of the tender – see Section 3.2.2 above.

³⁸ See Regulation 47E(4) of PCR, as amended (also see Regulation 45E(4) of UCR, as amended).

ECJ gives guidance on the time limit for the bringing of procurement challenges

The new procurement remedies regulations which came into effect in the UK in December 2009 accelerated a trend for the rules on procurement challenge becoming more bidder-friendly. That trend has been confirmed by a new European Court decision.

Currently, if a bidder wishes to bring legal proceedings in the UK to challenge a contracting authority's award decision, the rule has been that it has to do so "*promptly and in any event within 3 months*". The ECJ has stated that the rule requiring legal challenges to be brought "*promptly*" is incompatible with the provisions of EU law. This decision requires contracting authorities to disregard the equivalent provision in the new remedies regime.

What is the case?

The case is *Case C-406/08 Uniplex (UK) Ltd v NHS Business Services Authority* ("*Uniplex*"), a decision made by the European Court of Justice ("*ECJ*") in respect of a claim brought against the National Health Service by a distributor of surgical instruments. The ECJ has provided a number of important guidelines regarding the interpretation of the Public Contracts Regulations 2006 ("*PCR*"), which implements the EU procurement rules in the UK.

Why is this case important?

This judgment provides important guidelines on the interpretation of a key PCR provision relating to the time period for bringing procurement challenges. Specifically, this case gives a clear signal that:

- the 3-month limitation period prescribed by the PCR only starts when the unsuccessful bidders are notified of the contracting authorities' reasons for not selecting the unsuccessful bidders;
- the requirement of the PCR that legal challenges must be brought "*promptly*" is incompatible with EU procurement rules; and
- the discretion granted to the Courts by the PCR to extend the 3-month limitation period must be exercised in such a way to ensure that as much effective remedy as possible is made available to bidders who are affected by an unlawful decision.

To contracting authorities, this case serves as an important reminder that, in order to trigger and rely on the 3-month limitation period, contracting authorities must disclose the reasons for their decisions to the bidders, rather than relying on delaying tactics.

To bidders, this case clarifies that "*3 months*" means just that and *not* a shorter period for the purposes of the limitation period. This will spell a welcome relief for all bidders, particularly in light of the approach taken by the Courts in the UK indicating that an aggrieved bidder who brings a claim within the 3-month limitation period could nevertheless be barred for failing to bring the claim "*promptly*".

Bidders should also take additional comfort from this case, which also confirms that as long as there is a good reason for the delay, a claim made out-of-time is not necessarily a lost cause.

What happened in this case?

In March 2007, the NHS published a contract notice in the Official Journal of the European Union, inviting expressions of interest to tender for a framework agreement for the supply of certain surgical instruments. Uniplex, a UK-based company which acted as a distributor of haemostats manufactured by a Dutch manufacturer, was one of the bidders to express an interest and participate in the procurement.

However, Uniplex was unsuccessful and was not admitted to the framework agreement. The NHS notified Uniplex of this on 22 November 2007 by sending a letter, and Uniplex in return requested a debrief by sending an e-mail to the NHS on 23 November 2007. On 13 December 2007, the NHS reverted to Uniplex and provided the reasons as to why Uniplex was unsuccessful.

Subsequently, Uniplex sent a letter before action to the NHS on 28 January 2007, alleging various breaches of the PCR. The NHS replied to this on 13 February 2008 by stating, amongst other things, that for the purposes of the limitation period prescribed in the PCR, the clock started ticking on 22 November 2007, when Uniplex was notified of the fact that it was excluded from the framework.

At that time, Regulation 47(7)(b) of the PCR provided that proceedings under the PCR must be brought “*promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought*”.¹

Uniplex eventually brought proceedings before the High Court on 12 March 2008. Uncertain as to whether or not Uniplex brought proceedings within time in accordance with the provisions of what was then Regulation 47(7)(b) of the PCR, the High Court referred the matter to the ECJ, seeking clarification as to how Regulation 47(7)(b) of the PCR ought to be interpreted in light of the provisions of Directive 89/665/EEC, which sets outlines, amongst other things, the remedies that must be made available in respect of breaches of EU public procurement rules. The questions posed by the High Court were as follows:

- (1) Should Regulation 47(7)(b) of the PCR 2006 be interpreted, such that the 3-month limitation period started on: (a) the date when the aggrieved bidder knew or ought to have known that the contract award was made in breach of EU public procurement rules; or (b) the date on which the breach of a relevant EU public procurement rule took place?
- (2) How should the requirement of Regulation 47(7)(b) to bring proceedings “*promptly*” be applied in practice?
- (3) In practice, how should the Court apply its discretion contained in Regulation 47(7)(b) to extend the limitation period if there is a “*good reason*” to do so?

Limitation Period and the requirement for “effective review”

In respect of the first question, the ECJ noted that Directive 89/665/EEC required Member States to ensure that contracting authorities’ decisions could be subjected an effective review,² and concluded that this requirement for an effective review could be secured only if the limitation period in Regulation

¹ Note that Regulation 47(7)(b) is now replaced by Regulations 47D(2) and 47D(4) due to amendments made to the PCR in order to implement Directive 2007/66/EC. See footnote 6 below.

² See Article 1(1) of Directive 89/665/EEC, as amended; also see para 26 of the ECJ judgment in *Uniplex*.

47(7)(b) started to run from the date on which the aggrieved bidder knew or ought to have known that the contract award was made in breach.

In so concluding, the ECJ had little difficulty in holding that an aggrieved bidder could be imparted with such knowledge only once the aggrieved bidder is informed of the reasons as to why it has been eliminated from the procurement, because the mere fact that a bidder is unsuccessful does not, without more, “enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.”

The ECJ also noted that the provisions of the PCR relating to limitation period had to be interpreted “in such a way as to ensure that that period begins to run only from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question”, and concluded that the Courts were obliged, by virtue of the very discretion granted to them, “to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rule”.

The requirement to bring proceedings “promptly” and the requirement for “effective review”

The ECJ’s answer to the first question is not particularly surprising, given that it was a ground which was already visited by the ECJ in the past.³ Likewise, the answer given by the ECJ to the third question accords with the current practice of the High Courts.⁴

What makes the ECJ’s decision in *Uniplex* unique is the answer to the second question that the requirement of Regulation 47(7)(b) of the PCR where by aggrieved bidders have to bring proceedings “promptly” was incompatible with EU procurement rules, and must be disregarded by the Courts.

The ECJ’s rationale behind this conclusion is that the wording of Regulation 47(7)(b) of the PCR not only gives rise to uncertainty, but also because “*The possibility cannot be ruled out that such a provision empowers national courts to dismiss an action as being out of time even before the expiry of the three-month period if those courts take the view that the application was not made ‘promptly’ within the terms of that provision*”. Indeed, the ECJ’s criticism of Regulation 47(7)(b) of the PCR is, in essence, an indirect criticism of the approach taken in the past by the Courts in the UK, whereby Regulation 47(7)(b) of the PCR is construed as imposing two independent requirements, namely a requirement to bring proceedings “promptly”, and a requirement to bring proceedings “within 3 months”.

As stated by the ECJ, “*If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying them, in order to apply Community law fully...*”⁵ Thus, until Parliament enacts an amendment to the PCR, the Courts will now have to disregard the requirement to bring proceedings “promptly” imposed under Regulation 47(7)(b) in

³ See *Case C-470/99 Universale-Bau AG, Bietergemeinschaft: 1. Hinteregger & Söhne Bauges.mBH Salzburg, 2. ÖSTU-STETTIN Hoch- v Tiefbau GmbH*, which was referred to frequently within this ECJ judgment. Contrast this with the Northern Irish High Court’s decision in *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 2)* [2008] NIQB 105, where it was held that the 3-month limitation period prescribed by PCR started to run only once a flawed decision made by the contracting authority is actually implemented in an irreversible way, e.g. flawed evaluation criteria actually being applied to select the winning bidder (for further discussion on *Henry Bros*, see our February 2009 update [Framework Agreements: Evaluation and Claim Period](#))

⁴ See paragraphs 36 et. seq. in Northern Irish High Court’s decision in *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 2)* [2008] NIQB 105; also see our February 2009 update [Framework Agreements: Evaluation and Claim Period](#)

⁵ See paragraph 49 of the ECJ’s judgment in *Uniplex*.

respect of legal challenges that fall under the old remedies regime, and under Regulation 47D(2) in respect of legal challenges that fall under the new remedies regime.⁶

Important 2011 Update: The Uniplex decision has now been formally made law in the UK, with effect from 1 October 2011, by the Public Procurement (Miscellaneous Amendments) Regulations 2011 (the “2011 Amendments”). See separate Digest entry. The requirement to act “promptly” has been removed and Proceedings have to be brought within 30 days of the day on which the bidder became (or ought to have become) aware of the breach of procurement rules giving rise to the right of legal challenge.

Morrison & Foerster
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⁶ For an overview of the new remedies regime brought about by Directive 2007/66/EC and implemented in the UK through amendments to PCR, see our January 2010 update [New Remedies Regime](#). Generally speaking, where legal challenges are brought in respect of procurements which were commenced before 20 December 2009, such legal challenges will fall under the remit of the old remedies regime, but on the other hand, where legal challenges are brought in respect of procurements which were commenced on or after 20 December 2009, such legal challenges will fall under the remit of the new remedies regime.

Contract Extensions and the New Remedies Regime

Most people involved in UK public sector procurement will be aware by now of the new public procurement remedies regime which took effect on 20 December 2009. This Update examines the impact of the new remedies regime in situations where authorities are seeking to extend an existing public sector contract – and also provides a refresher on how to assess proposed contract extensions in terms of procurement challenge risk.

The new remedies – especially that of mandatory set-aside – pose a greater threat to authorities extending existing contracts than to first-time contract awards. Using a case study of a typical contract extension situation, this Update also explains that the best way for an authority to reduce the risk of procurement challenge to a contract extension is, perversely, to alert the market (and potential challengers) to the proposed extension. Authorities will be torn between not wanting to alert the market but needing to do so in order to reduce risk of challenge. We think that this is known as a Catch 22.

Introduction

The new remedies regime is generally accepted to be one of the most significant changes in public procurement over the past 5 years and one which may trigger significant changes in how contracting authorities, losing bidders and winning bidders behave in relation to public sector contracting processes. We have identified in a previous Update the main practical implications of the new remedies.¹

However, in all the many thousands of words that have been written about the new remedies regime, the focus has been almost exclusively on the impact of the regime on new procurements and contract awards. Almost nothing has been written about the effect of the new remedies regime on a very large sector of the procurement market – that is, extensions to existing public sector contracts. This Update analyses the intersection of the new remedies regime with one of the other main changes in public procurement law over the past few years – that is, the European Court of Justice decision in the *Presstext* case which is generally considered to have a profound impact on the way in which authorities go about negotiating and implementing changes to existing public sector contracts.

A Case Study

To understand the impact of the remedies regime on contract extensions, it may be helpful to consider a typical situation that frequently occurs. Imagine that a particular Department has entered into an IT services contract with a Supplier. The contract was entered into following an openly advertised competitive dialogue procedure in which the Supplier won out over two losing bidders.

Three years later, the Department wants to make a significant number of changes to the contract but does not want to go back out to the market; it simply wants to re-negotiate and make changes to the existing contract with the Supplier. The changes include:

- some new types of services not previously covered by the contract (but which arguably could have been within the scope of the original OJEU notice);
- an extension to the term from 5 years to 7 years; and

¹ See our January 2010 update [New Public Procurement Remedies in the UK](#)

- a re-negotiation of some of the commercial terms of the contract, for example to reduce some service levels but raise others, defer some of the benchmarking provisions, change the way indexation works, and reduce prices in the near term in exchange for an increase in the price in the extended years.

How exposed is the Department to the risk of procurement challenge and the risk of a remedy under the new regime as a result of what it intends to do? What should it do to justify the proposed re-negotiation? Does it risk cancellation of the amended contract (or other remedies) if it proceeds?

Variations or Extensions to Existing Contracts

We have previously written a separate Update about the impact of the European Court of Justice case in *Pressetext* and the rule which it set out in relation to proposed amendments or variations to existing public sector contracts.² The rule is that any “material difference” to an existing procured contract should be subject to a new procurement process and should not simply be agreed to with the incumbent. The key part of the ECJ’s ruling in *Pressetext* is that a change to an existing contract would constitute a “material difference” where:

- the change to be introduced into the contract conditions, had it been part of the initial tender, “*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*”; or
- the change would result in the scope of the original contract being extended “*considerably to encompass services not initially covered*”; or
- the change would result in a shift in “*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.*”

The first two of these tests are simply reiteration of two existing well-known tests, but the third test – relating to the shift in economic balance – introduces a new way of determining when an amendment to an existing public procurement contract ought to be subject to a new, openly advertised award procedure and when an existing contract could simply be amended by re-negotiation with the incumbent without requiring a brand new procurement.

In our case study, how should the Department react to the *Pressetext* principles given what it intends to do to its contract with the Supplier?

Services

1. With regards to the planned new services, the Department should first check whether they were in-scope of the original advertised procurement. If they were, but they were simply not originally contracted for, it will feel comfortable that it is not falling foul of the first or second *Pressetext* tests. This is clearly the safest basis to proceed with a re-negotiation as to services.
2. If the services were not originally in-scope, the Department may still not be completely blocked. The Department will look to some of the exemptions contained within the Public Contracts Regulations 2006 (“PCR”) to see whether any apply. Some of these exemptions are absolute (*e.g.*,

² See our January 2009 update [Amending an Existing Contract](#)

certain types of financial services or R&D services fall outside the requirement to follow open procurement) whereas others are more limited.

3. Regulation 14 of the PCR sets out a number of circumstances when the Department could proceed down a negotiated procedure route to add services without open advertising. These include: 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 operator; if, for reasons of extreme urgency brought about by unforeseeable events, the time limits specified for the open, restricted or negotiated procedures cannot be met; or if the Department wants the Supplier to provide additional services which have become necessary, and such services cannot for technical or economic reasons be carried out or provided separately from those under the original contract without major inconvenience.
4. The Regulation 14 partial exemptions do provide some latitude to the Department to add services even if the contract didn't originally cover them. But, of course, the more the Department pushes the boundaries and relies on wide interpretations of Regulation 14, the more the spectre of the new remedies regime looms.

Term

5. As with service extensions, the key question with a term extension is whether the extended term was within the bounds of what was originally told to the market. If it was, then a term extension ought to be acceptable under the first test in *Presstext*, although one cannot rule out a problem under the third test. Unlike services extensions, the scope for partial exemption under Regulation 14 is much more limited.

Other Changes

6. The other changes that the Department proposes involve the new, third test of *Presstext*. But the third test – relating to the shift in economic balance – potentially covers new ground and raises the possibility that contract changes previously regarded as being entirely within the ordinary course of dealings in the contract management phase might now be prohibited. The Department must be on its guard to ensure that significant contract changes are not made to the existing contract without first checking whether the proposed change is so material that it is impermissible, and in fact would require a new procurement process.
7. In practice, the Department will need to conduct an exercise with its commercial team and any external advisers to determine whether the changes that are planned to be made to the contract would result in a shift of the economic balance of the contract in favour of the Supplier in a manner which was not originally provided. This task is rarely as straightforward as it seems.
8. One of the issues which is as yet unclear in the case law is whether the planned changes need to be considered individually in order to determine their effect on the economic balance or whether it is appropriate to take a high-level view of the whole series of changes. The ECJ in *Presstext* considered the changes individually, although this was a feature of how the Court was asked a series of individual questions. In our experience, most authorities are taking the latter view and are conducting a review of the series of changes to determine the overall balance and, in most cases, ensuring that the net effect is either positive to the authority or, at worst, neutral. It is helpful that in the *Presstext* case the European Court of Justice ruled that changes which are detrimental to the Supplier are not affected by the case and are not required to go through a new procurement exercise. Obviously, if the review by the Department concludes that the overall balance of the

changes when taken as a whole are favourable to the Supplier, then the rule would be that a new procurement exercise would need to be conducted.

Of course, the danger for the Department is that it doesn't know for sure whether it has taken the correct approach or reached the right conclusion. It cannot rule out that an aggrieved losing bidder might become aware of the extension and take a different view - *i.e.*, by alleging that the extension does have a net overall effect on the economic balance of the contract and ought to have been opened up to tender. In those circumstances, the new procurement remedies regime provides greater scope for aggrieved bidders or potential bidders to apply for remedies against the Department, one of which would involve a mandatory setting aside of the extension.

Accordingly, the review by the Department can certainly help to assess or mitigate the risk of challenge and adverse remedies but it cannot entirely eliminate the chance that an aggrieved bidder might take a different view and might make an application under the procurement remedies regime.

Procurement Remedies Regime

So, assuming the Department goes ahead with the extension, what would be the position under the new remedies regime?

1. Firstly, assuming that an aggrieved bidder finds out about the extension and wishes to challenge, unless the bidder finds out before the extension is signed, then the most likely remedy is to apply for damages against the contracting authority. The exposure to damages under the remedies regime is unlimited but it must be a mitigating factor in terms of the risk to the authority that the damages themselves would have to be scaled back according to the probability of the losing bidder actually winning had the new set of services or the amended contract been advertised.
2. If an aggrieved bidder finds out about the extension before it is signed, it may apply for an injunction to prevent the extension going ahead. Under the new rules, the first effect of an application for a remedy at this stage would be to cause a mandatory suspension of the proposed extension. The onus would be on the Department to apply to the court to overturn the suspension and allow it to proceed with the project.
3. While a complainant has to do relatively little to cause a mandatory suspension of the proposed contract award/extension (*i.e.*, merely issue and serve legal proceedings), the bar is set higher for success on an injunction applications. The well-known case of *American Cyanamid v Ethicon* in 1975 laid out the tests that the complainant must show a serious issue to be tried, that damages must be an inadequate remedy, and that the balance of convenience must favour the granting of the injunction.³
4. Most of the published cases on both injunction hearings and applications for damages concern initial contract awards where there has been a technical breach of procedure, say in relation to the application of selection or award criteria. The issues often come down to ones of subjective interpretation of the rules. The problem for the Department in our case study is that the issues are likely to be more clear-cut – that is, it has simply not advertised the proposed extension in the first place, so the prospect is greater of a court determining that there is a serious issue to be tried and that the balance of convenience favours the injunction.

³ Two recent cases demonstrate the application of these tests in the procurement sphere: *European Dynamics v HM Treasury* (2009) and *B2Net v HM Treasury* (2010)

5. So the Department has to fear a mandatory suspension under the new rules and a possible injunction application if – perhaps a big “if” – an aggrieved bidder manages to find out about the Department’s plans and apply before the extension contract is signed. On top of this, of course, one has to add the threat of the new mandatory remedy of set-aside/ineffectiveness, which can hang over the Department for up to 6 months after the extension contract is signed.
6. One of the grounds on which mandatory set aside is a required remedy is where an award of contract was made without prior advertisement, despite the requirement for prior advertisement. Obviously, in this extension situation, that would be exactly what would have happened – *i.e.*, the current extension ought to have been treated as a new contract (because none of the exemptions applied) and ought to have been advertised. Therefore, as long as the challenging bidder is able to establish that an advertisement ought to have been made but wasn’t, then the mandatory set aside remedy becomes available.
7. This is why position in relation to extensions of contracts is arguably worse than in relation to new contracts, because at least in relation to a new contract in most cases an advertisement will have been made, thus eliminating the “easiest” ground for the mandatory set-aside remedy. In relation to new contract awards, the only likely ground for ineffectiveness requires the complainant to show that there has been a breach of one of the main procurement provisions and a breach of standstill and the combination of the breaches must have been such as to affect the chances of the bidder winning the contract. In relation to extensions, it almost becomes axiomatic that one of the key grounds for the mandatory set aside will not have been fulfilled and therefore the set-aside remedy becomes available. The risk of mandatory set-aside applications is therefore greater in relation to extensions than in relation to first time contract awards.

Mitigating the Risk

So what can the Department do if it feels there is some risk of enhanced remedies in relation to a proposed extension of contract?

1. One glimmer of light exists in relation to the time limits for bringing a claim under the new remedies regime. The general rule for aggrieved bidders seeking formally to challenge is that the claim must be made promptly and in any event within 3 months beginning with the date when the grounds for starting the proceedings first arose.⁴ However in relation to set-aside, the rule is that the bidder has 6 months to bring legal proceedings. This means that the Sword of Damocles would be hanging over the contract extension for up to 6 months after the time when it is done. This 6-month limitation period is subject to an exception that the time for applying for set-aside is reduced to 30 days if the Department either publishes a contract award notice in the Official Journal or serves the losing bidders a secondary or voluntary award notice explaining the proposed extension and the reasons for it.
2. The problem in relation to extensions, of course, is that if one of the requirements is to serve a summary notice on losing bidders, it is very difficult to know who the losing bidders would be and on whom the summary notice ought to be served. It might be possible to go back to the original losing bidders from the original contract a few years ago. But these may have changed or there may be other bidders who would have been interested had the requirement to advertise been fulfilled in relation to the extension.

⁴ See our February 2010 update [Limitation Period and the Need for Promptness](#) for the interpretation of the “promptly” requirement.

3. Another approach that the Department might take is to publish a “voluntary transparency notice” in the Official Journal and wait 10 days after the publication of the voluntary transparency notice before entering into the extension contract.⁵ By doing so, the Department would go to the heart of the first ground for ineffectiveness and remove it as a basis of claim.
4. Of course, filing the voluntary transparency notice increases the chances of an aggrieved bidder applying for an injunction and triggering a mandatory suspension. As a result, the Department may consider that alerting the market in this manner to be a risky strategy, but if the real aim is to de-risk the extension then filing a voluntary transparency notice may be seen as a small price to pay in the short-term for longer-term peace of mind. The alternative is to do nothing externally, sign the contract extension and then either keep fingers crossed for 6 months or agree to some form of 6-month lead-time or extended transition on the extended contract.
5. If one looks at this situation from the perspective of the Supplier with which the Department is proposing to conclude an extension, the Supplier is likely to want to require the Department to follow a de-risking strategy because it doesn’t want to begin work on an extended contract and then have it taken away.
6. It also means that incumbent suppliers will be far more likely to want to negotiate into the terms of contract extensions some provisions for unwinding or seeking compensation in the event that there is a successful application to set aside and the winning bidder suddenly finds that it has “lost” the extension that it thought it had gained. The types of contract provisions which might be considered could include warranties or indemnities from the authority – although the authority is likely to want to share the risk. The parties could consider discussing an alternative form of modification or extension as a back-up; and certainly would want a strong severability clause to make sure that, in the event of a suspension or set-aside, the pre-extension contract could continue despite a declaration of ineffectiveness.

Morrison & Foerster
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⁵ Regulation 47K

Dedicated Regime for Defence and Security Procurement to be created

EU member states are in the process of implementing a 2009 EU directive dealing with procurement in the field of defence and security (the “Defence Directive”). The aim of the Defence Directive is to create a more flexible and transparent procurement system for contracting authorities and entities in the defence sector, whilst continuing to safeguard national security interests.

Importantly, the Defence Directive will also make it harder for civilian public bodies in the EU to use “national security” as a basis for exempting projects from the scope of the open procurement regime. As a result, the progress of the implementing regulations will be relevant not just to entities involved in purely military procurement, but also to those involved in the purchase or supply of non-military, but still sensitive or secure, goods and services.

1. What is the development?

In August 2009, the EU adopted the Defence Directive,¹ which is designed to implement new procurement rules specifically aimed at public contracts in the fields of defence and security. The Defence Directive is intended to adapt standard procurement rules and tailor them to contracts for the procurement of defence and security equipment.

The Defence Directive must be implemented into law in EU member states by 20 August 2011. The UK Ministry of Defence (“MoD”) is in the middle of a two-phase consultation on the implementation of the Defence Directive, particularly focusing on the provisions which are optional for member states.

In general, the Defence Directive (and the new UK implementing regulations, when they come) is not about exempting more projects from the scope of the procurement regime. One aim of the directive is to stop some of the perceived abuses that have gone on over the years by contracting authorities classifying non-defence projects within the scope of Article 296 of the EU Treaty, which allows members states to claim exemption from the procurement regime for projects which are deemed to be secret or require special security measures.

2. Why is this development important?

Existing EU procurement rules are considered to be ill-suited for most defence and security-related contracts.

Under the current system, the procurement of defence and security-related contracts is mainly governed by the controlling Directive that applies to conventional, non-utilities procurement² (the “**Public Contracts Directive**”). However, there a number of mechanisms that permit member states to bypass general procurement rules in order protect security interests.³ In the past, these exemptions have been applied inconsistently by member states, creating a situation where defence procurement procedures significantly vary from one member state to another. The lack of uniformity arising from differing

¹ Directive 2009/81/EC

² Directive 2004/18/EC. To a lesser extent, Directive 2004/17/EC that governs utilities procurement also applies, but the application of the latter directive is limited.

³ Article 296 of the Treaty establishing the European Community provides that a member state may take “*such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material*”, whilst Article 14 of Directive 2004/18/EC also provides a similar derogation from the procurement rules.

national procurement rules has led to a lack of competition, inefficient public spending and a sense of lack of transparency in the European defence market.

In addition, defence and security-related contracts are complex in nature and include classified, sensitive and confidential information which, for security reasons, may be required to be protected from unauthorised access. The EU considered that old procurement rules (primarily dealing with civil procurement) did not take sufficient account of these specific requirements.

The new Defence Directive addresses these requirements and adapts the open procurement rules to meet these particular features of the defence market.

3. What is the scope of the Defence Directive?

The Defence Directive is heavily based on current rules set out in the Public Contracts Directive although the applicable financial thresholds are based on those outlined in Directive 2004/17/EC (the “**Utilities Directive**”). There are, however, a number of provisions that have been adapted to facilitate the award of defence and security-related contracts.

The main changes brought about by the Defence Directive are as follows:

(a) Procurement procedures

There is no open procedure under the new rules. Contracting authorities may use the negotiated procedure with prior publication without restriction, or the restricted procedure. As extensive negotiations are often required in these types of contracts, this will give contracting authorities more flexibility to negotiate the finer details of more complex procurement contracts.

(b) Security of supply

Article 23 contains new provisions on the “*security of supply*”, which are intended to provide contracting authorities with greater assurance that equipment, works or services can be delivered in times of crisis or armed conflict. Tenderers will be required to provide documentation and/or commitments to ensure that there will be security of supply.

Contracting authorities are obliged to specify their security of supply requirements in contract documentation (Article 23).

(c) Security of information

Article 7 includes new security-related provisions to ensure that sensitive and classified information is protected during the tendering and contracting process. Compliance with such requirements may also be extended to subcontractors.

Contracting authorities can require that tenderers and subcontractors provide specific commitments on safeguarding the confidentiality of classified information during the tender process.

(d) Framework Agreements

The permitted duration for framework agreements has been increased from 4 years (under the Public Contracts Directive) to 7 years.

(e) Threshold values

The Defence Directive applies higher threshold values: €387,000 for supply and service contracts and €4,845,000 for works contracts.⁴ The Defence Directive shares these threshold values with the Utilities Directive.

(f) Subcontracting

Member States may allow contracting authorities to ask successful tenderers to subcontract up to 30% of the contract value and that tenderers compete proposed subcontracts to third parties on an EU-wide basis. These changes are intended to open up supply chains and create business opportunities for small and medium-sized enterprises and to improve competition within the EU.

4. Does the Defence Directive apply outside military requirements?

The Defence Directive covers new procurement contracts awarded after 20 August 2011 by contracting authorities for:

- a) the supply of military equipment (including any parts, components and/or subassemblies);
- b) the supply of sensitive equipment (including any parts, components and/or subassemblies);
- c) works, supplies and services directly related to the equipment referred to in (a) and (b) for any element of its life cycle; and
- d) works and services for specifically military purposes or sensitive works and sensitive services.

Clearly, therefore, the Defence Directive applies to military procurements. But it can also cover “*sensitive works and sensitive services*”, meaning “*equipment, works and services for security purposes, involving, requiring and/or containing classified information*”. In the specific field of non-military security, the Defence Directive should apply to procurements which have features similar to those of defence procurements and are equally sensitive. This can be the case in particular in areas where military and non-military forces cooperate to fulfil the same missions and/or where the purpose of the procurement is to protect the security of the EU and/or its member states on their own territory or beyond it against serious threats from non-military and/or non-governmental actors. This may involve, for example, border protection, police activities and crisis management missions.

In the UK consultation, the MoD has specifically asked for comments on the transposition into UK law of the definitions of “*military equipment*”, “*sensitive equipment*”, “*sensitive works*” and “*sensitive services*”.

⁴ Note that at the time the Defence Directive was published, the thresholds were €12,000 and €5,150,000 respectively. However, the revision of threshold values for public procurement brought about by the EU Regulation No. 1177/2009 had lowered these values from 1 January 2010. Further information on the changes to the threshold value can be found in our December 2009 update [New Threshold Values for 2010](#)

Article 3 provides that if a single contract requirement covers supplies or services that fall within the ambit of either the Defence Directive, the Public Contracts Directive and/or the Utilities Directive, the rules of the Defence Directive will take precedence (provided that a single contract is justified). But, somewhat surprisingly, if a contract requirement partly falls within the ambit of the Defence Directive, and the other part is not subject to either the Public Contracts Directive or Utilities Directive, the contract will be excluded from the rules of all three directives (again, provided that a single contract is justified).

The Defence Directive will not alter the position in relation to the arms trade with third countries outside the EU, which remains governed by WTO rules and the Government Procurement Agreement (“GPA”) of non-EU suppliers. Under EU law, contracting authorities can choose to exclude suppliers based outside the EU, although where a member state has signed the WTO GPA, then the GPA also contains reciprocity and non-discrimination provisions.

5. Can the exemption under Article 296 of the EC Treaty still be invoked?

One of the objectives of the Defence Directive is to limit to exceptional cases only the use of exemptions under both the EC Treaty and the Public Contracts Directive, and to encourage member states away from routine and inappropriate use of Article 296 and other derogations.

Contracting authorities will still have the possibility to use Article 296 to exempt from open procurement defence and security procurement contracts which are so sensitive that even the new rules cannot satisfy their security needs. In most cases, however, authorities should be able to use the new Defence Directive. In relation to purely military procurements, the use of the procedures under the Defence Directive ought to be clear-cut – likewise for “shared use” procurements where the goods or services to be acquired cover military and non-military uses.

The position of non-military, quasi-defence or security-specific procurements may be less clear. Authorities with national security-related requirements, for example, will be able to rely on the directive only where the procurement projects in question have “*features similar to those of defence procurements and are equally sensitive*”, and the fact that a specific regime exists to deal with defence procurement (containing enhanced secrecy provisions) makes it even less likely that a civil government agency with a non-military requirement would be able to invoke the Article 296 defence and avoid open procurement altogether.

6. How will the Defence Directive be implemented in the UK?

Unlike EU Regulations, EU Directives are not directly effective in EU member states; they require the individual member states to adopt additional legislative measures in order to transpose them into domestic law.

In order to transpose the provisions of the Defence Directive into UK law, the MoD intends to implement the provisions of the Defence Directive by creating specific Regulations and by amending the existing legislations to remove procurement rules that will be covered by the scope of the Defence Directive. The second consultation will take place later this year and will include a draft statutory instrument.

Limitation Period for Challenges – when does the clock start to tick?

Court provides confusion, not guidance, on the time limit for the bringing of procurement challenges

The UK courts are potentially on a collision course with the European Court of Justice over the issue of when an aggrieved bidder should bring a challenge to an irregular procurement. Based on a recent ECJ ruling, if a bidder wishes to bring legal proceedings in the UK to challenge a contracting authority's award decision, the current rule is that it has to do so within 3 months after the grounds for launching such a challenge arose. The High Court has now stated that such ground arises at the point when the aggrieved bidder becomes aware of the infringement itself in a broad sense, even if it is not necessarily aware of the detailed reasons behind the specific elements of the contracting authority's decision.

What is the case?

The new case is *SITA UK Limited v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 (Ch), a decision made by the English High Court in respect of a procurement challenge regarding a prominent PFI project to provide waste disposal facilities for Greater Manchester.

Why is this case important?

This case illustrates how the UK public procurement rules regarding limitation periods will be interpreted and applied by the Courts in the UK, despite the recent judgment of the European Court of Justice (“ECJ”) in *Case C-406/08 Uniplex (UK) Ltd v NHS Business Services Authority* (“*Uniplex*”),¹ which encourages a more liberal interpretation of the EU procurement rules in respect of limitation periods.

Since leave to appeal has been granted, the principle emerging from the High Court's decision in this particular case is not yet set in stone (*but see February 2011 Court of Appeal update below*) but, at least for the time being, this case serves as an important reminder to all bidders that legal challenges ought to be brought as soon as possible and certainly as soon as they become aware of any form of infringement of the procurement rules by the contracting authority. It will be much better to use the discovery procedure after proceedings are commenced, rather than risking having a claim struck out by delaying the commencement of proceedings.

For both contracting authorities and bidders, this case also serves as a useful reminder of the flaws of the traditional negotiated procedure, which arguably still exist in the competitive dialogue procedure introduced under the Public Contracts Regulations 2006. Under the competitive dialogue procedure as well as the negotiated procedure (which remains available under certain limited circumstances), contracting authorities and bidders should remain wary of how the scope and scale of projects change in the course of the negotiations, bearing in mind that, strictly speaking, only a fine tuning is allowed under the current rules once BAFOs have been submitted.

What happened in this case?

This case concerns a PFI project initiated by the Greater Manchester Waste Disposal Authority (“GMWDA”). Hailed as one of the largest and most advanced projects of its kind, it involves the

¹ For further discussion on ECJ's judgment in *Uniplex*, see our February 2010 update [Limitation Period and the Need for Promptness](#).

development of a network of state-of-the-art recycling facilities, comprising 36 plants on 23 sites across Greater Manchester, capable of handling 1.3 million tonnes of waste per annum.

In February 2005, the GMWDA published a contract notice in the Official Journal of the European Union (“OJEU”), inviting expressions of interest for a contract to design, build, finance, and operate waste processing facilities. The procedure adopted for this procurement was the negotiated procedure (because the project was initiated before the competitive dialogue procedure was introduced), and the GMWDA eventually selected two bidders to negotiate with – a consortium led by Viridor Laing (Greater Manchester) Limited (“VL”), and a consortium led by SITA UK Limited (“SITA”).

Both VL and SITA submitted their best and final offers (“BAFOs”) in November 2006 and, on 26 January 2007, GMWDA appointed VL as the preferred bidder, and SITA as the reserve bidder. GMWDA continued to negotiate with VL but, as the shape of the project changed over time, limited negotiation between GMWDA and SITA also continued to take place.

Nevertheless, GMWDA decided in the end to award the contract to VL and, on 18 April 2008, it issued the so-called *Alcatel* notice, formally advising SITA of its intention to award the contract to VL. SITA immediately wrote back on the same day, requesting a formal debrief and also, amongst other things, a copy of the contract that GMWDA planned to enter into with VL. GMWDA wrote back on 9 May 2008, providing the de-brief sought by SITA. GMWDA refused to provide a copy of the contract with VL which SITA had requested, but nevertheless stated that it would publish a redacted version of the contract on its website once the contract was signed.

However, with the on-set of the credit crunch, the financing of the project ran into difficulties and the contract was not signed in April 2008 as originally anticipated, and it was not until 8 April 2009 that the contract between GMWDA and VL was signed. In its finally awarded form, the project was expected to run over a 25-year period, was to trigger a construction programme worth £640 million, and was estimated to have a total contract value of £3.8 billion. This prompted SITA to write to GMWDA, on 21 April 2009, pointing out that the value of the contract awarded to VL was significantly higher than SITA’s BAFO as well as VL’s own BAFO and that “*there is a prima facie case to answer by GMWDA in respect to its compliance with its legal obligations under Procurement Regulations.*”

SITA’s letter of 21 April 2009 initiated a lengthy exchange of correspondence between SITA and GMWDA, including a letter sent from GMWDA’s solicitors to SITA on 17 July 2009, which provided an explanation of the circumstances that led to the increase in the value of the project between January 2007 (when the parties’ BAFO were initially assessed) and April 2008 (when the award of contract was first notified). This exchange eventually culminated in SITA issuing proceedings against GMWDA on 27 August 2009. GMWDA responded to SITA’s claim by making an application to strike out SITA’s claim on the basis that it was time-barred.

Regulation 32(4)(b) of the Public Services Contracts Regulations 1993 provided that procurement challenges had to be commenced “...promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought.” This requirement was mirrored in Regulation 47(7)(b) of the original Public Contracts Regulation 2006, which succeeded the 1993 Regulation, and can still be found in Regulation 47(D)(2) of the Public Contracts Regulation 2006 as last amended by the Public Contracts (Amendment) Regulations 2009.²

² Note that the ECJ in *Uniplex* held that the requirement to bring proceedings promptly gave rise to uncertainty and was incompatible with the principles of EU procurement rules. For further information on the amendments introduced by the Public Contracts (Amendment) Regulations 2009, which implements Directive 2007/66/EC, see our January 2010 update [New Remedies Regime](#).

In seeking to have SITA's claim struck out, GMWDA essentially argued that the grounds for bringing proceedings referred to in the Regulations first arose on 8 April 2009 when SITA became aware of the allegedly illegal award of the contract, whilst SITA argued that there were certain specific matters relating to its claim which only came to light in July 2009 (*i.e.*, the matters referred to in the July 2009 letter from GMWDA's solicitors). Thus, the question which faced the Court essentially boiled down to how narrowly or broadly the phrase "*the date when grounds for bringing proceedings first arose*" should be interpreted.

In the end, the Court decided in GMWDA's favour and struck out SITA's claim, noting that the chain of correspondence between SITA and GMWDA in the period of April to July 2009 clearly indicated that SITA knew, or ought to have known of the material part of the infringement of the procurement rules by GMWDA when the award of the contract with the increase contract value was announced on 8 April 2009. In so concluding, the Court took the view that "*the expression 'grounds for bringing proceedings' should be treated effectively synonymous with 'infringement' in a broad sense.*"³

In other words, in the eyes of the Court, the fact that SITA was aware of a potential breach of the procurement rules by GMWDA as early as April 2009 was sufficient to give rise to "*grounds for bringing proceedings*" and the fact that SITA did not learn of the detailed circumstances which led to the change in the value of the final contract until GMWDA's solicitors wrote to SITA in July 2009 did not mean that the limitation period started at that later point in time, or that there was a justification to extend the limitation period.

In delivering its judgment, the Court took into account the ECJ's guidance in *Uniplex* that limitation periods could only run "*from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question*".⁴ However, it is clear that it has otherwise adopted a very strict and conservative interpretation of the rules regarding limitation period, and one might argue that such an approach does not sit well with the more liberal and purposive approach the ECJ has taken in respect of interpretation of the EU procurement rules.

This is because the approach taken by the Court that only a broad knowledge of the infringement is sufficient to trigger the limitation period appears to be somewhat at odds with the ECJ's guidance in *Uniplex* that a knowledge of infringement can only be imparted on the aggrieved bidder once the bidder is informed of the reasons of the contracting authority's decision.

In *Uniplex*, the ECJ held that "*...the fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings. It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.*"⁵

On this basis, one might also argue that the Court's decision in this case not to extend the limitation period contradicts the ECJ's guidance in *Uniplex* that the discretion granted to the Courts by the Regulations to extend the 3-month limitation period must be exercised in such a way to ensure that as

³ See paragraph 127 of the High Court's judgment.

⁴ See paragraphs 20-30 of the High Court's judgment, as well as paragraph 32 of the ECJ's judgment in *Uniplex*.

⁵ See paragraphs 30-31 of the ECJ's judgment in *Uniplex*.

much effective remedy as possible is made available to bidders who are affected by an unlawful decision.⁶

SITA was granted leave to appeal to the Court of Appeal, so as and when SITA takes the matter further, it will be interesting to see how the Court of Appeal will approach the issue.

Morrison & Foerster
19 April 2010

Court of Appeal Update: In February 2011, the Court of Appeal confirmed that the three month limitation period (i.e., for bringing a claim for a breach of procurement rules) runs from the time when the claimant knew or ought to have known that such a breach had occurred. It will not be extended by further evidence in support of the claim subsequently coming to light. The Court of Appeal decided unanimously that SITA had not been justified in waiting to bring its proceedings until it received further information about the alleged breach of the procurement rules.

This outcome favours public bodies, but the flip-side, of course, is that the ruling could lead to an increased risk of legal challenge during the course of a procurement exercise, as bidders can't now afford to run the risk of waiting until a procurement process has finished before considering legal action.

⁶ See paragraph 50 of the ECJ's judgment in *Uniplex*.

Court confirms approach to applications for injunctions made during an on-going procurement process

Under the public procurement remedies regime, a public contract procurement process must be suspended if an aggrieved bidder brings a legal challenge; and the contracting authority will have to apply for a Court order to lift this automatic suspension. The test which the Courts will apply in determining such an application will be no different from the test that the Courts have traditionally applied in assessing applications for interim injunctions made by aggrieved bidders under the old regime. Whilst the tables appears to have been turned in bidders' favour by the new remedies regime, bidders still need to make sure that their complaints have a sound legal foundation in order to derive a meaningful benefit from the new automatic suspension remedy.

What are the cases?

The cases are *B2Net v. HM Treasury (sued as Buying Solutions)* [2010] EWHC 51 (QB) ("**B2Net**") and *Apcoa Parking (UK) Ltd v. Lord Mayor and Citizens of the City of Westminster* [2010] EWHC 943 (QB) ("**Apcoa**"). Both of these cases are decisions made by the English High Court and, in both of these cases, an aggrieved bidder brought proceedings in an attempt to suspend an on-going public procurement process.

Why are these cases important?

These two cases provide useful guidance and a reminder as to how similar applications are likely to be determined under the new remedies regime which came into force in December 2009 (the new remedies regime which implements Directive 2007/66/EC in the UK is discussed in greater detail in our previous update¹).

Under English law, applications for interim injunctions are decided in accordance with case law based upon the two-stage test set out in *American Cyanamid v. Ethicon* [1975] AC 396 ("**American Cyanamid**"). In brief, where an application for an interim injunction is made, the Court will first consider whether or not there is a serious issue to be tried and whether damages would be an adequate remedy, and then where the balance of convenience between the parties lies (*i.e.*, would it hurt the claimant more if the defendant is allowed carry on with its affairs pending a full trial, than it would hurt the defendant if it is prevented from carrying on with its affairs pending a full trial?). The second limb of the test – the question of the balance of convenience – usually equates to whether damages would be an adequate remedy for the claimant.

In the context of public procurement challenges, applications for interim injunctions were typically brought by an aggrieved bidder who was disqualified at an early stage in the procurement process before the final award, and sought to suspend the on-going public procurement process pending a full trial. Under the "old" remedies regime, an interim injunction was seen as the only really meaningful remedy (albeit a difficult one to obtain) available to an aggrieved bidder, due largely to the fact that, once the contracting authority and the winning bidder had concluded the contract or framework agreement in question, the Court could only award damages if a claimant managed to establish a breach of the procurement rules.

¹ See our January 2010 update [New Remedies Regime New Public Procurement Remedies in the UK](#).

Under the new regime, the position has changed considerably, and not only is the set-aside of an illegally awarded contract available as a potential remedy², but also, where an aggrieved bidder challenges a contracting authority's decision by formally initiating legal proceedings, a contracting authority is now legally obliged to suspend its procurement process. This automatic suspension of the procurement process essentially turns the tables around by requiring the contracting authority facing the legal challenge to make an application for an interim order to lift the automatic suspension, if it wishes to continue the procurement³.

Now, in deciding whether to grant an interim order to lift the automatic suspension, the Court "*must consider whether, if [the rule regarding automatic suspension] were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract*"⁴. When the answer to this hypothetical question is 'No' (*i.e.*, it would have been inappropriate to grant an interim injunction under the old regime), the Court can grant an interim order to lift the automatic suspension, but when the answer is 'Yes' (*i.e.*, it would have been appropriate to grant an interim injunction under the old regime), the Court cannot grant an interim order to lift the automatic suspension.

This means that, insofar as the new automatic suspension of public procurement is concerned, the primary effect of the new remedies regime is to shift the burden of making an application from the aggrieved bidder to the authority, and that the tests which courts apply in assessing the applications will, to all intents and purposes, remain the same. Thus, all bidders must bear in mind that they will still need to deal with the tests of "serious issue to be tried" and "balance of convenience", if they are to make the most of the automatic suspension by keeping the suspension in place.

It is for these reasons that cases such as *B2Net* and *Apcoa* will continue to be relevant even in respect of those public procurement challenges that will be subject to the new remedies regime. Whilst aggrieved bidders might well have a much easier time suspending an on-going procurement process (because all they have to do is to start legal proceedings), the way in which the Court decides whether or not to lift such a suspension hasn't changed from the previous regime – a sound legal foundation in a claim remains an essential prerequisite to the holy grail of effective remedy in flawed public procurements.

What happened in these cases?

- **The *B2Net* decision**

In July 2009, Buying Solutions⁵ published a contract notice in the Official Journal of the European Union ("OJEU"), advertising an opportunity to tender in respect of a framework contract for the provision of certain IT equipment and services. The procurement consisted of three separate lots, and Lot 2 was for IT infrastructure hardware. B2Net was a storage integrator who provided, amongst other things, services to reduce its clients' operating costs and simplify the operational management of data storage environments.

² See Regulation 47J(2)(a) of the Public Contracts Regulations 2006, as amended (also see Regulation 45J(2)(a) of Regulation 47(9) of the Utilities Contracts Regulations 2006, as amended).

³ See Regulation 47G of the Public Contracts Regulations 2006, as amended (also see Regulation 45G of the Utilities Contracts Regulations 2006, as amended).

⁴ See Regulation 47H(2) of the Public Contracts Regulations 2006, as amended (also see Regulation 45H(2) of the Utilities Contracts Regulations 2006, as amended).

⁵ Buying Solutions (formerly known as OGC buying.solutions) is an executive agency of the Office of Government Commerce in HM Treasury. Buying Solutions essentially acts as buyer of goods and services on behalf of government departments and other public bodies to leverage economy of scale.

B2Net submitted its duly completed Pre-Qualification Questionnaire (“PQQ”), hoping to win its place in the framework for Lot 2. In October 2009, Buying Solutions announced the results of the PQQ assessment, and it turned out that B2Net was unsuccessful. Following a debriefing, B2Net learnt that it was disqualified from Lot 2 by a very narrow margin because of the way in which some of the questions in the PQQ were framed and the way in which B2Net had responded to those questions. Dissatisfied by Buying Solution’s explanation, B2Net launched proceedings against Buying Solutions and made an application for an interim injunction.

Applying the existing case laws developed around *American Cyanamid*, the Court first considered whether or not there was a serious issue to be tried. Based on the particular set of facts available, the Court was prepared to accept that there may be a serious issue to be tried, although it did not consider the merits of B2Net’s case to be particularly strong. The Court then went on to consider how the balance of convenience test should be applied. Based on the facts, the Court had little difficulty in finding that damages would be an adequate remedy for B2Net, whereas the consequences of an interim injunction could not be adequately dealt with by way of cross-undertaking in damages. Accordingly, the Court dismissed B2Net’s application for an interim injunction.

- **The *Apcoa* decision**

In April 2009, Westminster City Council (the “Council”) published a contract notice in the OJEU, advertising an opportunity to tender for contracts for parking enforcement and other related services. Apcoa, a major provider of parking management and enforcement services, was one of the bidders. Having realised that it had conducted the procurement process unlawfully in a number of respects, the Council abandoned the first procurement process and initiated a second procurement process.

When it organised the second procurement process, the Council had, amongst other things, increased the qualifying threshold in respect of participating bidders’ turnovers to a level which was beyond that which Apcoa could achieve. In launching the proceedings and seeking an interim injunction to prevent the Council from awarding the contract to any other bidder, Apcoa essentially argued that it was treated unfairly by the Council who increased the qualifying threshold of turnover, and that the Council was not entitled to abandon the first procurement in order to commence the second procurement.

Noting that to grant an interim injunction in the circumstances of this particular case was tantamount to denying the Council its right to abandon a public procurement process (which was both a statutory right as well as a contractual right, as the relevant contract documents made it clear that the Council was entitled not to award the contract at all, and the Council was not committed to any course of action), the Court had little difficulty in concluding that there was no legal basis on which Apcoa could found its complaint and therefore Apcoa failed to satisfy the first hurdle of the test in *American Cyanamid*.

The Court also noted that Apcoa failed to demonstrate why damages would not be an adequate remedy, commenting that whilst a “*flagship contract and the reputation kudos that would have been attached*” were not things that could be reflected in an award of damages, “*it is also difficult to envisage a form of injunctive relief that could do any better*”. In the particular circumstances of the case, the Court clearly took the view that the balance of convenience clearly favoured the Council, who would suffer a much greater inconvenience from an interim injunction, having already been forced to arrange a six month extension of its existing contractual arrangements.

Important 2010 Update: Note that one element of the American Cyanamid test in relation to the granting of an injunction is whether damages would be an adequate remedy. In procurement cases, this can present difficulties, especially in framework procurement cases where it is hard to assess what work would have been secured by a tenderer for a multi-party framework agreement. In European Dynamics v HM Treasury, December 2009, the Court dismissed the claimant's argument that damages would be impossible to assess and thus that damages would be an inadequate remedy. The Judge set out a form of pro rata basis for assessing damages, allowing him to conclude that damages could have been assessed. The Judge also strongly dismissed the argument that there should be a presumption that injunctions ought to be granted in public procurement cases.

Morrison & Foerster
14 May 2010

Court defeat for contracting authority shows the potential risks of aborting a public procurement in favour of a parallel procurement, and highlights issues in the use of a “public sector comparator” model.

Leeds City Council has lost the first stage of what might be a protracted legal battle over its cancellation of a procurement process for the design and construction of a new music and entertainments venue. The Council sought to dispose early parts of the procurement challenge from an aggrieved bidder, but its attempt to do so was rejected. As a result, a question mark now hangs over public bodies which want to cancel a procurement part-way through. An interesting side note to the case is that it potentially calls into doubt the Council’s use of a “public sector comparator” to assess affordability and value for money. Since the Council fell at this first hurdle, both of these issues will now proceed to a full court hearing. The eventual result will provide clarification to many contracting authorities.

What is the case?

The case is *Montpellier Estates Limited v. Leeds City Council* [2010] EWHC 1543 (QB), a decision made by the English High Court in an application made by a local authority to strike out and seek summary judgment in respect of parts of a claim brought by a disgruntled property developer who lost out in an aborted large-scale construction project.

Why is this case important?

In the aftermath of the recession, austerity measures are all the rage. The UK government, with its recently announced emergency budget, makes its stance clear: it considers that aggressive cuts to every aspect of public sector spending are necessary in order to reduce the UK’s budget deficit. One of the more obvious effects such austerity measures has on public procurements, aside from likely reduction in new procurements, is the cancellation of on-going public procurements.

Traditionally, the general rule has always been that a contracting authority has a very broad discretion to terminate any on-going public procurement process. Whilst this case does not yet fetter this general rule, it nevertheless demonstrates that if a contracting authority is not careful in how it conducts itself, it may not be able to rely on this principle to fend off legal challenges brought by bidders affected by the aborted procurement processes, particularly where the contracting authority aborts a given public procurement in favour of a solution which the contracting authority identifies through a parallel procurement exercise.

The onset of the financial crisis coincided with the trend which saw legal challenges under the Public Contracts Regulations 2006 (the “PCR”), and also its utility counterpart, the Utilities Contracts Regulations 2006, becoming increasingly common. The forthcoming cuts in public sector spending could well prompt more aggrieved bidders, particularly those who rely heavily on public sector businesses, to pursue contracting authorities more aggressively.

Any contracting authority would be well-advised to take as much care in how it terminates any on-going procurement as it does in evaluating bidders and deciding whether or not to award contracts. Likewise, bidders will want to be even more critical in observing how a contracting authority behaves, particularly in respect of large-scale private finance initiative projects which are at risk of being abandoned, and in

respect of procurement processes which were commenced on or after 20 December 2009¹.

What happened in this case?

In July 2007, Leeds City Council (the “**Council**”) published a contract notice in the *Official Journal of the European Union*, inviting bidders to participate in the procurement process for the development of a new multi-purpose arena facility in the city of Leeds, to be conducted in accordance with the competitive dialogue procedure. Bidders were invited to make proposals based on their own site and/or a site located at Elland Road which was owned by the Council.

Montpellier Estates Limited (“**Montpellier**”) is a property development company specialising in major projects involving the regeneration of industrial sites, primarily in north of England. Montpellier owned a site in Leeds known as ‘City One’, and in a feasibility study conducted on behalf of the Council prior to the publication of the contract notice, the City One site was identified as one of the potentially suitable sites for the proposed development.

Montpellier was concerned that the site at Elland Road had a built-in advantage over any other privately-owned site by virtue of being owned by the Council, and it was reluctant to participate in the procurement. Nevertheless, it was given assurances by the Council that the procurement would be conducted openly and fairly, regardless of the fact that the Elland Road site was one of the competing sites. Accordingly, Montpellier decided to take part in the procurement.

At the outset, things seemed to go well for Montpellier. It successfully passed the pre-qualification questionnaire stage of the competition and was invited in October 2007 to take part in the second stage of the competition, the “invitation to participate in dialogue”. It was also invited in February 2008 to take part in the third stage of the competition, the “invitation to continue in dialogue” (“**ITCD**”).

However, Montpellier remained concerned about the fairness and openness of the competition and, throughout the procurement process, it repeatedly sought from the Council assurances that Montpellier was not merely being used as a stalking horse for an option involving a publicly-owned site. The Council gave its assurances that that was not the case.

In June 2008, the Council notified all of the bidders for the first time that the assessment at the ITCD stage would involve a comparison with a public sector comparator². Subsequently, in August 2008, the Council asked the remaining bidders to submit their “*best commercial offer*”, which was to be evaluated against the “*evolving public sector comparator*”.

Against this background, which the judge described as “*somewhat unpromising*”, Montpellier submitted its tender in September 2008. In October 2008, the Council notified Montpellier that it was aborting the procurement process. Yet, on the same day, the Council announced that it was going to develop the proposed arena at another site at Claypit Lane, a site which the Council jointly owned with the Leeds Metropolitan University and which was not a site the bidders were originally asked to consider.

¹ The new remedies regime, which provides for enhanced remedies in respect of breaches of the PCR, applies to public procurement processes which were initiated on or after 20 December 2009. For further details regarding the new remedies regime, refer to our January 2010 update [New Public Procurement Remedies in the UK](#)

² A public sector comparator has been used in many large-scale procurements as a tool to assess affordability: it measures what the project would cost if the procurement or project were to be done in-house by the authority. As such, it is not a device to compare or evaluate bidders against each other; rather it’s a way of assessing whether or not a procurement makes sense at all (because if a tender wins but is worse than the public sector comparator, the authority is in theory better off not going ahead).

Perhaps unsurprisingly, the Council's decision to abandon the procurement and to proceed with the development at a new, alternative site which was not originally within the scope of the project, prompted Montpellier to initiate proceedings against the Council in February 2009, alleging that the Council breached the PCR. The long list of alleged breaches of the PCR by the Council set out in Montpellier's particulars of claim included, amongst others, the following allegations that the Council had:

- introduced a new evaluation criteria not previously indicated in the contract notice or the subsequently issued tender documentations by introducing the public sector comparator as means of evaluation;
- applied a weighting not previously indicated in the contract notice or the subsequently issued tender documentations by requiring Montpellier's tender to be compared against the public sector comparator;
- terminated the procurement without giving Montpellier any opportunity to bring its tender within the Council's previously undisclosed affordability constraints;
- failed to follow the relevant process and procedures by abandoning the procurement and instead opting for a previously undisclosed alternative plan; and
- breached an implied contract that existed between it and Montpellier.

The Council made an application under the Civil Procedure Rules to strike out these specific claims or, in the alternative, to obtain summary judgment in respect of these specific claims.³ In making this application, the Council essentially argued that the procurement was not terminated as a result of the application of any award criteria (since it was terminated before the final stages of the competitive dialogue procedure was reached) and that the law provided for a very broad discretion for contracting authorities to terminate a public procurement process. The Council emphasised that the PCR and the underlying EU rules only required that award criteria be applied to a decision to award or not to award a contract, and not to a decision to abandon a public procurement process.

Montpellier, on the other hand, argued that strike-out of claims and summary judgments were to be reserved for the most obvious cases and that, in cases such as this, where there are issues that are uncertain or developing, the court should be slow to grant a summary relief of the form sought by the Council. Montpellier emphasised that its criticism of the Council's behaviour is not centred on the fact that the Council had abandoned the procurement but, rather, on the fact that the Council had introduced the public sector comparator which was tantamount to a pass/fail test (as opposed to an assessment against a pre-determined criteria and weighting), and the fact that the Council had been, unbeknownst to the bidders, conducting a "parallel procurement".

The judge acknowledged that contracting authorities generally have a wide scope of discretion to terminate a public procurement process but, at the same time, took the view that it would be wrong to strike out or grant summary judgment in respect of those specific parts of Montpellier's complaint in the particular circumstance of this case, because Montpellier's complaint "*is not directed solely to the circumstances of termination but... to the parallel process leading to the formulation of Plan B*", which

³ Under Rule 3.4 of the Civil Procedure Rules, the court can strike out a statement of case on the ground, amongst others, "that the statement of case discloses no reasonable grounds for bringing or defending the claim". Similarly, under Rule 24, the court can potentially give summary judgment against either party to a dispute if: "(a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

was “*continuing, albeit undisclosed, during the procurement process*”. The judge also took the view that it was inappropriate to refuse Montpellier the right to argue that there was an implied contract at this stage in the proceedings.

Accordingly, the application made by the Council was rejected in its entirety by the judge.

This is a judgment which was made only in respect of a limited attempt by the Council to nullify a narrow portion of Montpellier’s complaint, and the core issues of the case remain to be resolved at a full trial. Whether or not the matter proceeds to a full trial might well be affected by Montpellier’s decision to proceed with its own plan for redevelopment of the City One site⁴, but should the matter proceed to a full trial, it could potentially set an important precedent regarding the contracting authority’s right to abandon a public procurement process and how future authorities should use a public sector comparator to assess value for money and affordability.

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19 July 2010

⁴ It is to be noted that Montpellier applied for a planning permission for 2 million sq. ft. mixed-use development of the City One site in March 2010, and the Council itself is reported to be very pleased with Montpellier’s redevelopment plan; see “*Sweet deal for Leeds? A detailed look at Montpellier Estates’ City One*” by Nadia Elghamry, 16 March 2010, Estates Gazette (estatesgazette.com).

Removing Mandatory Suspensions

Since the new UK public procurement remedies regime came into force, we have been waiting for examples of how the courts will deal with the new mandatory suspension remedy. We now have the answer. Two new court decisions illustrate the way in which UK courts will deal with applications by contracting authorities to remove the automatic mandatory suspension that applies to a public procurement process when a challenge is made by an aggrieved bidder.

As we have previously reported¹, under the new Remedies Regime² which came into force in December 2009, where an aggrieved bidder in a public procurement process challenges a contracting authority's decision by formally initiating legal proceedings before the award of contract, the contracting authority is now legally obliged to suspend its procurement process. This automatic suspension of the procurement process essentially turns the tables by requiring the contracting authority facing the legal challenge to make an application for an interim order to lift the automatic suspension if it wishes to continue the procurement.

We had speculated³ that the courts would follow established approaches to injunction applications; that the primary effect of the new remedies regime would be procedural (*i.e.*, to shift the burden of making an application from the aggrieved bidder to the authority); and that the tests which the courts will apply in assessing the applications will, for all intents and purposes, remain the same. This has been borne out. Thus, all bidders must bear in mind that they will still need to deal with the tests of "serious issue to be tried" and "balance of convenience", if they are to make the most of the automatic suspension by keeping the suspension in place.

What are these cases?

The cases are *Exel Europe Limited v. University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 ("*Exel Europe*") and *Indigo Services (UK) Limited v. The Colchester Institute Corporation* ("*Indigo*").

Both of these cases involve decisions by the English High Court. In both cases, the High Court granted the application by the contracting authority to lift the automatic suspension that prevented the authority from entering into a contract with its chosen supplier. In each case, the automatic suspension applied following the initiation of proceedings by an unsuccessful tenderer. Also, in both cases, the High Court treated the application as though it were an application for an injunction by the disappointed tenderer and applied standard *American Cyanamid* test to the merits of the injunction. In doing so, the Court concluded that the balance of prejudice pointed in favour of lifting the suspension and allowing the authority to enter into the contract.

¹ See our January 2010 update: [New Remedies Regime New Public Procurement Remedies in the UK](#)

² The new Remedies Regime came into force on 20 December 2009, implemented by the Public Contracts (Amendment) Regulations 2009 and the Utilities Contracts (Amendment) Regulations 2009. These two Regulations, which amend the Public Contracts Regulations 2006 ("PCR") and the Utilities Contracts Regulations 2006 ("UCR") respectively, implement Directive 2007/66/EC of 11 December 2007.

³ See our May 2010 update: [How will an application for an injunction made during an on-going procurement process be determined?](#)

Why are these cases important?

These are the first cases to come to light under the new Remedies Regime which introduced the remedy of mandatory suspension for the first time. As a reminder:

- if a losing bidder commences legal proceedings in respect of a contracting authority's award decision, the contracting authority is not allowed to proceed with the contract award (Regulation 47G(1) of the PCR);
- the authority may apply to the High Court for an order lifting the mandatory suspension (Regulation 47H(1)(a) of the PCR);
- the court may, on the application of the authority, lift the automatic suspension and in considering whether to do so (Regulation 47H(2) of the PCR):
 - the court must consider whether, if the mandatory suspension were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
 - if the court considers that it would not be appropriate to make such an interim order, it will then make an order lifting the mandatory suspension.

In both of these cases, the process set out above was followed. In making its decision on whether to grant an order lifting the mandatory suspension, the High Court has followed the line which we predicted in our previous update⁴ and applied the two stage test set out in *American Cyanamid v. Ethicon* [1975] AC 396. In brief, under the *American Cyanamid* tests applied where an application for an interim injunction is made, the Court will first consider whether or not there is a serious issue to be tried, and then where the balance of convenience between the parties lies (*i.e.*, would it hurt the claimant more if the defendant is allowed to carry on with its affairs pending a full trial than it would hurt the defendant if it is prevented from carrying on with its affairs pending a full trial?). The second limb of the test – *i.e.*, the question of the balance of convenience – usually equates to whether damages would be an adequate remedy for the claimant.

At least now authorities and tenderers are aware of the tests that the courts will apply in these circumstances. Fortunately, the High Court has used a tried and trusted set of standards rather than take the opportunity to come up with a new set of tests. This approach is to be applauded as it gives parties more certainty.

As a practical matter, therefore, although the introduction of the mandatory suspension remedy in December 2009 was a new innovation, the main effect that it might have is simply to slow down, rather than to stop completely, any affected procurements. Although an aggrieved tenderer has a lower initial hurdle to surmount in order to institute the mandatory suspension, the test for whether the suspension ought to become permanent, or the procurement stopped, remains the same.

Overall, these two cases demonstrate the difficulty faced by aggrieved tenderers wishing to claim that there has been a breach of the procurement rules. Courts generally consider that there is a valid public interest in a contracting authority proceeding with a proposed contract award for public services in the

⁴ See our May 2010 update: [How will an application for an injunction made during an on-going procurement process be determined?](#)

absence of a very strong substantive case that there has been a procedural irregularity. If anything, the cases underline the importance of the claimant being able to establish a clear and demonstrable breach of the rules rather than simply a different approach to the subjective application of the project evaluation criteria.

What happened in these cases?

- **The *Exel Europe* decision**

The University Hospitals Coventry and Warwickshire NHS Trust (“UHCW”) managed and operated a collaborative procurement hub called the Healthcare Purchasing Consortium (“HPC”). HPC was run by UHCW on behalf of itself and about 40 other NHS trusts in the West Midlands. In 2009, UHCW decided to set up a new framework agreement for goods and services and to transfer to a third party the management and operation of HPC. Over 4 months in 2009, UHCW held discussions with a company called HCA as a result of which HCA obtained various data about HPC.

In March 2010, UHCW published a contract notice in the *Official Journal* for a 5 year framework agreement for a single operator to whom the responsibilities of HPC would be transferred. Exel Europe and HCA were among the five bidders.

However, in May 2010, Exel Europe withdrew from the tender process expressing concerns about the inadequacy of the information provided and the stability of the proposed commercial structure. No other tenderers apart from HCA submitted tenders. In July 2010, UHCW wrote to Exel Europe informing it that HCA was the preferred bidder.

Exel Europe did nothing for a number of weeks but, after some correspondence in September 2010, it eventually initiated proceedings in October 2010 alleging 6 particular breaches of the procurement rules. It was this which caused the Regulation 47G(1) mandatory suspension to apply. UHCW applied for a court order to lift the automatic suspension. The court applied the *American Cyanamid* tests set out above.

The first question discussed was whether there was a serious question to be tried; and the second whether the balance of convenience lies in granting or refusing interlocutory relief. Interestingly, the court noted that, in the context of public procurement cases, if a claim by the aggrieved tenderer is so weak as not to amount to a serious claim, it becomes almost inevitable that, in most cases, the balance of convenience is unlikely to favour granting or maintaining the relief and therefore the court is almost bound to lift the automatic suspension.

Serious Issue

The court noted that there is a public interest in securing valid and properly executed procurements although this does not necessarily have an overriding impact, especially perhaps where there is clear proof of a material breach of the process. In relation to whether there is a serious case to be tried, the court noted that Exel Europe had been slow to bring part of its case (*i.e.* that based upon the lack of information in the original tender documents) and therefore was technically out-of-time from bringing proceedings because Exel Europe obviously knew about the alleged deficiencies at the time it withdrew from the tender.

The High Court also drew an adverse conclusion from the fact that Exel Europe had chosen to drop out of the tender process. Authorities owe a duty to economic operators although not necessarily to those who drop out before a deficiency in the procurement process occurs.

Continuing with its analysis, the High Court concluded that the only serious issue to be tried related to Exel Europe's complaint about the pre-tender negotiations between UHCW and HCA which the court felt gave rise to a suspicion of potential irregularity. As for the other complaints raised by Exel Europe, the Court did not consider them as serious issues.

2011 Update: In Metropolitan Resources North West v Secretary of State, the Court ruled that the issue is not whether the claimant was bound to win, merely whether a serious issue had been raised. In that case, the issue concerned the transparency and equality of the authority's decision, so it was deemed to be a serious issue.

Balance of Convenience

Moving on to the balance of convenience test and the adequacy of damages as a remedy, the court took into account the importance of the public interest in the efficient and economic running of the National Health Service. The defendant had established an urgency for the procurement exercise to go ahead since its existing arrangements had expired and were only being kept alive on a temporary basis. If Exel Europe had been successful then there would have been a new tender process which would have meant a further delay of more than six months before a contract would have been awarded. On the other hand, the High Court was also satisfied that damages would have been an adequate remedy for Exel Europe in this case and would have been available based on Exel Europe's lost opportunity. Exel Europe failed to demonstrate that it would have behaved or had the opportunity to behave differently in the absence of the breach and the court was satisfied that damages based on the percentage chance of Exel Europe winning the contract would be readily assessable by accounting experts.

Accordingly, as a result of these factors and the weakness of at least 5 out of 6 Exel Europe complaints, the court decided to grant the authority's application under Regulation 47H(1) and lift the suspension on the authority's ability to enter into a framework agreement.

- **The *Indigo* Decision**

In May 2010, the Colchester Institute (the "Institute"), an educational vocational college, advertised in the *Official Journal* its proposal to award a contract for the provision of cleaning services. The contract was to run for 3 years from 1 January 2011. The incumbent cleaning services provider at one of the two sites when new services were sought was Indigo Services ("Indigo"), whose contract expired on 31 December 2010.

Indigo and four other bidders were pre-qualified and were invited to tender for the contract. The Institute evaluated the bids and placed Indigo in third position and proposed to award the contract to the first place bidder, Emprise Service. As is required, the Institute notified all bidders and adhered to the 10-day standstill period between notification and contract award.

On the last day of the standstill period, Indigo commenced proceedings in the High Court challenging the procurement decision. As a result of Regulation 47G(1), the Institute was hit with the automatic suspension and applied to the Court under Regulation 47H to lift the automatic suspension. The High Court took the same approach as in the Exel Europe decision and applied the *American Cyanamid* tests.

Serious Issue

Initially, the Court considered whether there was a serious issue to be tried. Indigo had raised a number of points regarding the initial advert and the information given to bidders. The court noted that these claims had not been brought in time since the time for bringing an action starts from when the claimant knew of the alleged infringement.

Indigo also complained about the scoring methodology set out in the invitation to tender and how it would be applied. Indigo claimed that the explanations given were opaque and too imprecise to avoid subjective and potentially arbitrary marking. Indigo also complained that some of the marks applied to its tender diverged from those advertised.

The Institute did not dispute these allegations but argued that the marking applied had no effect as Indigo would still have lost the tender even had the markers not departed from the scoring methodology and applied fractional marks where only whole numbers had previously been advertised. The High Court concluded that there may well be a serious issue to be tried and that, on the basis of the information before it, it could not conclude whether Indigo had suffered material loss of opportunity to obtain the contract. On balance, the Court did not support the Institute's argument that there was no causative link between the alleged breach and Indigo losing the bid. But crucially, the Court felt that even if there was a causative link, there would only be a low likelihood of that making any material difference in the overall scoring.

Balance of Convenience

More importantly, the High Court examined the balance of convenience argument and, in particular, the question of whether damages would be an adequate remedy. In this case, the Court noted that quantification of the profits that could have been earned by Indigo over the period of the new contract would be difficult and imprecise to calculate, and so damages would not necessarily be an adequate remedy for Indigo.

However, the court gave greater weight to the impact of a further standstill on the Institute. Continuing the suspension would deprive the Institute of cleaning services and force closure of the site which would affect the interests of students and the wider public interest in the provision of higher education in the region.

Accordingly, the High Court came to the decision that the prejudicial impact on the Institute and the wider public of continuing the standstill far outweighed any prejudice which may be shown toward Indigo by lifting the standstill and relegating Indigo to a claim for damages. The Court also noted that, even though it could not discount the possibility that there was a serious issue to be tried, the Court did not consider that the chance of loss was great enough to justify ordering some form of re-run of the tender.

Important Update: These principles are becoming more routinely applied. In Halo Trust v. Secretary of State for International Development, the claimant tenderer sought a declaration that the authority's award of a contract for mine action services in Cambodia infringed the PCR. It also sought to set aside the award to a competing tenderer. The primary objective of the project was originally mine clearance but, part-way through the tender process, the authority clarified that the funding could also be used for developmental activities involving mine-affected communities. The claimant alleged that there was a fundamental change to the project and that there was confusion about the link between mine clearance and development. The Court held that the claims were too weak to amount to a serious issue to be tried

and therefore interim declaratory and injunctive relief was refused.

In other cases, courts have lifted automatic mandatory suspensions notwithstanding the difficulty of assessing damages if the claimant were to be successful: the usual basis seems to be the prejudice suffered by the authority if it is prevented from awarding a contract.

As of April 2011, we are not aware of any reported cases of a court upholding and continuing a mandatory suspension.

Morrison & Foerster
6 January 2011

The 2011 Procurement Law Agenda

The first 9 months of the new UK coalition government were marked, in public procurement terms, by the early freeze imposed by the Cabinet Office on all new central government procurements and the wide-ranging review of existing projects and commercial terms with the largest suppliers to government. In this issue of the *UK Public Procurement Law Digest*, we look at what public procurement issues are likely to be making the news over the next 12 months.

2011 ought to be the time when, as well as slowly thawing the project freeze, the coalition government begins to roll out its policy approach to procurement and determines which particular policy initiatives are going to result in new projects.

Overall, the key message that we expect to be making procurement law headlines in 2011 can be summed up in one word: simplification.

Efficiency and Reform Group and its Agenda

To its credit, once the political changes as a result of the May 2010 General Election had been resolved and the new coalition government formed, the new administration acted quickly to formalise power and control over central government procurement practice and policy in the new Efficiency and Reform Group (“ERG”) within the Cabinet Office. The ERG incorporates previous entities such as the Office of Government Commerce (“OGC”), Buying Solutions, and the Office of the Government CIO. This change has at least had the effect of putting in one place responsibility for all procurement policy across central government.

The ERG’s most immediate practical objective was to identify measures to make cost savings through better efficiency and reform of procurement. As well as announcing an immediate moratorium on technology-based and other outsourcing projects across the central government, the key initiatives on which the ERG moved quickly were re-negotiating existing key contracts, and ensuring transparency of central government contracts with an emphasis on smaller, shorter contracts. The ERG also moved quickly to call in the main suppliers to the government and hold negotiations designed to result not only in cost savings on future government contracts but also a hand-back of fees billed under prior government contracts.

To less acclaim and to the on-going consternation of many in the industry, the moratorium continues to be in effect. As a result, there has been relatively little new central government procurement activity. The reins of power are still held tightly within central government, and many government departments are feeling frustration at not being able to proceed with key projects. The Cabinet Office remains focused on tight budgetary control in view of the UK’s overall macro-economic situation.

However, signs are emerging of the likely key procurement law initiatives for 2011. These include:

- centralised contracts for committed volumes for commodity items;
- streamlining and simplifying OJEU-compliant procurements, thereby reducing project costs;
- better standardisation of approaches to procurements; and

- removing barriers for small to medium-sized enterprises (“SMEs”) to participate in procurement.

At the same time, there has been a flurry of guidance notes and consultation papers on procurement law issues. These include a review of the competitive dialogue procedure by the Treasury - and, we submit, that it will be hard to find many people familiar with this procedure who disagree that it needs to be reviewed and simplified. There has also been guidance on transparency issues and the use of the accelerated restricted procedure, and an EU Commission Green Paper on the modernisation of public procurement policy at the European level.

We’ll start our review with three developments of immediate practical effect.

Mandated Use of Core Pre-qualification Questions

The ERG has published a procurement policy action note which mandates that central government departments must use a set of core pre-qualification questions in all new procurements from 1 December 2010. These questions are intended to cover prospective service providers’ organisational contact details; grounds for mandatory and discretionary rejection; economic and financial standing; and elements of technical and professional quality.

The aim of these mandatory core questions is to eliminate the great variety of questions asked at the pre-qualification stage by different government departments and to reduce bidders’ time and cost requirements and to streamline the government’s evaluation processes. While anything which helps to make tender documents simpler to put together and bids simpler to prepare is an improvement, there must be some doubt as to whether there genuinely is a “one size fits all” approach to pre-qualification questions. It will certainly be helpful to have a minimum mandatory set of pre-qualification questions but departments do need to have the ability to add particular additional questions to suit the parameters of their own individual projects.

Use of Accelerated Restricted Procedure

In December 2008, the EU Commission responded to the global recession by allowing use of the accelerated restricted procedure for major projects procured during 2009 and 2010. This use was justified by urgency on the grounds of speeding up the procurement process so as to provide a boost to member states’ economies during the global financial crisis.

The Office of Government Commerce has now announced that this relaxation in the rules has been extended to apply to any contract notice published in the Official Journal before the end of 2011.

For less complex procurements, the accelerated restricted procedure allows contracting authorities to begin a project with a time limit for responses of 15 days from publication of an OJEU notice instead of the usual 37 days.

Transparency

The ERG has also published a guidance note implementing the coalition government’s requirements for greater transparency in central government procurement.

Under the new rules, government departments must publish all new tender documents and contracts with a value over £10,000 on a Contracts Finder website¹. All departments must also state which contracts have been awarded to SMEs. These commitments support the commitment made in mid-2010 that all new central government ICT contracts would be published online.

Departments are still expected to publish all relevant information in full, although some redactions of information are permitted in line with the exemptions provided by the Freedom of Information Act (including national security, protection of personal data, commercial sensitive material). However, as we have reported elsewhere in the *UK Public Procurement Law Digest*,² the number of potential grounds for redaction of information is decreasing and it is increasingly likely that all information, including even pricing information in central government contracts is likely to be published in future.

Competitive Dialogue

The competitive dialogue procedure was introduced into UK law by the Public Contracts Regulations 2006 (“PCR”). The aim was to provide greater flexibility in delivering complex projects. The competitive dialogue has been used across the public sector to deliver a broad scope of projects, and over 1,200 procurements have been undertaken using the competitive dialogue. However, many contracting authorities that have used the competitive dialogue have found that, in practice, it has led to more complexity and less certainty in procurement than the negotiated procedure which preceded it.

HM Treasury has published a review of the competitive dialogue procedure which reports that:

- some projects which are not obviously complex appear to have been procured using competitive dialogue;
- many contracting authorities are increasingly viewing competitive dialogue as the default process for all but the most straightforward procurements – which should not be the case;
- there is confusion in the market as to what is permissible under the open, restricted and negotiated procedures, and authorities would value more central guidance;
- the competitive dialogue is a positive addition to the range of procurement options where it is conducted appropriately but, where that it is not the case, the competitive dialogue can be burdensome and expensive; and
- there has been particular criticism of the lack of preparation, insufficient skills and capacity on the part of contracting authorities which has a negative impact on bid costs and procurement durations.

As a result, the Treasury has made a number of recommendations about the future use of the competitive dialogue procedure:

1. Use of Competitive Dialogue. Competitive dialogue should not be seen as the default procedure for all complex procurements. The Treasury notes the ERG is working on a procurement “superhighway” which should provide a decision tree for contracting authorities wishing to select the most appropriate route for procurement. Through simple questions covering value, complexity

¹ See <http://www.businesslink.gov.uk/ContractsFinder>

² See our February 2009 update and subsequent amendments: [Freedom of Information: Disclosure under the UK Freedom of Information Act](#)

and nature of the items being procured, this ought to direct users to the most appropriate route for their particular procurement. The Treasury hopes this will give contracting authorities the confidence to use alternative procedures for less complex procurements.

2. Justifications. The Treasury recommends that all future projects which use the competitive dialogue rather than the open or restricted procedures should include the justification for such use in the published procurement documentation.
3. Pre-procurement Preparation. This is the most important stage of competitive dialogue procurement but also the most neglected and poorly executed. The ERG intends to issue guidance to address what should be done at this key stage. The ERG guidance will encourage authorities to engage with potential service providers before starting the formal competition process. The Treasury recognises that there are important benefits from engaging early, such as improving contracting authorities' understanding of potential outcomes and informing the service provider community of the procurement strategy and business case.
4. Pre-qualification and Down-select. The Treasury recommends that the ERG should develop a guide to the competitive dialogue procedure in order to inform new entrants to the market as to what can be expected during competitive dialogue procurements. This is intended to help SMEs get involved in more complex projects. The Treasury also warns against the dangers of taking too many bidders through to the final dialogue stage. Many contracting authorities are reluctant to move from three to two bidders in the down-select stage and so they artificially retain bidders even with little chance of success.
5. Focus During Dialogue. The Treasury believes that the competitive dialogue procedure offers a significant benefit in that it can be tailored to individual projects. However, there is a potential for significant abuse if the procedure is used by contracting authorities which have not done enough pre-procurement preparation and where authorities use the dialogue effectively as an opportunity for free consultation with the market. The competitive dialogue should be a chance to clarify and refine solutions rather than for the authority to develop its own specifications. The Treasury recommends that procurement timetables ought to be developed to allow for a realistic schedule of meetings to enable dialogue to take place. Taking time to establish a level of detailed assurance in advance of entering into dialogue should avoid costly overruns and impromptu requests for further information.
6. Post-dialogue: Specifying, Clarifying and Fine-tuning bids. The Treasury has considered what may occur at the post-bid stage and has decided that competitive dialogue works successfully at this stage.
7. Evaluation of Bids and Debriefing. The Treasury recommends that contracting authorities ought to publish a detailed guide to the evaluation approach to be taken, setting out the value of each piece of information requested and linking responses to the evaluation criteria. The need for this guidance mirrors the direction we have previously reported that the courts have been offering to contracting authorities through reported case decisions.

Overall, more guidance on the use of competitive dialogue is to be welcomed. However, it is unfortunate perhaps that this guidance does not go into more detail about the areas where competitive dialogue has been seen to have worked well or not so well. Equally, the message from the government still seems to be that the choice is between the open or restricted procedures on one hand and the competitive dialogue procedure on the other hand. The negotiated procedure - which many contracting authorities have historically found the most useful and flexible - still seems to be stuck in the back water and not officially

recommended at all, even though it still remains a part of the PCR and the overall public procurement regime.

Modernisation of EU Public Procurement Policy

On 27 January 2011, the EU Commission published a green paper consultation on the modernisation of EU public procurement policy. The green paper contains lots of questions but no answers. The intention is that responses received to the green paper will feed into legislative proposals later in 2011. Although the suggested questions provide interesting insights into the direction in which the Commission might take EU procurement policy, it will be a long time before any of these potential approaches become part of the legislative regime.

Overall, the EU continues to commit itself publicly to simplifying and updating the EU public procurement rules so as to make the award of public contracts more flexible and to enable public contracts to support better other EU policies (*e.g.*, support for SMEs; encouraging social policy and mobility; incentivising better energy and resource efficiency). Public procurement plays a key role in the “Europe 2020” strategy which targets smart, sustainable, inclusive growth and encourages a shift to an efficient and low-carbon economy. Particular areas covered by the latest consultation include:

- whether the definitions of public works, supplies or services contracts ought to be rationalised;
- whether there is any sense in maintaining the distinction between part A services and part B services;
- whether the current financial thresholds at which the procurement regime applies ought to be increased;
- whether there should be a change in the exclusions from the procurement directives; and
- whether the approach to utility procurement continues to be correct.

Additionally, the EU recognises the frequent criticism that the public procurement procedures lack flexibility and are difficult or impractical to apply in certain circumstances so, for example, the Commission asks whether more negotiations should be allowed in public procurement, for example by allowing the negotiated procedure with prior publication to be used more generally. Also, the Commission questions whether past performance should be more explicitly allowed as an evaluation factor.

Interestingly, the EU Commission’s Green Paper is reflected by a consultation exercise conducted by the Cabinet Office in the UK. This consultation has been designed to seek feedback on aspects of procurement law that are considered problematic, gather suggestions for rule changes, and identify whether any rules can be eliminated altogether. Further simplification of the competitive dialogue remains on the agenda – as does, intriguingly, greater use of an old favourite: the competitive negotiated procedure.

The Cabinet Office also floats the possibility of changes in the use of framework agreements, either by making them “open” to allow subsequent competitors to gain entry at points in time after the initial competition has closed, or by lifting the 4 year maximum duration.

General Approach

Overall, the Cabinet Office feels that many procurements have been taking too long and there is an acute sensitivity to time and cost in winning government contracts. The ERG aims to reduce the average procurement time down to a recommended 7 months even for the most complex procurements (as opposed to the current average of 11.1 months for a typical competitive dialogue process). The Cabinet Office stresses that the procurement law process is successful as long as procurements are run with good project discipline and departments focus on getting the requirements right and increasing the amount and value of pre-procurement activity. The overall message seems to be that a “rush to OJEU” is to be avoided and effective planning is essential.

There has also been a move by the government to ensure that more procurements are open to competition from SMEs. This is reflected in a goal to increase the penetration of SMEs in procurements. While this is to be welcomed – and any moves to streamline the procurement process are likely to work in favour of SMEs – it is worth remembering that one of the largest procurements of recent times (the National Programme for IT (*i.e.*, “Connecting for Health”) project run by the NHS) came close to a crisis point because of over-reliance on one particular SME software provider (iSoft). Any move in favour of SMEs must be tempered by an appropriate risk analysis to make certain that procurements do not become over-reliant on SMEs or, at least, SMEs without the appropriate level of financial stability.

OGC and the ERG are also working to develop a new model contract particularly for ICT procurement. The existing ICT model contract is viewed as cumbersome and only really appropriate for large-scale procurements. It is considered to be inappropriate for smaller procurements. OGC has indicated that it intends to move towards a “light” version of the model contract. This is expected to appear during 2011.

Morrison & Foerster
2 February 2011

The Dangers of Prison Food, Electronic Auctions, and Moving Goalposts in Public Procurement

The UK High Court has rejected a public authority's attempt to strike out a claim by an aggrieved food distributor, emphasising the importance of sticking to the basic principles in conducting and challenging public procurements.

In recent procurement law cases, courts have tended to side with public authorities (rather than bidders) when considering whether a claim raises a serious issue to be tried. In this case, at least on three counts, the Court refused to rule out a procurement complaint based on allegations of irregularity in the award process. The judge indicated his willingness to let the aggrieved bidder have its day in court. The one ground on which the Court agreed with the government – that the time limits for bringing claims should be closely adhered to – is consistent with previous cases.

What is the case?

The case is *Harry Yearsley Limited v The Secretary of State for Justice* [2011] EWHC 1160 (TCC), a decision made by the English High Court in an application made by the UK government to strike out and seek summary judgment in respect of parts of a claim brought by a disgruntled food supplier which lost out in a tender to supply the UK's prisons with frozen food.

Why is this case important?

While this case may not create any new legal rules, it does contain several reminders of important established principles that relate to public procurement law challenges. These include the importance of aggrieved bidders acting promptly within the limitation period as soon as they become aware of a potential breach of public procurement law, and the fundamental obligation imposed on contracting authorities in respect of the transparent and non-discriminatory application of evaluation criteria. This case also demonstrates the pragmatic approach to application of the “*presstext*”¹ principles that the Courts in England might well take in determining procurement challenges that are based on allegations that a public contract was amended materially after the award.

With the UK economy being slow to recover from recession and with the implementation of the Coalition Government's plan to significantly cut public spending progresses, both bidders and contracting authorities are well-advised to go back to basics and ensure that public procurement projects (including any on-going or planned re-negotiation of an existing contract) are undertaken clearly in accordance with the various judgments that have become well-established principles in the field of public procurement.

What happened in this case?

In December 2008, the UK's Ministry of Justice (“MOJ”) initiated a procurement process on behalf of Her Majesty's Prison Service for a contract to supply the UK's prisons with frozen food. Following the

¹ In Case C-454/06 (“*presstext*”), the leading case law on amendments to existing contract, the European Court of Justice stated that amendments to an existing contract constitute an award of a new public contract for the purposes of EU public procurement law if the amended contract is “*materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to re-negotiate the essential terms of that contract*”, and went on to describe what would constitute a ‘material difference’. For an overview and analysis of *presstext*; see our January 2009 update: [Amending an Existing Contract](#)

submission and assessment of pre-qualification questionnaires, an invitation to tender (“ITT”) was sent out to potential suppliers and the MOJ received tenders from five bidders, including Harry Yearsley Limited (“HYL”), a major frozen food distributor and the then-incumbent supplier.

Within the ITT, the MOJ described the procurement as a two-stage assessment. The first stage involved selection based on certain quality criteria and the second stage involved an electronic auction. The quality criteria were set on a threshold basis, and essentially any bidder who passed the required threshold was allowed to proceed to the electronic auction.

As part of the quality criteria, the ITT stipulated that compliance with certain requirements were mandatory, and this included compliance with the ‘Halal Standard’², which stipulated, amongst other things, that animals had to be slaughtered in accordance with Islamic law so as to render the meat fit for consumption by Muslims. One specific requirement of the Halal Standard was that the animals had to be slaughtered by hand.

Furthermore, the ITT, as well as the rules governing the electronic auction provided by the MOJ, pointed out that the electronic auction was a “*price only*” assessment. This was contrary to the MOJ’s stipulation that the contract was to be awarded to the “*most economically advantageous tender*”.

HYL passed the first stage of the selection process, but it was unsuccessful in the electronic auction and the contract was ultimately awarded to “3663” (a major wholesale food distributor) on or around 2 June 2009. HYL was provided with a written debrief on or around 5 June 2009. Unsatisfied with the outcome of the procurement, HYL began making various enquiries.

By early October 2009, HYL had taken legal advice and was of the view that the procurement process was flawed; its position was made very clear in a letter sent to the MOJ. Yet, it was not until April 2010 that HYL issued its claim form and, even then, the April 2010 claim form was not served on the MOJ, and was not followed up by particulars of claim.

Further communications between HYL and the MOJ led HYL to conclude that there were other flaws in the procurement process and, specifically, that:

- 3663 was allowed to participate in the electronic auction despite its inability to comply with the Halal Standard; and
- following the award, various amendments to the contract were made. In particular, it was amended to allow 3663 to supply machine-slaughtered beef (instead of beef manually slaughtered in accordance with the rituals and formalities required by Islamic law), contrary to the requirements of the Halal Standard.

Thus, on 27 July 2010, HYL issued a fresh claim form, which was accompanied by short particulars of claim and was served on the MOJ. In seeking damages from the MOJ, HYL levied five specific allegations of breaches of the Public Contracts Regulations 2006 (“PCR”) against the MOJ, alleging that MOJ had:

- adopted evaluation criteria and weightings which differed from those that were set out in the ITT;

² As to the official stance of the UK’s Food Standard Agency (“FSA”) on Halal meat, see Annex 5A to “*Food Law – Practice Guidance (England)*”, issued in May 2011 by the FSA. The Islamic law requirements quoted in Annex 5A state that for a meat to be Halal, amongst other things, “*the slaughter man must be a Muslim who has been properly trained and licensed*”.

- allowed 3663, the successful bidder, to derogate from the Halal Standard;
- made material changes to the contract after it was awarded to 3663;
- made a flawed use of the electronic auction as part of the procurement process; and
- in its debrief to HYL, displayed a lack of transparency and fairness, provided inadequate information and acted in a discriminatory manner.

In response to these claims, the MOJ made an application under the Civil Procedure Rules (“CPR”) to strike out these specific claims or, in the alternative, to obtain summary judgment in respect of these specific claims³. It argued, amongst other things, that:

- the proceedings were brought out of time;
- HYL did not suffer, nor did it risk suffering, any loss or damage as a result of the alleged breaches; and
- HYL has no real prospect of succeeding on the merits of its claims.

Time Limits for Claims

Because the original procurement was initiated before the implementation of the new remedies regime introduced by Directive 2007/66/EC and the amendments made to the PCR, the Court proceeded to apply the PCR as it stood prior to the amendments taking effect on 20 December 2009⁴.

The implication of this approach was that the requirement under the new remedies regime that the claim had to be “served” in order to stop the clock for the purposes of limitation period did not apply. Therefore, in deciding when the proceedings were “brought” (generally speaking, procurement challenges have to be brought within 3-month of the aggrieved bidder becoming aware of the breach), the Court had to consider only the CPR, which provides that “*Proceedings are started when the court issues a claim form at the request of the claimant*”⁵. Thus, the clock stopped running for HYL on 20 April 2010 when the first claim form was issued.

As a result, arguably the strongest of HYL’s various claims fell away because it was brought out of the 3-month limitation period that generally applied to procurement challenges. This ruling undermined HYL’s allegation that the use of an electronic auction as a pure assessment of pricing – coupled with the use of quality criteria as a threshold condition – was flawed. In the Court’s view, the timing issues were fatal to this particular claim because “*by early October 2009 HYL had the knowledge of the facts upon which it now relies for its contention that the electronic auction procedure did not comply with the regulations*”, yet proceedings were not brought until April 2010.

³ Under Rule 3.4 of the CPR, the court can strike out a statement of case on the ground, amongst others, “*that the statement of case discloses no reasonable grounds for bringing or defending the claim*”. Similarly, under Rule 24, the court can potentially give summary judgment against either party to a dispute if: “(a) *it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.*”

⁴ For an overview of the new remedies regime, see our January 2010 update: [New Remedies Regime New Public Procurement Remedies in the UK](#).

⁵ See Rule 7.2 of the CPR.

However, the Court did refuse to strike out the remainder of HYL's claims because the Court agreed with HYL that it was not in a position to know all of the facts that underpinned those other claims until much later, when additional matters came to light through its various exchanges with the MOJ.

Evaluation Criteria and Weightings

HYL's claims with respect to evaluation criteria and weightings were two-fold. Firstly, HYL claimed that the MOJ had changed the evaluation criteria and weightings from those originally notified to bidders, and secondly, HYL claimed that the MOJ allowed 3663 to participate in the electronic auction despite knowing that 3663 was unable to comply with the Halal Standard, thereby effectively lifting what was supposed to be a mandatory requirement. In support of the latter allegation of non-compliance of 3663's tender with the Halal Standard, HYL produced evidence by way of witness statements and various exhibits.

With respect to HYL's claim regarding the change to evaluation criteria and weightings, the MOJ conceded that it did use the wrong weightings but it still argued that, because the first stage evaluation against quality criteria was only an assessment against threshold criteria and HYL had passed the first stage evaluation, the use of wrong weightings did not prejudice HYL at all. The MOJ made similar arguments with respect to HYL's claim regarding the alleged derogation from the Halal Standard, *i.e.*, since HYL was successful in the first stage evaluation, any differential treatment given to 3663 or any other bidder in the first stage evaluation made no difference to HYL.

It is on this same basis that the MOJ argued that HYL did not suffer, nor did it risk suffering, any loss or damage as a result of any alleged breach of the PCR committed by the MOJ with respect to the evaluation against the quality criteria. The Court disagreed. It noted that whilst HYL backed its claim regarding the alleged derogation from the Halal Standard with substantive evidence, the MOJ refuted this allegation only on general terms and failed to rebut it with any specific supporting evidence, leading the judge to conclude that *"The MoJ has come nowhere near satisfying me that the allegations in relation to the breach of the Halal Standard have no prospect of success."*

The Court also made it clear that, although the argument advanced by the MOJ had force, such argument was not necessarily correct, noting that whilst the onus was on HYL to prove its loss as a matter of probability at the full trial, as HYL submitted, *"the dynamics of the electronic auction would have been quite different [and] HYL would or might have won it"*, had other tenders been properly disqualified at the first stage evaluation for non-compliance with the Halal Standard, which was said to be a mandatory requirement.

Amendments to the contract awarded to 3663

As regards the contract awarded to 3663, HYL accused the MOJ of making material amendments to the contract and pleaded four specific examples:

- *"change in weight of muffins"*;
- *"provision of a substitute fish for Pollock"*;
- *"increase in the price of frozen chops... on an annual basis by some £47,000 odd in the context of a contract with a value of some £22 million"*; and

- the concession to allow 3663 to supply machine slaughtered beef, contrary to the requirements of the Halal Standard.

With respect to the first three of these alleged examples of amendments, the Court took the view that they were “*relatively minor*” and clearly was of the view that they were not material enough to pass the test set out in *pressetext*⁶.

In fact, the Court went as far as to indicate that, were it not for the fact that the allegation of post-award amendment to the contract was pleaded only by way of example and the entirety of the scope of the amendment was not clear, the Court was prepared to strike out the first three pleaded examples of alleged amendment to the contract. The Court also ordered HYL to specify “*all the facts upon which it relies*” if HYL wished to pursue the claim based on the alleged post-award amendment to the contract.

Whether or not any of the alleged changes made to the contract awarded to 3663 will actually be caught by the rules set out in *pressetext* remains to be seen until the case proceeds to a full trial, but this case could potentially result in the Court issuing guidance (possibly for the first time) on how the test set out in *pressetext* will be applied in practice under English law.

Conclusion

This is a judgment in respect of a preliminary application made by the MOJ, and the core issues of the case remain to be resolved at a full trial. Whether or not it will proceed to a full trial at all, and how the matter will be resolved, if it does, remains to be seen. However, even at this preliminary stage, the case is full of salutary lessons in public procurement as to what should be done or not done by both the contracting authorities and bidders:

- The requirement under the new remedies regime that a claim must be “served” on the contracting authority in order to stop the clock ticking for the purposes of the limitation period does not apply to a procurement which was commenced under the old regime before 20 December 2009, for which purpose the clock stops simply when a claim form is issued. In pursuing or defending procurement challenges, both contracting authorities and bidders will need to carefully examine the timeline of events and actions taken by the parties, depending on when the procurement in question was initiated.
- For the purposes of the limitation period, the clock starts to run from the time when the bidder knew or ought to have known that a potential breach of the PCR had taken place, and bidders who hold back on issuing proceedings (under the old remedies regime) or hold back on issuing and serving the claim on the contracting authority (under the new remedies regime) may run the risk of being time-barred to plead what is potentially a very good argument. Bidders should therefore consider bringing formal challenges as soon as they suspect any potential infringement at any point during the procurement process without waiting until it has the complete picture⁷.
- When bringing a procurement challenge, there is no need for actual loss to be proven, and an aggrieved bidder only needs to prove loss as a matter of probability (*i.e.*, risk). An argument that a particular flaw in a procurement process would not have made any difference to a given bidder

⁶ See our January 2009 update: [Amending an Existing Contract](#)

⁷ As to the importance of acting sooner rather than later, see the judgment of the High Court in *SITA UK Limited v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 (Ch) (as subsequently upheld by the Court of Appeal; for a summary and analysis of the High Court’s judgment, see our April 2010 update: [Limitation Period for Challenges – when does the clock start to tick?](#))

because the outcome of the process would not have been any different for that bidder (and, therefore, the bidder has not suffered any loss or was unlikely to have risked suffering any loss), is unlikely to be sufficient to enable a contracting authority to make a successful application for a strike-out⁸.

- Evaluation criteria must be disclosed and applied properly. One of the earlier judgements to emerge from the Courts following the coming into force of the PCR clearly states that a contracting authority cannot unilaterally apply evaluation criteria/weightings which differ from what was communicated to the bidders, nor can it apply them in a manner that differs from what was communicated to the bidders⁹. Furthermore, evaluation criteria must be applied uniformly and consistently. An inconsistent application of evaluation criteria (*e.g.*, lifting a mandatory requirement with respect to one particular bidder in the course of evaluation, as the contracting authority was alleged to have done in this case) is likely to infringe one of the most fundamental principles derived from EU law that all bidders must be treated equally and in a non-discriminatory manner.
- Where a contracting authority runs a procurement by selecting the “most economically advantageous tender” as the overall criteria for awarding a contract, it must be careful in designing its selection process and setting its evaluation criteria, and refrain from adopting a process or criteria which results in assessment of only quantitative factors, or only qualitative factors. In such situations, contracting authorities must ensure that the overall evaluation properly takes into account both quantitative as well as qualitative aspects of the tenders¹⁰.
- When bringing a procurement challenge based on post-award amendments made to a public contract, bidders should carefully consider how their case is put forward, bearing in mind that not all amendments to an existing contract will automatically trigger scrutiny by the Court. Amendments to an existing contract must surpass a threshold of materiality before reliance can be placed on *presstext*. Likewise, contracting authorities and incumbent suppliers will need to tread carefully when re-negotiating their existing contract by considering whether or not the provisions which they seek to amend are likely to surpass the materiality threshold in accordance with *presstext*.

Morrison & Foerster
8 June 2011

⁸ For another example of the Court’s careful approach in determining an application to strike out procurement challenges, see the judgment of the High Court in *Montpellier Estates Limited v Leeds City Council* [2010] EWHC 1543 (QB) (for a summary and analysis of this judgment, see our July 2010 update: [Risk of Abandoning Procurements](#))

⁹ As to the importance of transparency and the mandatory nature of the disclosure of evaluation criteria and weighting, see the judgment of the High Court in *Letting International Limited v London Borough of Newham* [2008] EWHC 1583 (for a summary and analysis of this judgment, see our December 2008 update: [Evaluation Criteria and Weighting – Disclosure and transparency are mandatory, not discretionary](#)).

¹⁰ Compare this case (where the ‘qualitative’ element of the evaluation was merely treated as a threshold condition and therefore the electronic auction rendered the overall evaluation a ‘quantitative’ evaluation) against *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 2)* [2008] NIQB 105, where the Northern Irish High Court held that while price is not a mandatory element of the “most economically advantageous tender”, and while it is open to a contracting authority to adopt a series of predominantly non-economic evaluation criteria, price or cost must be a part of the evaluation in some form (for a summary and analysis of this judgment, see our February 2009 update: [Framework Agreements: Evaluation and Claim Period](#))

The Remedy of “Set Aside” or Ineffectiveness

The UK High Court has struck out an application for “ineffectiveness” made by an aggrieved bidder under the UK procurement rules, clarifying the way in which the new contract set-aside remedy operates and reinforcing the importance of acting with promptness in seeking remedies under European public procurement law.

The remedy of “set-aside” or “ineffectiveness” was introduced in 2009 in order to allow courts to overturn contract awards in certain circumstances. Until now, there have been no reported cases to illustrate how the courts would approach the remedy. When first enacted, the remedy was considered potentially draconian, but decisions in cases such as the one described below show how hard it may be to make a sufficiently strong case to persuade a court to apply the set-aside remedy.

What is the case?

The case is *Alstom Transport v. (1) Eurostar International Limited and (2) Siemens PLC* [2011] EWHC 1828, a decision made by the English High Court in an application made by the cross-channel train operator, Eurostar, and the successful bidder, Siemens, to strike out parts of a claim brought by Alstom, an aggrieved bidder who lost out in a tender for a contract to supply the new generation of trains as part of Eurostar’s £700 million investment in its fleet.

Why is this case important?

This case involves an interim application, made by a private company which is alleged to be a “utility”, to strike out parts of a claim made by an aggrieved bidder. As such, much of the substance of the aggrieved bidder’s complaints remains to be determined at a subsequent trial. Nevertheless, this case clarifies the way in which the “ineffectiveness” remedy operates under the current procurement remedies regime, and it conveys a number of important messages for both bidders and utilities alike.

It is easy to forget that the procurement remedies regime applies equally to utilities, as well as to more traditional public sector bodies. So, whilst this case centres on the interpretation of the public procurement rules that apply to the utilities sector, due the similarity between the legal regimes that underpin the utilities sector and the non-utility public sector, the messages that emerge from this case would be equally relevant to those bidders and contracting authorities that engage in procurement outside the utilities sector.

The key messages that emerge from this case are as follows:

- Awarding authorities/utilities and winning bidders should welcome this ruling, as it provides clarification that allegations as to subsequent alteration to an awarded contract will effectively not be covered by the ineffectiveness remedy, insofar as the allegation is that the contract finally awarded at the conclusion of a given procurement process was materially different from that which was initially advertised.
- This ruling also clarifies that the information which an awarding authority/utility is required to provide to unsuccessful bidders in order to benefit from the shorter 30-day limitation period for the ineffectiveness remedy does not have to be in writing or in any particular form.
- Awarding utilities should take heed of the unsuccessful attempt of the utility in this case to interpret the requirement for advertisement narrowly. It is now clear that the fact that the negotiated procedure was used and no “contract notice” in the conventional sense was issued does not mean that there was no requirement for advertisement for the purposes of the ineffectiveness remedy.

- A losing bidder will need to be mindful of the fact that, if it wishes to pursue ineffectiveness as a remedy, it must act promptly. Whilst the general limitation period for public procurement challenges is 3 months, and a claim for ineffectiveness has a 6-month limitation period, in most circumstances, it is likely that losing bidders will need to act within 30 days of the debriefing.
- If a bidder wishes to challenge formally an awarding authority/utility’s decision, it could potentially weaken its case if it has failed to listen to what the awarding authority/utility asks the participating bidders to do in the ITT/ITN, BAFO, and other documentation released by the awarding authority/utility. An unwilling and reluctant bidder could potentially fall foul of an argument that any shortfall or non-compliance on the part of the authority would not have made any difference to the outcome of the procurement.

What happened in this case?

The Background

Having decided that it was time to upgrade its fleet of trains, Eurostar embarked on a procurement exercise based on the negotiated procedure, issuing a pre-qualification questionnaire (“**PQQ**”) to six potential bidders in January 2009. Alstom, along with Siemens and another bidder, passed the PQQ stage in February 2009 and, in May 2009, Eurostar issued an Invitation to Negotiate (“**ITN**”).

Due to the conflict between the then-prevailing regulatory requirement mandating the use of concentrated power systems (“**CPS**”) and Eurostar’s willingness to accept a train design that utilised distributed power systems (“**DPS**”), Alstom ceased its work on the tender. However, when the Channel Tunnel Intergovernmental Commission (the “**IGC**”) began a consultation in July 2009 to amend the regulatory requirements to allow, amongst other things, train designs based on DPS, Eurostar told Alstom that bids using DPS-based designs were acceptable because the IGC was likely to change the safety rules. Accordingly, Alstom resumed its work on the tender, and eventually submitted its bid in October 2009.

There were further communications between Eurostar and Alstom regarding the Best and Final Offer (the “**BAFO**”), and Alstom eventually submitted its BAFO in January 2010, on the assumption that the IGC would change its safety rules to allow DPS-based train designs. However, Alstom was not happy with its BAFO and later submitted a revised bid in April 2010. This, however, was rejected and, by June 2010, Siemens was the preferred bidder whilst Alstom was the reserve bidder. Eurostar and Siemens entered into a preliminary agreement on 18 August 2010, and ultimately, on 5 October 2010, Eurostar formally notified Alstom that the contract would be awarded to Siemens.

Eurostar’s decision to award the contract to Siemens was made despite the fact that the regulatory uncertainty surrounding the permissibility of DPS-based train designs was still persisting and, at the point of contract award, it was by no means 100% certain that IGC’s safety rules would be formally amended to allow DPS-based train designs to operate in the Channel Tunnel¹.

Alstom was not happy with the outcome. On 11 October 2010, on the same day that the debriefing meeting between Eurostar and Alstom was held, Alstom notified Eurostar that it intended to bring proceedings against Eurostar under the **Utilities Contracts Regulations 2006** (the “**UCR**”)². Eurostar subsequently notified Alstom on 13 October 2010 that Eurostar and Siemens had already entered into the

¹ It wasn’t until June 2011 that the IGC officially announced a change to its safety rules, allowing for DPS-based train designs provided that certain specific safety conditions were met.

² Note that whilst Eurostar refuted the suggestion that the UCR applied to it on the basis that it was a private company, it nevertheless accepted, for the purposes of the application of the injunction (and the subsequent application to strike out the claim for ineffectiveness separately brought by Alstom at a much later date), that the UCR could be assumed to be applicable to Eurostar.

preliminary agreement back in August 2010; then, on 19 October 2010, Alstom issued its claim form and application notice seeking an injunction to prevent Eurostar from contracting with Siemens³.

Alstom, amongst other things, argued that:

- the fact that Eurostar had encouraged bids for trains using DPS as opposed to CPS (despite the fact that the applicable safety regulations had not been formally amended to allow for DPS-based train designs) meant that the entire procurement process was affected by a fundamental uncertainty which, in turn, meant that it was not possible to make any fair tender or to evaluate the tenders fairly; and
- Eurostar failed to inform Alstom properly and fully in advance of the evaluation criteria, weightings, and methodology used.

The application for injunction was determined in accordance with the longstanding test based on *American Cyanamid v. Ethicon* [1975] AC 396. The court dismissed the claim on the basis that, whilst Alstom’s allegations raised serious issues to be tried, the test of the balance of convenience did not favour the granting of an injunction which would, amongst other things, deprive Eurostar of its ability to complete the procurement in a timely manner so as to enable it to prepare properly for the impending competition which is set to result from the opening up of the Channel Tunnel to other train operators such as Deutsche Bahn and which would be against the public interest (the Court noted that “*the public interest will be served by the introduction of timely and effective competition for Tunnel train services*”)⁴.

There was also evidence indicating that Alstom was not as keen and eager as Siemens in its preparations and participation in the tender process, and this resulted not only in a significant gap in the final assessment scores awarded to Siemens and Alstom, respectively, but also clearly negatively affected Alstom’s odds of obtaining the injunction it sought. The judge who presided over the application for injunction commented on this, amongst other things, as follows:

“...looking at the matter generally, the evidence leaves me with the impression that Siemens took the bidding process far more seriously than Alstom, placed it at the front of its list of priorities, and perhaps most importantly, paid greater attention to what Eurostar was telling bidders and to what was contained in the ITN and BAFO documents. If, as I think, Alstom stands only a quite small chance of demonstrating that all its alleged arguable breaches, taken together, would have made any difference to the outcome, Alstom will be unlikely to obtain an order setting aside Eurostar’s decision at trial”.

Having managed to avoid the imposition of an injunction, Eurostar and Siemens proceeded to sign their contract on 3 December 2010, and Eurostar informed Alstom of this fact on the same day. However, Alstom did not give up.

It continued to pursue its claims and, on 4 May 2011, Alstom sought to amend its claim by introducing a request for a declaration of ineffectiveness in respect of the final contract entered into by Eurostar and Siemens. Eurostar and Siemens in turn sought to strike-out this request.

The Remedy of Ineffectiveness (Set-Aside)

A declaration of ineffectiveness is a new remedy made available to aggrieved bidders under the amendments to the UCR and its non-utilities counterpart, the Public Contracts Regulations 2006 (“PCR”), introduced by Utilities Contracts (Amendment) Regulations 2009 and Public Contracts (Amendment)

³ Note that Siemens was never sued directly by Alstom; rather, the Court ordered that Siemens be joined as a defendant in these proceedings.

⁴ For the judgment of the Court with respect to the initial application for injunction, see *Alstom Transport v. (1) Eurostar International Limited and (2) Siemens PLC* [2010] EWHC 2747 (Ch).

Regulations 2009, which together implement the changes to the remedies regime introduced by Directive 2007/66/EC of 11 December 2007 (the “**New Remedies Directive**”⁵).

The most significant feature of the amendments to the UCR and PCR introduced by the New Remedies Directive is the availability of a declaration of ineffectiveness or set-aside of a contract entered into by the utility/contracting authority and the successful bidder. Both in the context of the UCR and PCR, the New Remedies Directive has introduced a presumption that a contract entered into by a utility/contracting authority is illegal and must be set aside, if it is entered into under certain conditions. Briefly, these conditions – the “grounds for ineffectiveness” – are that the contract award was:

- made without prior advertisement, despite the requirement for that to happen; or
- made in breach of one of the primary provisions of the procurement rules (*i.e.*, a traditional breach, such as failure to treat all bidders equally and in a non-discriminatory fashion) as well as certain ancillary requirements (such as the requirement to comply with standstill period⁶), and the failure to comply with the ancillary requirements deprives the aggrieved bidder of “*the possibility of starting proceedings [in respect of the primary breach], or pursuing them to a proper conclusion, before contract was entered into*”; or
- for a specific contract under a dynamic purchasing system (or a framework agreement), and such award was made in breach of the rules governing the award of specific contract and the estimated value of such specific contract in question exceeds the relevant threshold⁷.

Where an aggrieved bidder seeks a declaration of ineffectiveness, a special limitation period applies and generally speaking, the aggrieved bidder must bring the claim for ineffectiveness within 6 months, but this 6-month limitation period can be cut down to 30 days where:

- a contract award notice was published in the Official Journal of the European Union in accordance with the relevant provisions of the UCR or PCR; or
- the aggrieved bidder was informed of “*the conclusion of the contract*” and “*a summary of the relevant reasons*” in accordance with the relevant provisions of the UCR or PCR.

Thus, utilities/contracting authorities and successful bidders can reduce the risk of legal challenge which threatens to nullify their contract after they commence performing their obligations, so long as utilities/contracting authorities provide as much information as possible up-front in publishing their contract award notice or otherwise notifying the unsuccessful bidders in accordance with the relevant provisions of the UCR or PCR.

The Court’s approach to Alstom’s argument for a declaration of ineffectiveness and Eurostar/Siemens’ counter-argument

In arguing that the final contract awarded to Siemens ought to be declared ineffective, Alstom relied on the first two grounds of ineffectiveness outlined above, whilst Eurostar and Siemens argue that neither of those two grounds applied (and, even if either of them applied, Alstom was time-barred).

⁵ For an overview of the regime introduced by the New Remedies Directive and its UK-implementation measures, namely the amendments to the Utilities Contracts Regulations 2006 and the Public Contracts Regulations 2006, see our [January 2010 Update: New Public Procurement Remedies in the UK](#).

⁶ As to the requirement for standstill period, see Regulation 33A of the UCR (also see Regulation 32A of the PCR).

⁷ Note that the third ground for ineffectiveness under the UCR only applies to award of specific contracts under a dynamic purchasing system, whilst the third ground for ineffectiveness under the PCR covers award of specific contracts under a framework agreement as well as award of specific contracts under a dynamic purchasing system.

Having dealt with the parties’ arguments, the court determined that:

- **For the purposes of the first ground of ineffectiveness under the UCR, the need for a prior advertisement required by the UCR should not be narrowly construed as meaning only a “contract notice” in its conventional sense.**

Where no contract notice was issued but other similar notices were issued, *e.g.*, notices for qualification procedure were issued as part of the negotiated procedure, such notices were capable of being brought within the ambit of the prior notice that had to be given to fulfil the advertisement requirement under the UCR. Thus, in this case (where the negotiated procedure was used), it was not open to Eurostar to argue that the first ground was unavailable to Alstom (which Eurostar had tried to do, on the basis that Eurostar was not subject to a requirement to advertise by virtue of the absence of the need to publish a “contract notice” in its conventional sense⁸).

- **The first ground of ineffectiveness under the UCR involves a simple, mechanistic test of whether or not an appropriate notice which calls for competition was given.**

Therefore, as long as a relevant notice satisfying the requirement for the publication of prior notice calling for competition for the award of the contract was given (be it by way of contract notice or some other notice permissible under the UCR), that was sufficient to satisfy this test and it was not open to Alstom to argue that because the contract which was finally awarded to Siemens was materially different from what was anticipated to be awarded, there was need for a fresh competition and Eurostar had to issue a fresh notice in respect of a new competition (which Eurostar had not done).

- **The second ground of ineffectiveness can only be relied upon if there is a breach of standstill requirement (or some other relevant ancillary requirement) and that breach prevents the aggrieved bidder from either: (a) starting proceedings before the signing of the contract; or (b) bringing such proceedings to a conclusion.**

Therefore, where (as here) Alstom as the aggrieved bidder was able to formulate and commence proceedings within the standstill period in an attempt to prevent the contract with the successful bidder from being concluded, it was not also open to Alstom to argue that a breach of the standstill requirement prevented it from bringing proceedings against Eurostar⁹; nor was it open to Alstom to argue that because the contract which was finally awarded to Siemens materially differed from what was anticipated to be awarded, Eurostar was required to issue not just a fresh notice but was also subject to a fresh standstill period.

- **For the purposes of determining the special limitation period which applies to a claim for ineffectiveness under the UCR, the information which the aggrieved bidder must be given by the utility in order to trigger the shorter 30-day limitation period does not have to be in any particular form (it does not even have to be in writing), and it only has to relate to the contract in respect of which the advertisement was initially published.**

The Court took the view that there was no need for the requisite information to be given in any formal way, or indeed, to be in writing at all, noting that in practice, most of the information that must be provided to an unsuccessful bidder is given by way of debriefing, which takes the form of meetings. The Judge’s view was that *“I can see no reason why the ‘informing’ should be done in writing; certainly, the Regulations do not say so... The process required is the passing of*

⁸ In reaching this view, the Court, amongst other things, took notice of the fact that whilst the UCR merely referred to prior publication of a “notice”, the PCR specifically referred to the prior publication of a “contract notice”.

⁹ In any event, based on the facts of this case, the Court did not feel that there was any breach of the standstill requirement on Eurostar’s part.

information (and summary information at that). Provided it is passed then the manner of passing does not matter, provided, of course, that the summary is sufficiently clear.”

The Court also took the view that, as a matter of strict interpretation of the relevant provisions of the UCR, the information which had to be given to the unsuccessful bidders in order to trigger the shorter 30-day limitation period for the ineffectiveness remedy could only be that which related to the contract which was originally anticipated to be awarded (*i.e.*, such information obligation could only relate to “*the contract which has apparently resulted from the previously announced procedures and therefore, ostensibly at least, which the unsuccessful candidates and tenders thought they were competing for*”).

Therefore, neither was it open to Alstom to argue that Eurostar failed to give the requisite debriefing information in any particular legally compliant fashion, nor was it open to Alstom to argue that Eurostar failed to give the requisite information in respect of the contract with Siemens which was alleged to have been materially amended.

In any event, the evidence of this case was such that the Court concluded that Alstom was given more than the requisite “*summary of the relevant reason*” (which, in the Court’s opinion, only had to be “*reasons for lack of success and the comparative merits of the winning bid*” and nothing more) and therefore, the 30-day limitation period started on 4 December 2010 and had expired long before Alstom sought to introduce its new claim for ineffectiveness in May 2011.

Morrison & Foerster
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The UK has amended its public procurement regime to clarify and tighten the rules applicable to public contract award challenges

On 1 October 2011, the most recent changes to the UK procurement rules come into force. The main changes focus on when and how challenges can be brought — and finally bring the UK rules into line with the principles laid down by the European Court of Justice. Whilst some might see this change as a blessing in the sense that it introduces greater clarity and certainty, others might see it as a curse in that it increases the compliance burden on both sides of the fence in the public procurement arena.

What is the news?

Over the summer 2011, the **Public Procurement (Miscellaneous Amendments) Regulations 2011** (the “**2011 Amendments**”) were introduced with little fanfare. The 2011 Amendments change the three key regulations that govern public procurement in the UK, namely the Public Contracts Regulations 2006 (the “**PCR**”), the Utilities Contracts Regulations 2006 (the “**UCR**”) and the Defence and Security Public Contracts Regulations 2011 (the “**DSPCR**”).

Why is this development important?

As we have been reporting over the past few years, the public procurement rules — both at EU level and at UK level — have been subject to interpretation by various courts, owing much to the increasing number of legal challenges brought against contracting authorities by aggrieved bidders.

In respect of such legal challenges brought in the UK under the PCR and UCR, some of the main court challenges have centred on the rules as to when and how public procurement decisions could be challenged¹. The 2011 Amendments, amongst other things, introduce a greater certainty by tightening and clarifying these rules, partly by codifying the judicial interpretation of these rules.

Bidders and contracting authorities alike will need to be prepared for the changes that are set to come into force on 1 October 2011. Of particular importance is the new, default 30-day limitation period introduced by the 2011 Amendments. Whilst some might see this change as a blessing in the sense that it introduces greater clarity and certainty (bearing in mind the economic downturn and the perceived wisdom that public sector projects play a key role in economic recovery), others might see it as a curse in that it increases the compliance burden on both sides of the fence in the public procurement arena.

Bidders will need to become ever more vigilant with respect to any potential infringements of procurement rules by contracting authorities. From 1 October 2011, an aggrieved bidder must act within 30 days if it wishes to maximise the chance of successfully challenging the decision of a contracting authority. Additionally, if the aggrieved bidder does decide formally to challenge a decision, it will need to issue (and immediately notify the contracting authority) its claim to make the most of the remedy of automatic suspension.

On the other hand, utilities and contracting authorities will need to ensure, more than ever, that they conduct their public procurements strictly by the book as the shorter limitation period that applies from 1 October 2011 could well compel more bidders to bring legal challenges at much earlier stages in the lifetime of a procurement process, something which bidders generally tended to avoid out of fear of weakening their chance of continued participation in an on-going procurement process.

¹ See, for example, our February 2010 Update [Limitation Period and the Need for Promptness](#) and our April 2010 Update [Limitation Period for Challenges – when does the clock start to tick?](#)

What are the key changes?

Aside from miscellaneous changes (such as the changes to reflect the disappearance of the Office of Government Commerce), the key changes introduced by the 2011 amendments can be summarised as follows:

- *Change to the general limitation period – down from three months to 30 days*

Prior to the 2011 Amendment	After the 2011 Amendment
Infringement challenge proceedings had to be brought promptly <u>and</u> within three months of the date on which the bidder became (or ought to have become) aware of the breach of procurement rules giving rise to the right of legal challenge.	Proceedings have to be brought within 30 days ² of the day on which the bidder became (or ought to have become) aware of the breach of procurement rules giving rise to the right of legal challenge ³ .

- *Change to the general limitation period — when the clock stops ticking*

Prior to the 2011 Amendment	After the 2011 Amendment
For the purposes of both the general three-month limitation period as well as the special limitation period that applies to the remedy of “set aside” (30-day or six-month, depending on the circumstances — see Footnote 2 below), in order to stop the clock ticking, an aggrieved bidder had to: <ul style="list-style-type: none"> • issue a claim form; <u>and</u> • serve it on the utility/contracting authority (and the winning bidder, where applicable). 	For the purposes of the general 30-day limitation period as well as the special limitation period that applies to the remedy of “set aside” (30-day or six-month, depending on the circumstances — see Footnote 2 below), in order to stop the clock ticking, an aggrieved bidder simply has to issue a claim form but it must be served within seven days on the utility/contracting authority and the winning bidder.

- *Change to the court’s discretion to extend the limitation period — court’s discretion now limited by three-month backstop*

² Prior to the 2011 Amendments, the 30-day limitation period only applied in respect of the remedy of ineffectiveness (or “set aside”); the special limitation period of six-month in respect of set aside could be cut down to 30 days if the utility/contracting authority took certain steps. The change to the general limitation period introduced by the 2011 Amendments effectively aligns the limitation period of all types of claims under the PCR, UCR, and DSPCR to 30 days in most circumstances.

³ Note here the removal of the requirement to bring proceedings “promptly” (which was a requirement previously imposed under the PCR and the UCR but not under the DSPCR), which the European Court of Justice held as being incompatible with the EU procurement rules in *Case C-406/08 Uniplex (UK) Ltd v NHS Business Services Authority*; see our February 2010 Update [Limitation Period and the Need for Promptness](#).

Prior to the 2011 Amendment	After the 2011 Amendment
By way of exception to the general three-month limitation period, the court has discretion to grant an extension if there is a good reason for doing so. There is no specific cap on the length of extension that the court can grant.	By way of exception to the general 30-day limitation period, the court has discretion to grant an extension if there is a good reason for doing so, but such discretionary extension cannot result in the aggregate total of limitation period exceeding three months.

- *Change to the automatic suspension of contract award — suspension won't apply unless utility/contracting authority is made aware of the relevant claim*

Prior to the 2011 Amendment	After the 2011 Amendment
Where the contract to be awarded is not signed, the signing has to be suspended if the aggrieved bidder has: <ul style="list-style-type: none"> • issued a claim form in respect of the contract award; <u>and</u> • served it on the utility/contracting authority (and the winning bidder, where applicable). 	Where the contract to be awarded is not signed, the signing has to be suspended if: <ul style="list-style-type: none"> • the aggrieved bidder has issued a claim form in respect of the contract award; <u>and</u> • the utility/contracting authority has become aware of the fact that a claim form relating to the contract award was issued. <p>In other words, the utility/contracting authority is prevented from entering into the contract with the winning bidder as long as the utility/contracting authority is notified of the fact that a relevant claim form was issued (even where the claim form is not formally served).</p>

- *Change to the contract award notification requirement*

Prior to the 2011 Amendment	After the 2011 Amendment
Contract award has to be notified to all bidders who submitted a bid, tender or offer.	Contract award has to be notified only to those bidders who submitted a bid, tender or offer, <u>and</u> who have not been definitely excluded from consideration prior to the final award decision being made. <p>In other words, those bidders who are definitely excluded from the procurement process during interim stages and are notified of such exclusion do not have to be notified of the final contract award (note, however, that aggrieved bidders can still contest whether or not they have been legally and validly excluded from the procurement process).</p>

How does the change to the limitation period affect past, on-going and future procurement exercises?

The 2011 Amendments will come into force on 1 October 2011. However, the way in which the new limitation period applies will vary depending on when the aggrieved bidder becomes aware (or ought to have become aware) of breach of procurement rules by a contracting authority. Importantly, when the utility/contracting authority commenced the procurement process in question is irrelevant and, in this sense, the 2011 Amendments will have a retrospective effect⁴.

The day the bidder first becomes aware (or should have become aware) of the breach of procurement rules	Applicable Limitation Period
Before 1 October 2011	Three months, but if there is good reason for doing so, the court can extend this. No limit on extension that the court can grant.
On or after 1 October 2011	Thirty days, but if there is a good reason for doing so, the court can extend this to up to three months.

Morrison & Foerster

September 2011

⁴ Note however that the timing of the commencement of public procurement will remain relevant for the purposes of determining whether or not the new remedies regime introduced by Directive 2007/66/EC applies to legal challenges brought under the PCR or UCR; see our January 2010 Update [New Public Procurement Remedies in the UK](#). The DSPCR already reflected the new remedies regime when it came into force in August 2011, so the timing of commencement of public procurement is irrelevant insofar as the applicability of the new remedies regime to defence and security procurements conducted under the DSPCR are concerned.

Summary – Why MoFo?

Top Quality Legal Advice	Our approach to each of our client engagements is consistent: we provide high quality legal services in a down-to-earth and practical manner; and we offer our clients the highest levels of commitment and responsiveness.
Experience of UK Public Sector IT Projects	Our London office is recognised as a market-leader in advising on projects procured in accordance with the Public Contracts Regulations. Our group leader, Alistair Maughan, is one of the foremost lawyers in the UK in this field and is a member of OGC's Legal User Group.
Relevant Expertise	MoFo is a world leader among law firms advising on IT and outsourcing projects: we are the only law firm with a top-tier technology transactions practice across 3 continents. We combine this with expertise in key areas such as public procurement law, HR, data privacy/security and freedom of information law.
Named, Dedicated Team	We have assembled a team of lawyers with strong experience on government technology projects. This allows us to flow-down work to more junior, cost-effective resources without loss of quality or relevant experience.
Authority-side work	We have a strong track record of advising government departments on outsourcing and procurement projects. We have been involved in public sector projects for, among others, HMRC, NPIA, DWP, UK Border Agency, UK Benefits Agency, DVLA, department for Transport and Ambulance Radio.
Bid-side work	Our team has experience of advising bidders on major public sector projects including Fujitsu, EDS, PwC, IBM, Booz & Co. and 3M. During the bid phase, we understand the dynamics of the customer relationship that our clients need to preserve – and we seek to optimise bids and enhance our clients' distinguishing features through the commercial negotiations.
More than just Lawyers	We do more than just provide legal advice. We will help our clients to avoid unnecessary risks and deliver their project on time and on budget. We look for creative and innovative solutions to our clients' business issues. Each project is a commercial, regulatory, technical and economic jigsaw. We're great at project management (and jigsaws!).
Thought Leaders	We're helping to shape the public sector and outsourcing industries. Check out our library of useful materials at www.mofo.com/sourcing
The MoFo Way	We commit to our clients and become a part of their team. We avoid legalese, jargon and academic answers to issues. Think lawyers with their sleeves rolled up, not academic legal advisors.



Alistair Maughan, Partner and Chair of the Global Sourcing Group

Academic Background:

Law degree, Leicester University (1984); College of law, Chester (1985).

Years of experience in matters relevant to public procurement projects:

18 years experience.

Contact:

amaughan@mofo.com

020 7920 4066

Alistair Maughan leads our UK public sector group and is acknowledged to be one of the UK's foremost public sector IT lawyers. His recent transactions include:

- advising **HMRC** on all aspects of the ASPIRE contract including the merger of ASPIRE with HMC&E's ISA contract, as well as claims against HMRC's suppliers relating to NTC, CHIEF and other matters;
- advising **National Police Improvement Agency** on its national fingerprint identification system and its project for the delivery of a UK emergency mobile radio network (including the major extension to cover the London Underground network);
- advising **UK Border Agency** on the procurement of a global visa application system for the United Kingdom.

His other public sector clients over the years have included the **Ministry of Defence, Department for Transport, the Benefits Agency, DWP, CCTA (predecessor to OGC), Rural Payments Agency.**

He also advises bidders on major public sector projects. Clients on part projects include Fujitsu, EDS, PwC, IBM, and Booz & Co.

He has advised on all forms of public procurement projects, including one of the first successful competitive dialogue projects, HMRC's "CHIEF" project to replace the UK's import/export tracking system.

Alistair focuses on IT, software, IP and outsourcing projects for major companies and public sector organisations. His primary areas of expertise include advising on outsourcing transactions (both IT and business process-driven; and both on-shore and offshore); negotiating contracts for the supply and acquisition of technology equipment, services and software; advising on issues and contracts related to e-commerce; counselling public bodies on procurement policy and procedures; and drafting, negotiating and advising on all types of technology contracts and issues.

Professional qualifications and/or recognition/awards and publications:

Alistair Maughan was admitted as a solicitor in England and Wales in 1987. He has practised law on both sides of the Atlantic and was also admitted to the New York Bar in 1990. Alistair is a highly-regarded commercial lawyer. The *Legal 500*, *Chambers Global* and *Chambers UK*, leading independent guides to the legal profession, recommend him as having "a formidable reputation on major projects", and comment that he "impresses clients with an outsourcing profile that is judged to be 'as good as you can get'..."; and is "the best outsourcing lawyer ever when it comes to acting for the customer end of the market," and "the King of outsourcing." *PLC Which Lawyer* describes him as "A leader in the field, particularly highly regarded for his public sector-related work."

Alistair is a regular speaker at seminars and conferences on procurement, IT and outsourcing issues.