UK response to European Commission Green Paper on the Modernisation of the EU’s Procurement Rules

The last few months have marked another step on the path to refreshing the EU’s procurement directives. On 24 June 2011 the European Commission published the results of its evaluation of the impact and effectiveness of EU public procurement legislation. This finds that the EU rules have resulted in greater transparency and greater levels of competition for advertised contracts, generating savings through lower prices that far outweigh the costs of procurement procedures. However, cross-border procurement has not increased as much as was anticipated and many bidders remain deterred from competing for tenders in other member states by a variety of factors. Implementation of the EU rules also varies across the member states particularly with regard to the time taken to complete procedures and the cost involved. This indicates that there is considerable scope within the Directives for reducing the cost of public procurement administration by aligning with the practices of the most efficient member states. The widespread use of frameworks may be having an adverse effect on efficiency. The report finds that the original objectives of removing legal and administrative barriers to participation in cross-border tenders remains a worthwhile ambition.

Consultation on modernising the regime

The Commission also published on 24 June a synthesis of the main views expressed by the respondents to the consultation on the modernisation of EU public procurement legislation launched in January 2011. The responses show a general desire to update EU procurement rules. A total of 623 replies were received, 40% of which came from businesses and 29% from public bodies. The UK submitted the most replies out of the 22 Member States from which responses were received. Most respondents welcomed the Commission’s Green Paper. The three issues which were raised the most were the need for a generalised negotiated procedure, raising threshold values and a review of the A/B services distinction.

A strong emphasis was placed on the need to simplify the rules, including introducing a more flexible approach to the organisation and sequence of the examination of the selection and award criteria, and allowing previous experience to be taken into account. There was a general desire to retain the distinction between works, supplies and services and the approach to defining procuring bodies. There were, however, mixed views on a number of issues, such as, for example, the strategic use of public procurement to support other policy objectives and the A/B distinction. The Commission will use the responses to the Green Paper and its evaluation of the procurement rules to formulate legislative proposals, which it intends to publish before the end of 2011.

Finally, although the Government suggests opening bids to more SMEs it still seems unmoved on changing the rules to allow SMEs to fulfil government contracts.

UK Response

On 25 July 2011 the Cabinet Office published the UK Response to the European Commission’s Green Paper on modernisation of EU public procurement policy. Like the majority of consultees, the UK supports greater simplification of the EU’s rules. In particular, it considers that the main priorities in the revision of the directives should be to make clear that, in certain circumstances, such as the development of employee led organisations/mutuals, employees should be able to gain experience of running public services for a period of, for instance, three years, to reduce lengthy and burdensome processes that add cost to business and barriers to market competition, to provide more flexibility to purchasers to follow best commercial practice and to support measures to enhance SME access to public procurement. The thresholds for the application of the EU Directives should also be increased. It also advocates the removal of, at least, private utilities from the application of public procurement rules. The UK also calls for clarification and clearer guidance on how social and environmental issues can be taken into account.

These UK proposals to modernise public sector procurement sound refreshingly promising, but they show up a number of contradictions in Government policy. Firstly, through this document the Government has finally admitted that it cannot carry out its ‘mutualisation’ programme, which aims to move 100,000 civil servants into joint ventures with the private sector and then award the JV contract, without a change to the rules. As this is the main goal of the Opening Public Services White Paper it is not clear where this leaves the programme, as it will be several years before any new procurement directive becomes law. Secondly, having stated that it would back procurement bids from UK based companies over foreign competition in the context of the Thameslink contract, where Siemens won, the Government now says it would always choose the most competitive, value-for-money bid regardless of nationality. It would be helpful if the Government could confirm if this represents Government policy rather than the gnashing of teeth which followed the announcement. Thirdly, after backing the ‘competitive dialogue

1 http://www.cabinetoffice.gov.uk/sites/default/files/resources/0707UKGbbResponsefinal%20(2).pdf
procedure’ as recently as last November in its Review of Competitive Dialogue¹ and notwithstanding the huge increase in bid costs arising from competitive dialogue, the Government is now advocating a generally available negotiated procedure where negotiation is possible once a bid has been submitted, which was where we were five years ago. Finally, although the Government suggests opening bids to more SMEs it still seems unmoved on changing the rules to allow SMEs to fulfil government contracts.

Procurement Information Note 05/11
On 11 August the Cabinet Office published an Information Note² to coincide with the European Commission’s current review of EU-wide procurement rules. The Note follows the Government’s response and outlines the steps the Government intends to take to implement its proposals.

The Note confirms that the Government will be actively influencing the Commission, other EU Member States and the European Parliament in the run up to the publication of the Commission’s proposals for revised and updated directives, and calls on those in the public procurement community who may have links to such bodies or other stakeholders to participate in that process and push the UK message.

It also recommends the Note be circulated throughout organisations, agencies and other bodies and that its content be brought to the attention of those with a procurement role.

Negotiations on the Commission’s legislative proposals are due to commence early in 2012. The Cabinet Office will keep stakeholders updated on developments.

¹ http://www.hm-treasury.gov.uk/d/ippc_competitive_dialogue.pdf
What was the fuss over the Remedies Directive about?

It is now more than 18 months since the Public Contract (Amendment) Regulations (SI 2009/2992), which implemented the 2007 Remedies Directive (2007/66/EC), came into effect. Recital (3) of the Directive stated that the existing remedies directive should ‘be amended by adding the essential clarifications which will allow the results intended by the Community legislature to be attained’. The new remedies regime has three central features: standstill provisions; automatic suspension of the procurement process following the commencement of proceedings; and a new remedy of ineffectiveness to deal with particularly flagrant breaches of the rules. This article considers the second and third of these in the light of subsequent developments.

Automatic Suspension

Regulations 47G and H deal with automatic suspension. Regulation 47G requires a contracting authority to refrain from entering into a contract once proceedings are started until either the Court brings the requirement to an end by interim order under regulation 47H(1)(a) or the proceedings at first instance are determined and no order has been made continuing the requirement. When deciding whether to make an order under regulation 47H (1)(a) the Court must consider whether, if regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract. Only if the Court considers that it would not be appropriate to make such an interim order may it make an order under regulation 47H(1)(a).

There have been a series of cases concerning the lifting of the suspension since the regulation came into effect. These include Indigo1, Exel2, HALO3, Metropolitan Resources4 and most recently, First4skills5 and Rutledge6. In all these cases other than First4skills, the court has lifted the automatic suspension. It is therefore worth considering the basis on which the courts have adopted this approach.

2 Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust, [ 2010] EWHC 3332 (TCC).
3 The HALO Trust v The Secretary of State for International Development, [2011] EWHC 87 (TCC).
4 Metropolitan Resources North West Ltd v Secretary of State for Home Department [2011]
5 First4skills Ltd v Department for Employment and Learning [2011] NIQB 59.
6 Rutledge Recruitment Limited v Department For Employment And Learning -and- Anor, [2011] NIQB 61
Indigo Services (UK) Ltd v The Colchester Institute Corporation

Indigo, the first case under the new Regulations where judgment was given on 1 December 2010, concerned the award of a cleaning contract by the Colchester Institute. Indigo, the incumbent, came third. Indigo alleged a number of irregularities in the tendering process, which failed to impress David Donaldson QC sitting as a deputy high court judge. Donaldson QC was also mindful of the urgency felt by the successful bidder as a result of having to mobilise to perform the contract. The judge concluded that the appropriate test was that in American Cyanamid, notwithstanding the new Regulations. He rejected the suggestion that the Regulations provided a ‘steer’ in favour of an injunction and in any event the subject matter of the case meant that the injunction would have been discharged even if a ‘steer’ had been given. However, without a ‘steer’ it is hard to see how the Regulations achieve the objective set out in the recitals to the Remedies Directive.

Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust

Indigo was followed by Exel where judgment was given on 21 December 2010. Exel concerned a tender process carried out by University Hospitals Coventry & Warwickshire NHS Trust, the Defendant, for the establishment of a framework agreement in order to transfer the responsibility of managing and operating the Healthcare Purchasing Consortium (HPC), which has been a collaborative procurement hub run by the Defendant on behalf of itself and some 40 NHS Trusts in the West Midlands and elsewhere. Exel believed that the information provided in or in connection with the ITT was insufficient and later withdrew from the tender process. Exel brought proceedings alleging various breaches of the rules. Akenhead J concluded that the legislation does indeed import the injunction test and the American Cyanamid principles; in assessing the balance of convenience, potential harm to the public interest, as well as the interests of the parties, are to be taken into account; there is no ‘steer’ in favour of the maintenance of the suspension; and Regulation 47(G) and (H) adequately transpose the Directive’s provisions and implement its policy. Akenhead J commented that, ‘I see nothing in Regulation 47H or in the application of the Cyanamid principles which offends or is not consistent with the Remedies Directive’. The balance of convenience required that the procurement should go ahead and damages were an adequate remedy.

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1 American Cyanamid & Co v Ethicon [1975] AC 396
The HALO Trust v The Secretary of State for International Development

The next case was Halo, again before Akenhead J who gave judgment on 27 January 2011. The Department for International Development tendered a contract under a framework agreement for mine clearance in Cambodia and appointed a company other than Halo. The entry into the contract was ‘urgent’ in the sense that it was supposed to be entered into by a certain date. Halo commenced proceedings alleging that there had been breaches of the procurement rules but without a great deal of merit. DFID went to court to have the automatic suspension in Reg 47H lifted. In deciding to lift the injunction, Akenhead J reiterated that there is no bias in favour of an injunction and that even if there had been a serious issue to be tried the public interest required the injunction to be lifted. Reasons cited at paragraph 61 of the judgment included that there was a public interest in DFID being able to continue de-mining operations; publicly competed contracts were preferable to a continuation of funding by grant; continuation of the suspension would take 5 – 7 months and it would be disproportionate to delay a decision for that time; whoever won the contract there would have been redundancies; and damages would be an adequate remedy.

Metropolitan Resources North West Ltd v Secretary of State for Home Department

Halo was followed by Metropolitan Resources on 1 April 2011 before Newey J. The case concerned whether the United Kingdom Border Agency’s decision to obtain initial accommodation services for asylum seekers from a provider, Happy Homes (who to date had only provided a different kind of accommodation for asylum seekers) instead of from Liverpool City Council (with whom it had a sub-contract but whose contract with UKBA was about to expire) without conducting any kind of competitive procedure was unlawful. The court found that the claimant had raised a serious triable issue, while observing that this was a low threshold. Furthermore, it found that damages would not be an adequate remedy for the claimant. However an award of damages might not be an adequate remedy for the defendant either, because it was unlikely that the claimant had sufficient resources to pay damages. The defendant authority would suffer greater irremediable harm if the suspension were maintained, and it succeeded at trial, than would be suffered by the claimant on the opposite case. If the Home Secretary was unable to enter into the contract, he would have to continue to procure the services from an existing local authority, which itself might amount to an unlawful procurement. On the basis of these findings the court found that the balance of convenience favoured disapplying the suspension.
Meanwhile in Northern Ireland

Finally, two cases before McCloskey J in the Northern Ireland High Court. In First4skills on 30 June the Court refused an application by the Department for Employment and Learning to lift the automatic suspension on the grounds that it had already given such relief in another case concerning the same procurement (which would appear to be unreported). The claimant had been rejected from the competition having failed to upload a spreadsheet which tender documents said was not to be evaluated and other tenderers had been given the opportunity to rectify such matters. On 5 July 2011 the High Court in Northern Ireland delivered its judgment in Rutledge. Rutledge concerned a procurement exercise for the provision of training services under the Department for Employment and Learning delivery of the ‘Steps to Work Programme’. The Department terminated a procurement exercise which Rutledge won and launched another exercise which it lost. Rutledge brought proceedings alleging various breaches of the procurement rules. The Department applied for the automatic suspension to be lifted. By way of contrast to First4skills, McCloskey J found there was no serious issue to be tried. On the balance of convenience the court concluded that there was a compelling need to award the contract without further delay, interruption or uncertainty. Public interest factors outweighed the disadvantages faced by Rutledge (there appear to have been no similar factors in First4skills or the point was not argued). The Court also took into account the fact that there were substantial obstacles to listing the substantive trial until November 2011. Whether any positive conclusions as far as claimants are concerned arise from First4skills is unclear.

Comment

In the light of this series of cases (First4skills excepted) the prospects for claimants appear rather bleak. It would seem that the 2009 Regulations have had little effect on the approach of UK courts and that contracting authorities will not have to try very hard to have the automatic suspension lifted. Judgments to date suggest that courts will find that the balance of convenience, taking into account the public interest, militates strongly against the maintenance of the suspension. In particular, a combination of the need to continue providing the services, the likely delay if the matter goes to trial and the possibility that the authority will have to extend illegally an existing contract all point to a discontinuance of the automatic suspension. While it is true that none of the cases exhibit a particularly strong triable issue, it seems likely that the court will require that claimants provide a cross-undertaking in damages if the injunction is to be continued (although this point is yet to be tested by the courts). Damages will be seen as an adequate remedy. Those who seek more than damages will need to anticipate in detail the arguments a contracting authority is likely to make although it now seems unlikely that an argument that the ‘balance of convenience’ test is not appropriate and does not properly implement the Remedies Directive will succeed. All of this is a long way from the position conceived at the time that the 2009 Regulations came into effect.
Ineffectiveness

In view of the lack of success claimants have been having in the field of maintaining the automatic suspension and thereby getting more effective remedies under the procurement rules, it is worth noting by way of conclusion the outcome of the first case on ineffectiveness. In Alstom Transport v Eurostar International Ltd & Anor¹, on 13 July 2011, the High Court (Mann J) struck out an application by Alstom for a declaration of ineffectiveness of a contract entered into between Eurostar and Siemens for the design, supply and maintenance of high speed trains. The High Court concluded that Alstom had not made out the grounds for ineffectiveness in Regulation 45K of the Utilities Contracts Regulations 2006 (as amended). In particular, the High Court concluded that Eurostar had published a relevant notice in the Official Journal. In addition, there was either no breach of the standstill period or, if there had been, this had not prevented Alstom from bringing proceedings before the contract was awarded. In any event, the High Court concluded that Alstom’s claim for a declaration of ineffectiveness had been brought out of time. It may not be possible to read too much into the Alstom judgement as, in the words of Mann J, ‘on the plain facts of this case, the ineffectiveness remedy [wa]s not available to Alstom’ (although Alstom’s argument that the changes to the contract were so substantial that there should have been a new tender process clearly had some substance and may merit an appeal). Whether others will be more fortunate remains to be seen.

Current Events

We are hosting our next public sector procurement forum on 11 January 2012 from 4.30 – 6 pm. The purpose of these sessions is to allow public sector procurement professionals to meet together and exchange best practice and discuss current issues. If you are interested in attending please email Nick Maltby at nickmaltby@bdb-law.co.uk.

¹ [2011] EWHC 1828 (Ch)
Latest News

Legislation

The Defence and Security Public Contracts Regulations 2011

On 2 August 2011 the Defence and Security Public Contracts Regulations 2011 (SI 2011/1848) were published. These Regulations implement Directive 2009/81 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts in the field of defence and security (OJ 2009 L 216/76). The Regulations apply to the procurement of military equipment (such as arms, munitions and war material) and associated goods, services and works, and the procurement of sensitive security equipment and associated goods, services and works (where the contract contains, involves or requires national security classified information). The Regulations modify the general public procurement rules and procedures to reflect the particular needs of the security and defence sectors. For example, they allow the use of the negotiated procedure with prior publication as a standard procedure. In addition, contracting authorities may require guarantees ensuring security of information and there are specific provisions governing security of supply and sub-contracting, as well as research and development contracts.

The Public Procurement (Miscellaneous Amendments) Regulations 2011

On 17 August the Public Procurement (Miscellaneous Amendments) Regulations 2011 were published alongside a document summarising the responses to the consultation on how to implement the fallout from Uniplex v NHS Business Services Authority (which concerned time limits in procurement cases, and in which the court held that the UK rules on time limits for bringing proceedings did not accord with EU law). Of the 3 policy options considered (10/15 days from date of knowledge; a longer period than 10/15 days from date of knowledge; 10/15 days but a discretion to extend), the Government has selected the second option with a period of 30 days but with a discretion to extend where the court considers there is a good reason for doing so. ‘Date of knowledge’ has not been defined (reg 3). The Regulations also make provision for what constitutes service: the Regulations now provide that proceedings are to be regarded as commenced when the claim form is issued (rather than served) but the claim form must be served within 7 days. The Regulations come into effect on 1 October 2011 and the 3 month period will apply until that date. The OGC has published an Information Note (06/11) regarding the changes.

European Commission Implementing Regulation 842/2011

On 27 August 2011 European Commission Implementing Regulation 842/2011, establishing standard forms for the publication of notices in the field of public procurement, was published in the Official Journal (OJ 2011 L222/1). This Regulation repeals Regulation 1564/2005, which established the standard forms to be used following the entry into force of the 2004 Directives.

Policy

Cabinet Office announces new Government Procurement team and publishes departmental SME Action Plans

On 3 June 2011 the Cabinet Office announced further measures to make government procurement more efficient and to open it up to small businesses. One central team, Government Procurement, will be responsible for contracting for widely used goods and services for the whole of government. This will enable the government to utilise its scale and buying power. Goods and services to be procured centrally initially include energy, fleet, information and communications technology, office solutions, print and print management, professional services and travel.

In addition, the Cabinet Office has published SME Action Plans for each government department. These build on the government’s work to open government procurement to small businesses and set out how each department will seek to achieve the government’s overall aim of awarding 25% of contracts to SMEs. Departmental actions range from breaking large contracts into smaller lots, working with major suppliers to increase SME access to sub-contracting opportunities, increasing the amount of information that is available to SMEs about contract opportunities, holding Product Surgeries for SMEs to pitch innovative ideas and piloting new procurement methods that are more open to SMEs.

2 http://www.cabinetoffice.gov.uk/content/small-and-medium-enterprise-sme-action-plans
EU Cases (date order)

Case C-306/08 - European Commission v Kingdom of Spain, OJ [2011] C 211/3
The ECJ has dismissed an action brought by the European Commission against Spain relating to the application of the public procurement rules to Spanish urban development schemes. The ECJ found that the European Commission had failed to prove that the main object of the contracts between the local authority and the urban developer was public works. Therefore, it had not established that the urban development contracts were public works contracts within the meaning of Directive 93/37 or Directive 2004/18.

UK Cases (date order)

All About Rights Law Practice, R (on the application of) v Legal Services Commission [2011] EWHC 964 (Admin)
On 14 April 2011 the High Court dismissed an application for judicial review of a decision by the Legal Services Commission (LSC) to reject a tender and to refuse to allow the tenderer to provide missing information. The claimant had erroneously submitted a blank version of a mandatory form when electronically submitting its tender documents. The High Court found that the error was solely that of the claimant. There was no requirement of proportionality or equality which would justify the form being completed and accepted after the prescribed deadline. LSC was not obliged to point out the error or to accept submission of the missing information after the deadline. For it to have done so would have been unfair to other tenderers and would have breached the principles of equal treatment and transparency.

R (on the application of Hoole & Co) v Legal Services Commission [2011] EWHC 886
On 15 April 2011 the High Court dismissed an application for judicial review of the e-tendering procedure used by the Legal Services Commission. One section of the tender documents submitted by the claimant was incomplete, which meant that the claimant was not awarded a contract. The court found that this was not the result of any fault by the LSC. The LSC was not under any obligation to allow the claimant to provide the missing information or to attempt to answer the relevant questions itself. The LSC was under an overriding duty to treat all tenderers equally and to apply the rules of the procurement procedure consistently and fairly between tenderers.
Mears Limited v Leeds City Council [2011] EWHC 1031 (TCC)

On 19 April 2011 the High Court handed down a judgment finding that Leeds City Council had breached the public procurement rules in a tender for improvement and refurbishment works for social housing. The High Court found that the Council had failed to disclose the weightings applied to certain award criteria or sub-criteria and that this could have affected the preparation of the claimant’s tender. The High Court concluded that, absent this breach, there was a real or significant, rather than a fanciful, chance that the claimant would have been successful in being selected to participate in the next stage of the tender procedure. It concluded that the appropriate remedy in this case was damages and that the Council’s award decision should not be set aside. The prejudice in terms of housing arrangements for a significant number of tenants and the delay in the provision of those arrangements weighed heavily against requiring the procurement process to start again.

R (on the application of Harrow Solicitors and Advocates) v The Legal Services Commission [2011] EWHC 1087

On 28 April 2011 the High Court has dismissed an application by an unsuccessful tenderer for review of a decision by a contracting authority not to allow the tenderer to correct a genuine mistake in the tender documents submitted. The High Court concluded that the contracting authority had not acted irrationally or disproportionately in refusing to allow correction following submission of the tender, even though the error was objectively verifiable. The mistake did not give rise to any ambiguity in the terms of the tender, which the contracting authority might have been under a duty to seek to clarify.

J Varney & Sons Ltd v Hertfordshire County Council, [2011] EWCA Civ 708

On 21 June 2011 the Court of Appeal dismissed an appeal by J Varney & Sons against a ruling of the High Court that rejected its action for damages against Hertfordshire County Council for alleged breaches of the Public Contracts Regulations 2006. The claimant argued that the Council had failed to disclose criteria, sub-criteria and weightings which were applied in the assessment of tenders. The Court of Appeal concluded that the High Court had correctly identified the relevant matters as sub-criteria of published criteria. In accordance with the ECJ case ATI –EAC, hitherto regarded as an exception to the principle that sub-criteria weightings should be disclosed, the Court held that the Council was not required to disclose the weightings that it applied to these sub-criteria in evaluating the tenders.