



Recent developments in procurement law

The primary purposes of this paper are threefold:

- (i) To look at the impact of the Remedies Directive and automatic suspension;
- (ii) To consider what happens if an abnormally low bid is submitted as part of the tender process; and
- (iii) To look at recent case-law in relation to making a challenge to the tender process.

Finally, we look at procurement in the future, with especial regard to the European Parliament resolution of 25 October 2011 on the modernisation of public procurement.

So what is the impact of the Remedies Directive so far?

The changes implemented by the Remedies Directive and the Public Contracts (Amendment) Regulations 2009 came into force on 20 December 2009. Prior to their introduction, there was a lot of talk about their likely impact. So, what actually happened? The new regime increased the level of detail contracting authorities are required to give to tenderers. Award letters had to include: (i) the award criteria; (ii) the bidder's score; (iii) (in the case of an unsuccessful tenderer) name and score of the successful tenderer; (iv) a statement of the standstill period and a summary of the relevant reasons for the decision. The other two main changes introduced were:

(i) Automatic suspension

In recognition of the need to allow the courts sufficient time to act within the standstill period, the new regulations required that once an application for review has been made by an aggrieved tenderer, the contract cannot be entered into until the court has made a decision regarding the application. Any such proceedings brought by an aggrieved tenderer must be commenced promptly, and as we will see, from 1 October 2011 must be made within 30 days¹ from the date when the party in question knew or ought to have known of the grounds for bring the claim.

(ii) Ineffectiveness

The new Remedies Directive stated that public contracts will be "ineffective" where there is a breach of the public procurement rules. It was the most significant remedy introduced in December 2009, the reason being that it can be claimed after the contract as been entered into between the contracting authority and the successful tenderer. By way of example, a contract will be rendered "ineffective" in the following circumstances:

- (i) If the contracting authority awards a contract without prior publication of a notice in the Official Journal of the European Union.
- (ii) If a contract is entered into under a framework agreement or dynamic purchasing system in breach of the public procurement rules, usually where the value was in excess of the applicable threshold.
- (iii) Where a contract is concluded without application of a proper standstill period, or where rules governing the suspension of a contract pending court proceedings have been breached, and has affected the chances of the claimant winning the contract.

¹ This period can be extended by the court in its discretion by up to three months.



Automatic suspension: 18 months on

There have been a number of cases since 1 December 2009 where the Contracting Authority has sought to lift the automatic suspension. One area of interest was the test that the court would apply. Would it apply the usual test that has been used in relation to injunctions since 1975 – that laid down by Lord Diplock in the case of *American Cyanamid Co v Ethicon Ltd*² or perhaps it would apply a more lenient test that was weighted in favour of the aggrieved tenderer?

In all but one of these cases, the Contracting Authority has been successful and the injunction has been lifted.

To take one example, in *Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust*³, the NHS Trust applied to have the automatic suspension under Regulation 47G lifted. In about 2009, University Hospitals Coventry and Warwickshire NHS Trust, decided to transfer their responsibility for managing and operating the Healthcare Purchasing Consortium (“HPC”) by establishing a framework agreement with a single operator. The HPC is a collaborative procurement hub run by the Defendant on behalf of itself and some 40 NHS Trusts in West Midlands and elsewhere and provides a wide variety of medical services, equipment, medications and other medical related items.

In February 2010, it was resolved that a competitive public procurement process should be undertaken and the framework agreement should be established by no later than 30 September 2010. This date was significant as the agreements with all the current HPC subscribers expired on 31 March 2010. The Contract Notice was published on 11 March 2010. On 19 April 2010, five tenderers pre-qualified, including Exel Europe Ltd and HCA International Ltd.

From an early stage in the procurement process, Exel Europe believed that the information provided in the Invitation to Tender (“ITT”) was insufficient for the restricted procedure which had been identified in the Contract Notice. As a result, Exel Europe eventually withdrew from the tender process on 28 May 2010. The only tenderer to submit a bid was HCA International. In due course the Defendant chose HCA International as its preferred bidder and notified Exel Europe on 15 July 2010.

Exel complained about the Defendant’s lack of contact, lack of communication and lack of a response to its repeated requests regarding various issues. It ultimately issued its claim in the Technology and Construction Court on 28 September 2010, alleging six breaches of duty. On 29 October 2010, the Defendant applied to have the automatic suspension under Regulation 47G lifted.

Mr Justice Akenhead confirmed that the principles with regard to interim injunctions as set out in the well-known case of *American Cyanamid Co. v Ethicon* would apply to these situations. He said that:

“... the Court should go about the Cyanamid exercise in the way in which courts in this country have done for many years.”

² [1975] AC 396

³ [2010] EWHC 3332 (TCC)



In other words, the Regulations do not favour maintaining the prohibition on the contracting authority against entering into the contract in question. This means that an aggrieved tender must persuade the court that:

- (i) There is a serious issue or question to be tried;
- (ii) Damages would not be an adequate remedy;
- (iii) The balance of convenience does not favour the contracting authority, i.e. does not mean that the authority can proceed with the award; and
- (iv) There are no other special factors which might influence the court.

In this, the Judge was following the decision of David Donaldson QCs sitting as a Deputy High Court Judge in the case of *Indigo Services v Colchester Institute Corporation*⁴ who said that:

"It was suggested on behalf of Indigo that the Regulations provided a "steer" - said to be a bias not amounting to a presumption - in favour of an injunction. Whether or not that is the case as regards final orders at trial (which I doubt), I can detect nothing of the sort as regards the decision at the interim stage. In any event, the conclusion which I reach at the end of this judgement would be unaffected even if I factored in the suggested "steer"."

Here, Mr Justice Akenhead found that there was a serious issue to be tried only in respect of one of the six allegations advanced by Exel. Exel alleged that the Defendant's discussions/negotiations with, another party, HCA International five months immediately prior to the open public procurement process gave them an unfair advantage, distorted competition or breached the principles of equal treatment and transparency. Mr Justice Akenhead found that this was the only serious issue to be tried and that the remaining five issues were at best weak.

With respect to the balance of convenience test, the Judge found that this was an appropriate case which required that public interest be taken into account. He held that an important area of public interest is the efficient and economic running of the National Health Service and the procurement of medical goods, drugs, equipment and services. Here, the Defendant had clearly established an urgency for the procurement of this contract, as the existing agreements for the provision of the services had expired in March 2010. If the suspension was not lifted, a judgment would likely not be obtained before May or June 2011 at the earliest, thereby further jeopardising the services currently being provided.

Finally, the Judge was wholly satisfied that damages would be an adequate remedy.

In *Halo Trust v Secretary of State for International Development*⁵, a case about mine clearance and related work in Cambodia, the Judge took a similar approach to delay. It was almost inevitable that, if the suspension was continued until trial of the substantive matters in this case, there would be a minimum delay of 5 to 7 months before trial and judgement. Unsurprisingly, the Judge concluded that:

4 [2010] EWHC 3237 (QB)

5 [2011] EWHC 87 (TCC)



“What will or may well be created by continuing uncertainty is that mine and land clearance may well be delayed or disrupted and people who might not have been injured and killed will be. In this context, the certainty created by the lifting of the statutory suspension significantly outweighs the uncertainty involved in continuing it. It needs to be borne in mind that all parties agreed in the Framework Agreement that time should be of the essence in relation to the Calldown Contracts.”

The Judge was also satisfied that damages would be an adequate remedy even if ultimately Halo succeeded in the proceedings. There might be redundancies and redundancy costs. These are eminently quantifiable and provable together with other management and overhead losses. Here, because Halo was a charity, there would not be a loss of profits claim. There was too no suggestion that Halo’s reputation, which appears to be good, would suffer as a result.

In *Metropolitan Resources North West Ltd v Secretary of State for Home Department*⁶, a case about the provision of accommodation for asylum seekers, Mr. Justice Newey decided that there was a serious issue to be tried. The claimant suggested that the UK Border Agency’s decision to obtain what was known as Initial Accommodation (“IA”) services for asylum seekers from a new provider who had not provided IA before was either a material change to the existing contract⁷ and/or was unlawful because there had not been any form of competitive tender process.

Further, when it came to assessing whether damages would be an adequate remedy, the Judge agreed that they would not be an adequate remedy. For example how would you assess the chances of the claimant actually winning the bid? In addition, the loss of the contract could cause severe damage to the claimant’s reputation and threaten its prospects of securing new contracts in the future. In doing so, the Judge referred to two previous cases, where the Judges had decided the point in different ways:

In the *Exel* case, Mr Justice Akenhead, as we have seen, considered that damages would be an adequate remedy. They could be satisfactorily assessed on a loss of a chance basis:

“It is now fairly well established that a claimant who successfully challenges a procurement exercise will be entitled to damages, usually calculable on a lost opportunity or chance basis, not dissimilar to that referred to in Allied Maples v Simmons and Simmons [1995] 1 WLR 1602, albeit that case is related to solicitor’s negligence. It is immaterial in considering whether damages would be an adequate remedy that the damages may not be in a substantial amount. The damages will be whatever they will be.”

However in the case of *Alstom Transport v Eurostar International Ltd & Anor*⁸ Vos J had concluded that damages would not be an adequate remedy. Vos J said in paragraph 129:

“I also accept that the assessment of [the claimant’s] loss would be a complex process requiring the valuation of a lost chance which is always a somewhat difficult process. The evaluation of its reputational and market position losses would be very difficult indeed.”

6 [2011] EWHC 1186 (Ch)
7 See Presstext Nachrichtenagentur GmbH [2008] ECR I-4401
8 [2010] EWHC 2747 (Ch)

Judge Newey considered that the difficulties which could arise in assessing the claimant’s loss mean that damages are not a wholly adequate remedy. He also considered the position



of the Border Agency. Damages would not provide them with an adequate remedy either. For example, leaving aside the quantification of any loss, the evidence also suggested that, were the claimant ultimately to have lost at trial, it would not be in a position to meet an award in the UK Border Agency's favour. There was little value in any cross-undertaking. Further, there was the position of the Border Agency having to continue with a contract where there were, on the evidence before the court, a number of problems.

This led the Judge to conclude that the balance of irremediable prejudice was on the UK Border Agency's side. The possible prejudice to the UK Border Agency (and, potentially, asylum-seekers) far outweighed the difficulties which could arise in assessing any damages to which the claimant may prove to be entitled.

In Northern Ireland, McCloskey J has considered two cases. In the first, he took a similar line in lifting the suspension⁹. The public interest outweighed the disadvantages that may be suffered by the aggrieved tenderer. To not do so would be of clear detriment to vulnerable and socially disadvantaged members of society. The Judge said:

"I am of the opinion that, considered collectively and dispassionately, these factors pale when juxtaposed with the public interest in play, identified above. The status quo in the Foyle area is plainly intolerable and should not be permitted to continue, absent some compelling justification. In my view, no such justification exists. The potent desirability of awarding the relevant contract without further delay, interruption or uncertainty is, by some measure, the dominant factor in the balance of convenience equation, comfortably eclipsing the sundry countervailing considerations advanced by the Plaintiff."

The courts seem to be heavily influenced by the need to take into account the public interest in maintaining existing services or providing new ones. There has only been one real exception to this trend, the case of *First4Skills Ltd v the Department for Employment and Learning*¹⁰, which also came before McCloskey J. This case was a little unusual in that the court had already refused the Department's application to lift the suspension in response to a claim brought by a different tenderer. Thus the court wasted little time in rejecting the Department's application. However, the Judge did go on to review the merits. He specifically noted that the correct approach in principle was that expressed by Mr Justice Akenhead in the *Exel* case. He also noted, contrary to the other cases, that here there was a serious issue to be tried. In the other cases the judges had said that the exercising of the balance of convenience was not influenced by the strength of the claimant's case.

Here the Judge had to balance the projected savings to the public purse; the improvements in the proposed new contractual arrangements; the advantages to both trainees and employers; the requirements of legal certainty; the limitation on any potential contract extension (not beyond March 2012); and the desirability of uniformity throughout the United Kingdom in the provision of training to apprentices against the plaintiff's cross-undertaking in damages and the reasonable prediction that the proceedings would be completed to the stage of judgment in advance of March 2012, when the contract extension will expire. One significant difference between the two Northern Irish cases appears to be the lack of public interest factors in the *First4Skills* case.

So to date, the evidence from the courts is that the balance is in favour of the contracting authority being able to persuade the courts to lift any suspension, leaving the aggrieved tenderer to seek the remedy of damages.

⁹ *Rutledge Recruitment & Training Ltd v Department For Employment & Learning & Anor* [2011] NIQB 61
¹⁰ [2011] NIQB 59



Ineffectiveness and time limits

Towards the end of the summer, the long-running dispute between Alstom and Eurostar over the award of a contract for a new generation of trains to be used in the Channel Tunnel came to an end. The part of the case discussed here¹¹ is interesting for two reasons. Firstly, Alstom objected to the decision and commenced proceedings in which it sought a declaration of ineffectiveness in relation to a preliminary contract. Second, it was said that the claim was brought out of time. This was the first time that a declaration of ineffectiveness had been sought from the courts.

Here, Alstom argued that the contract eventually entered into with Siemens was materially different to the contract tendered for, which meant that the contract had been awarded without prior publication of a notice in the Official Journal. Further, this material difference meant that Eurostar had not observed a proper standstill period; both reasons why a proper procurement process had not been followed. Mann J looked at the qualification notice issued by Eurostar to commence the tender process and held that it was wide enough to cover the contract signed with Siemens, even in its varied form. The Judge said that the test of whether a proper notice has been provided is a “mechanistic” one which was satisfied here.

There was a further problem for Alstom in that, on the facts, there was no reason why Alstom could not have brought its claim for ineffectiveness before the end of the standstill period and so before the contract had actually been entered into. Alstom needed to establish that there was a breach of the standstill requirement and that that breach prevented Alstom from starting proceedings before the conclusion of the contract, or prevented it from bringing those proceedings to a conclusion. Here, there was a standstill period announced by Eurostar. There was a moratorium. Within that period Alstom managed to formulate and bring proceedings seeking to stop the contract. While those proceedings at that time did not have all the material currently available, it was apparent that the essence of the current argument about the varied contract was recognisable. Accordingly, either there had either been no breach of the standstill obligation, or if there had been, it had not deprived Alstom of the chance of starting proceedings. Mann J said:

“To some extent the ineffectiveness provisions are obviously intended to operate only when anticipatory proceedings could not be brought. One can understand that as a rationale - it was obviously thought that it would be better to try to stop a contract than to try to bring an existing contract to an end. Particularly after it has been on foot for some considerable time. The possibility of the former should exclude the latter; the latter should only be available when the former has not been possible because of act of the utility in not holding its hand on contracting to the requisite extent. In the present case Alstom’s own acts have demonstrated that it was able to launch proceedings before the contract was entered into.”

New amendments to the Public Procurement Regulations

On 1 October 2011, the Public Contracts Regulations 2006 were further amended by the Public Procurement (Miscellaneous Amendments) Regulations 2011. One reason for this was as a result of the Uniplex decision¹². In Uniplex, the European Court had suggested that the current UK requirements to bring procurement challenges promptly were imprecise and uncertain. The result of these changes is to increase the pressure on a contractor who

11 [2011] EWHC 1828 (Ch)
12 Uniplex (UK) Ltd v NHS Business Services Authority [2010] EUECJ C-406/08



considers that he might want to challenge the tender process, to do so promptly, albeit as the Alstom case demonstrates, that is already something contractors must be alive to, and by promptly we mean from the date when the contractor suspects that there has been a breach, and that is not necessarily at the end of the tender process.

The key change introduced is that the time limit for bringing a procurement claim will be reduced to 30 days from the date of knowledge that is the date on which the economic operator first knew, or ought to have known, that grounds for starting proceedings had arisen. The court will continue to have discretion to extend this period where there is good reason for doing so, subject to an absolute maximum period of three months. If the date of knowledge was before 1 October 2011, then the old time limits, namely three months from the date of knowledge, will continue to apply.

This is essentially the process which was confirmed in the case of *Sita UK Limited v Greater Manchester Waste Disposal Authority*¹³ where the court confirmed that the time period begins to run when the potential claiming party has knowledge of the basic facts which apparently clearly indicate (although they do not necessarily prove) a breach of the Regulations.

So for example, a prospective tenderer cannot argue that it should be entitled to see if it was successful in the tender process before bringing proceedings. This argument was specifically rejected in the case of *Hereward & Forster v LSC*¹⁴, a case brought in September 2010 involving tenders for contracts in immigration law. Here a challenge had been made to award criteria which included a requirement that applicant organisations employ an immigration supervisor regularly working in the office. If attendance was 100%, full marks would be achieved. This requirement had been added between the time of the original consultation and the date the tender documents were issued. The Judge agreed that the criterion indirectly discriminated on the grounds of sex in breach of section 1 of the Sex Discrimination Act 1975, as a significant proportion of part time workers who would be unable to fulfil the requirement for 100% attendance would be women. However the claim had been brought out of time, as the time at which the grounds for the challenge arose was 30 November 2009 - the date when the LSC invited tenders for immigration work and the date when the LSC set out details of the supervisor criterion.

This is a significant point for contracting authorities and tenderers alike. What if there are changes between the time of consultation and the time the tender documents are finalised? A contracting authority must think through carefully the reasons for the changes. It might also feel the need to point them out to the tenderers. For the tenderers themselves, the case is a warning not to delay bringing a claim. If you do, the right to bring that claim may well be lost. It is of course a delicate commercial balance that needs to be maintained – but a tenderer should at least be prepared to acknowledge that the potential right to make a claim later on has been lost.

This was confirmed in the case of *Mermec UK v Network Rail*¹⁵, a case falling under the Utilities Contracts Regulations 2006, as amended. Here, Network Rail Infrastructure Ltd sought tenders for the provision of what is called Plain Line Pattern Recognition (“PLPR”), which is part of a maintenance regime involving high-speed examination of rail track and fittings. Mermec submitted a tender and on 23 September 2010, were informed via email that they had been unsuccessful. The Standstill Letter sent to Mermec included their scores for each of the criteria and the scores of the successful bidders. Mermec thought

13 [2010] EWHC 680 (Ch)

14 [2010] EWHC 3370 (Admin)

15 [2011] EWHC 1847



that there were alleged irregularities in the scoring of their bid when compared with other bidders and that the Standstill Letter issued to them failed to comply with the terms of the Utilities Contract Regulations.

Mermec wrote to Network Rail on 30 September expressing their dissatisfaction with the outcome, and requested a meeting to discuss the scoring system used. There was a meeting on 14 October 2010. The Judgement sets out a copy of some notes made by a Mr Tracy at this meeting. The minutes are interesting for a number of reasons, not least in revealing one of the most difficult commercial dilemmas for tenders in these circumstances:

"...NR insisted that our Price was very high as compared to competition. Our final evaluation through scoring analysis and NR intelligence indicates that for the whole life costs of the pilot project we were about £250,000 more expensive than Omnicom and for the national rollout double Omnicom-£4m higher.

We reviewed the scoring numbers with NR and made many comments as laid out in our notes document... We were ably supported by Mr Shaun Whitlock... both at the meeting and during preparation. It was fairly obvious that NR made significant efforts to "arrange" the technical scoring so that we could not win the bid. We stress the fact that the [Mermec] bid was only for bogey mount and not body mount as Omnicom proposed. We were criticised for not supplying a detailed quote for body mounting. They considered it an omission on our part. We stressed that they [had] not replied to our specific bogey/body mounting questions prior to our submission of the BAFO. They also made several comments regarding the inferior quality of our bid as compared to Omnicom.

It was clear that NR had no intention of changing their decision and felt very comfortable in their position. After 90 minutes of meeting we considered no further progress could be made. We did however request the detailed scoring matrix as per the scoring scheme communicated with the ITT. They will review with their management to determine if they will supply-Systech to follow up.

Our legal position will be supplied by Systech-my view is that any further legal action will jeopardise our long-term position with regard to being able to supply NR with any products..."

On 22 December, just within the (at the time) three month period, a claim form was issued on behalf of Mermec but it was not served on Network Rail until 30 December.

Mr Justice Akenhead held that the basic facts supporting the complaint were and must have been clear in effect on the day on which the email of 23 September was received, that is the same day. The right to sue or make a claim arose on that day. At the meeting on 14 October there was nothing to suggest that this provided any information the bare bones of which could not be established from the letter of 23 September 2010.

The judgment ends with a brisk dismissal of a suggestion that the bidding process was rigged. The Judge says:

"In football supporter terms, it is no more than a cry of "we was robbed""



If a formal claim is to be made, the new regulations make it clear that proceedings will commence, and the time clock will stop ticking, on the issue of the claim form rather than the date of service on the defendant. The claim form must be served on the contracting authority within seven days after the date of issue. The amendments also make it clear that the automatic suspension will be triggered when that authority becomes aware that a claim form has been issued.

Finally, the Regulations have also been amended to reflect the new criminal offences introduced by the Bribery Act 2010, which came into effect on 1 July 2011. Therefore a contracting authority must still automatically exclude any bidder which has a conviction for bribery. Where there is some room for manoeuvre is in relation to convictions for failing to have adequate procedures in place to prevent bribery or corruption. In March of this year, Kenneth Clarke, the Lord Chancellor and Secretary of State for Justice, said this:

“The Government have also decided that a conviction of a commercial organisation under section 7 of the Act in respect of a failure to prevent bribery will attract discretionary rather than mandatory exclusion from public procurement under the UK’s implementation of the EU Procurement Directive (Directive 2004/18). The relevant regulations will be amended to reflect this.”¹⁶

However, there appears to be very little evidence that anything further has happened since.

Abnormally low offers

In the current economic climate, with budgets significantly reduced, councils and other contracting authorities are coming under more and more pressure to reduce costs. Procurement and competitive tendering is an obvious route to making economic savings. However in times of recession, tenderers can sometimes be moved to put in a bid which might be considered to be low, even abnormally low. What should a contracting authority do in these circumstances? There are, of course, two considerations:

- (i) what if the bid is so low that ultimately it could lead to higher costs and/or performance issues over the duration of the contract; and
- (ii) what is the position of the other parties to the tender process? Can they challenge the tender process if the contract is awarded to a tenderer who is thought to have submitted an abnormally low price?

To recap, contracting authorities can award a contract on the basis of either:

- (i) Lowest price (which not permitted for competitive dialogue and is not suitable for negotiated procedure).
- (ii) The most economically advantageous offer (taking into account criteria linked to the subject matter of the contract, such as price, quality, technical merit, cost-effectiveness, delivery date and aesthetic and functional characteristics).

Potential for disputes with contracting authorities relating to abnormally low offers usually arises where a contract has been awarded based on the most economically advantageous offer.

¹⁶ <http://services.parliament.uk/hansard/Commons/bydate/20110330/writtenministerialstatements/part009.html>



The Regulations do not define what constitutes an “abnormally low” offer, nor is there much helpful guidance to date on the point from the ECJ or the courts. Possible things to look out for included:

- (i) Significant variations from the other bids;
- (ii) A bid which comes in, in whole or in part, below what the contracting authority was expecting based on its own market knowledge and costings;
- (iii) The assumption of greater risk than had been anticipated.

The risks to the contracting authority include:

- (i) Non-performance;
- (ii) Missing out on a better overall tender package;
- (iii) Greater overall costs;
- (iv) Post tender variations;
- (v) Additional management costs;
- (vi) The costs of retendering;
- (vii) Legal costs of a procurement challenge

Under Regulation 30(6), if an offer for a public contract is abnormally low, the contracting authority can reject it, but only after it has:

- (i) requested in writing from the bidder an explanation of the offer or part of the offer which it considers to be abnormally low (Reg 30(6)(a));
- (ii) taken account of the evidence provided in response to the request (Reg 30(6)(b));
- (iii) subsequently verified the offer or parts of the offer being abnormally low with the bidder (Reg 30(6)(c)).

Regulation 30(7) sets out the types of information that may be requested under Reg 30(6) (a). This could include:

- (i) the economics of the method of construction, manufacturing process or services provided (Reg 30(7)(a));
- (ii) technical solutions suggested by the bidder, or exceptionally favourable conditions available to the bidder relating to execution of the works, supply of goods or provision of services (Reg 30(7)(b));
- (iii) originality of the works, goods or services to be provided by the bidder (Reg 30(7)(c));
- (iv) compliance with relevant local employment/working conditions (Reg 30(7)(d));
- (v) the possibility of the bidder obtaining State aid (Reg 30(7)(e)).

There has been some debate over whether the difference in wording between the Regulations and Article 55 of Directive 2004/18 imposes different obligations on a contracting authority¹⁷. The wording of Article 55 is as follows:

“If, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.”

¹⁷ See *Morrison Facilities Services Limited v Norwich City Council* [2010] EWHC 487 (Ch) and *Varney v Hertfordshire County Council* [2010] EWHC 1404 (QB).



Article 55 provides that contracting authority must do certain things (request details from the tenderer) before rejecting an offer that appears to be abnormally low, whereas Regulation 30(6) states that the contracting authority may reject an offer that is abnormally low but only if it has done certain things. The issue has cropped up in two recent cases in which judges seem to have come out with diverging opinions as to whether a contracting authority is under a general duty to investigate tenders that it suspects are abnormally low. In *Morrison Facilities Services Limited v Norwich City Council*¹⁸ Arnold J held that it was seriously arguable that when a contracting authority suspects there has been an abnormally low tender, it comes under a duty to investigate that tender, and that this is a duty owed to the competing tenderers. It was also well arguable on the facts both that the council did have such a suspicion here, and that its investigations had been insufficient.

Morrison provided an analysis of the winning bidder's tender and showed it to be so low in value that it would seriously risk non-performance of the contract and had argued that the tender submitted by the winning bidder, which was £5.5 million less than the second lowest bid, would be insufficient to cover unavoidable costs as well as the necessary capital programme in executing the contract over the five-year period.

In coming to that conclusion, the judge relied upon the use of the word "shall" in article 55 of the Directive, and more particularly upon passages in the decision of the Court of First Instance in *Renco SpA v Council of the European Union*¹⁹.

However, this was not a final decision on the point – merely a decision that it was seriously arguable for interim relief purposes. The case subsequently settled without going to trial.

The case is also interesting for two further reasons. First, it is an example of the court actually granting an injunction in favour of the aggrieved tenderer and second, the Judge found that an award of damages would be an inadequate remedy for Morrison. The main reason for this was that had there been improved clarity in relation to the award criteria, the final bids would have been framed differently. This meant that it would be difficult to establish any resultant "loss of chance."

A second case followed shortly after *Morrison* where the argument was raised at trial in *Varney v Hertfordshire County Council*²⁰. Varney was one of the unsuccessful tenderers for the contracts for the operation of the 18 Household Waste Recycling Centres in Hertfordshire for the five year period from 2008 to 2013. Varney was the incumbent operator at three sites, for the period 2003 to 2008. It tendered for the contracts to operate all but one of the eighteen sites, but was awarded none.

Flaux J held that there was no substantive difference between the provisions of the Directive and the Regulations – both provide that a contracting authority cannot reject an offer that is abnormally low unless it has investigated certain aspects of that offer. In other words, the relevant provisions operated purely so as to provide procedural protection for a tenderer whose bid might be rejected as being abnormally low, and created no duty in favour of other tenderers.

Furthermore, in this case the unsuccessful tenderer, Varney, had argued that the council was under a general duty to investigate tenders that are abnormally low generally. Flaux J rejected this argument and stated that there was nothing in the provisions of either the Directive or the Regulations that supported such a contention – the council was under no

18 [2010] EWHC 487 (Ch)

19 Case T-4/01, [2003] ECR II-171

20 [2010] EWHC 1404 (QB)



duty to investigate suspect tenders where it had no intention of rejecting those tenders on that basis. He went on to clarify that, in any event, such a duty could only arise where the council either knows or suspects that the tender in question is abnormally low. The Regulations only require a contracting authority to investigate a tender which appears to it to be abnormally low and which it proposes to reject for that reason.

In reaching that conclusion, the Judge referred to the in *Renco SpA v Council of the European Union*²¹, where the Court stated:

“75 The Court finds that the applicant cannot criticise the Council for checking many of the prices quoted in its tender. It is apparent from the wording of Article 30(4) of Directive 93/37 [the predecessor of the current Directive] that the Council is under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders . . . The Court notes, for example, that the Council, in its defence, stated that it had questioned the applicant about very many of the abnormally low prices, namely the price of 319 items in the summary out of a total of 1 020. It also asked the applicant for clarification regarding a series of very blatant anomalies and particularly about the price of the doors, which are the same for single doors, double doors or glass doors. The applicant has not provided adequate explanations for those anomalies either in its reply or at the hearing.

76 In that regard, the Court observes that, although Article 30(4) of Directive 93/37 does not require the Council to check each price quoted in each tender, it must examine the reliability and seriousness of the tenders which it considers to be generally suspect, which necessarily means that it must ask, if appropriate, for details of the individual prices which seem suspect to it, a fortiori when there are many of them. Furthermore, the fact that the applicant's tender was considered to conform to the contract documents did not relieve the Council of its obligation, under the same article, to check the prices of a tender if doubts arose as to their reliability during the examination of the tenders and after the initial assessment of their conformity.”

Flaux J agreed that this was not a case where the European Court was saying that the relevant authority owed a duty to investigate “abnormally low” tenders generally, as opposed to where the authority was considering rejecting the tender. Here, the authority was proposing to reject the tenders in question. The Judge therefore concluded that:

“It follows that, on the correct interpretation of both the Directive and the Regulation (save in the case of Fourways where the Council did consider the tender abnormally low and was contemplating rejecting the tender at least in part if not totally), the Council was not under a duty generally to investigate so-called “suspect” tenders in circumstances where the Council had no intention of rejecting those tenders. . .

Furthermore, I consider that there is another fundamental obstacle to Varney's case that the Council was in breach of duty in failing to investigate the other tenders. Although Regulation 30(6) talks in the abstract of an offer which is abnormally low, the Directive refers to tenders which “appear to be abnormally low” which only makes sense as a reference to what “appears” to the relevant authority. In the circumstances,

21 [2003] ECR II-171 – a decision of the European Court of First Instance (now the General Court)



it seems to me that the duty for which Varney contends could only arise where the Council either knows or suspects that the tender in question is abnormally low. Leaving Fourways out of account, it is quite clear on the evidence of Mr Shaw and Mr King (which I accept) that neither of them actually knew or suspected that the other tenders were abnormally low."

However, it was open to the aggrieved tenderer to complain that the contracting authority had made a manifest error in deciding whether the tender was abnormally low and therefore deciding not to investigate. The Judge said such a duty can only arise in the case where the relevant authority actually knows or suspects that a tender is abnormally low. To argue that a contracting authority ought to have known or suspected, but did not know or suspect, is not sufficient to impose the duty. Otherwise, a contracting authority would have to investigate all tenders in detail to satisfy itself of the economic viability of each tender. This was, the judge said, an unrealistic and onerous burden.

Given that the decision in the *Morrison* case was only issued followed an interim application for interim relief purposes, it would seem that the decision of Flaux J is the one to be followed. Certainly, the prudent contracting authority, where it has concerns that any bid is abnormally low, should fully investigate whether that bid is sustainable. But that is a matter of commercial common sense as much as it is one of good procurement law practice. An abnormally low tender which may be rejected is one that is priced at such a level that the authority considers itself, in all the circumstances, unable to rely upon the contract being properly performed. That conclusion might follow even if the contract was not actually loss-making, if it did not generate a normal level of profit, but it would not necessarily follow even if losses would be sustained.

So what can the Contracting Authority do? Well it is interesting to see what the Council in *Varney* did. There was another bid which was a suspected abnormally low bid. They established that the tenders other than that of the suspect one were not considered abnormally low, because they were consistent with one another and did not deviate from the mean average of all tenders received for the sites for which they had tendered. This is the "anomaly threshold" test.

An authority has a discretion as to what test it uses for identifying what may be an abnormally low tender and that it is permissible to use a comparison with the average of the tenders submitted for the contract as a threshold for determining whether a tender is abnormally low²².

It was argued that the Council was under a duty to investigate the tender price against the likely cost of performing the relevant services. The Judge said that there was nothing in the existing case law to suggest that an authority is under a duty to apply a number of criteria or "thresholds" or that other unsuccessful tenderers can come along later and say that the authority should have applied another threshold. As it happened, the Council had taken this point up. To take site attendance costs, they were expecting to pay more by way of site attendance charges under the new contracts. The abnormally low contract stood out because its proposed site attendance charges were all less than was being charged under the existing contract.

Finally, what happened in the *Varney* case was that three of the sites were awarded to the tenderer who had the abnormally low overall tender. Whilst it was felt too much of a risk to

²² See *Impresa Lombardini v ANAS* [2001] ECR I-9233



offer more than the three sites the Council felt that it was a risk worth taking to offer them the sites they already operated. The court agreed. The evidence showed that there was no evidence that the tenders for the three sites had been unsustainable and that overall the contracts were making a small profit.

Criteria

The *Varney* case reached the Court of Appeal²³ in June of this year. There were three grounds of appeal, namely that:

- (i) The Council had failed to disclose the criteria, sub-criteria and weightings which would be applied when determining which of the tenders was the most economically advantageous;
- (ii) The Council applied criteria, sub-criteria and weightings which were inconsistent with the information which it had disclosed; and
- (iii) The Judge wrongly held that Varney had failed to bring its claim within the time limit imposed by regulation 47(7).

Stanley Burton LJ noted that Varney's "basic grievance" was that it had been led to believe by the ITT that "staffing levels proposed by tenderers would play a very significant part in the evaluation of tenders". In consequence, Varney's tender "proposed high levels of good quality staff for each site (with a consequent increase in price) yet, in the event, staffing levels were given very little significance by the Council when it came to marking tenders." As a result, Varney had little chance of winning any tender, since it overpriced its bid.

Varney claimed that Regulation 30 required a contracting authority to disclose to tenderers in advance of tenders being submitted the criteria which will be used for evaluating tenders and the weightings to be accorded to those criteria. The obligation of transparency in Regulation 4(3) requires a contracting authority to disclose to tenderers in advance of tenders being submitted the sub-criteria which would be used for evaluating tenders and the weightings to be accorded to those sub-criteria. Disclosure of criteria and sub-criteria does not consist merely of stating relevant matters in the ITT. Criteria and sub-criteria must actually be identified as such. Finally, a contracting authority must actually apply the criteria, sub-criteria and weightings which it has disclosed.

The Council said that the Return Schedules (i.e. which showed the staffing levels) did not constitute award criteria but rather sub-criteria. The award criteria "were 'customer satisfaction' and 'price' and the Return Schedules were not separate principles or standards or tests but no more than sub-sets of those principles or standards or tests. Further, it was entitled not to identify sub-criteria and disclose their weightings provided that the conditions set out the judgment of the European Court of Justice in *ATI EAC v ACTV Venezia*²⁴ were satisfied, which they were. In particular, the disclosure of sub-criteria and their weightings could have made no difference to the preparation of tenders. Finally, the defects in the ITT alleged by Varney were evident when it was published and it could then have brought proceedings against the Council, well before the date when it did in fact bring proceedings.

Stanley Burton LJ noted that Varney relied on the case *Letting International v Newham LBC*²⁵, in which Silber J applied the definition of "criterion" in the Shorter Oxford English

23 [2011] EWCA Civ 708

24 Case C-331/04, [2005] ECR I-10109

25 [2008] EWHC 1583 (QB); [2008] LGR 908



Dictionary as meaning “principle, standard, or test by which a thing is judged, assessed or identified”. That would, he said:

“mean that regulation 30 requires every standard by which a bid is to be evaluated, no matter how minor or subsidiary, to be disclosed as such with its proposed weighting. This would seem to me to be impracticable, and I do not think it is what Community law requires.”

The Court of Appeal noted that transparency is achieved under the Regulations in two ways: first, in requiring the criteria for the awarding of a contract to be identified to tenderers, with the weighting attached to each criterion, so that those matters are known and applied equally to all tenderers; and secondly, in requiring a public authority to provide the information specified in regulation 32 to the tenderers as soon as possible after making the decision as to the successful tenderer or tenderers. They agreed that the crucial case was the *Venezia* one, which concerned a public contract for passenger transport in three lots. The European Court said that:

“Accordingly, the answer to the questions referred must be that Article 36 of Directive 92/50 and Article 34 of Directive 93/38 must be interpreted as meaning that Community law does not preclude a jury from attaching specific weight to the subheadings of an award criterion which are defined in advance, by dividing among those headings the points awarded for that criterion by the contracting authority when the contract documents or the contract notice were prepared, provided that that decision:

- *does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;*
- *does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;*
- *was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.”*

Flaux J had found as a fact that each of these three conditions was satisfied. Therefore the key question was whether the Return Schedules constituted sub-criteria (or, to use the language of ATI, “subheadings of an award criterion”), rather than criteria.

The application of the principles laid down in ATI was reaffirmed in relation to a regulation with materially the same provisions as Directive 2004/18 in *Evropaiki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Maritime Safety Agency (EMSA)*²⁶, where the Court said this:

“148 In accordance with settled case-law, it is, none the less, possible for a contracting authority, after expiry of the period for submission of tenders, to determine weighting coefficients for sub-criteria of award criteria previously established, on three conditions, namely that that ex post determination, firstly, does not alter the criteria for the award of the contract set out in the contract documents or the contract notice; secondly, does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation; and, thirdly, was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers (see, to that effect and by analogy, ATI EAC e Viaggi di Maio and Others,



paragraph 146 above, paragraph 32, and Lianakis and Others, paragraph 131 above, paragraphs 42 and 43).

This all led the Court of Appeal to conclude that:

"It follows from these authorities that the definition of criterion adopted and applied by Silber J in Letting International is too general and too wide. It is necessary to decide whether the standards applied by the contracting authority were criteria or sub-criteria; and if the latter, whether they were defined in advance, if so whether the requirements of ATI are satisfied."

So did the Return Schedules relate to sub-criteria or criteria? Here, the criteria for the award of the contract were identified by the Council in the contract notice as price (65%) and customer satisfaction (35%). The Court of Appeal felt that to require such matters as the Return Schedules and their weightings to be identified at such an early stage would be a significant imposition on contracting authorities. The matters referred to in the Return Schedules were relevant to the criteria identified in the contract notice. They were identified in advance, in the ITT and Varney knew that the information sought by the Schedules was to be used in awarding the contracts.

The Return Schedules were not separate award criteria. The Return Schedules 1 to 15 dealt with different aspects of customer satisfaction, one of the stated award criteria and therefore were sub-criteria or a sub-set of that award criterion. As such, there was no absolute requirement that their weightings be specified in the ITT. There was no breach of the principles of equality and transparency. Every tenderer was given the same information. It was obvious to Varney that the information required by the Return Schedules would be used to decide on the award of the contracts. Further, Varney's tender was unaffected by the fact that the Return Schedules were not identified as criteria or sub-criteria and they did not know the weightings to be attributed to them. Specifically in relation to staffing levels, which was the subject of the major complaint, Varney had accepted that the staffing levels put in its tender were unaffected by how the tenders were marked. The Court of Appeal agreed with the trial Judge who had said that:

"... in reality it was perfectly obvious that the award criteria were going to be marked by reference to the information provided in response to the Return Schedules and if any of the tenderers had wanted clarification of that or of what marks would be attached to each Return Schedule, they would surely have asked. Accordingly I am satisfied that this is a case where, within the ATI principle, there was no requirement to disclose in advance the sub-criteria or the weighting attached to each of them, because such disclosure could not have affected the preparation of any of the tenders. In the circumstances, the Council was not in breach of the obligation of transparency in that regard."

So what does this mean?

The conclusions of the *Varney* decision make it clear that contracting authorities must provide sufficient detail so that tenderers can understand what is expected of them, provided they follow the *Venezia* principles. This seems to be a more commercial, pragmatic and common-sense approach than suggested by previous case law. Certainly the *Varney* case seems to give contracting authorities a potentially broader line of defence than might have been thought previously.



Does this mean that there should be any change to what has become the accepted best practise of adopting the cautious approach of disclosing sub-criteria, weightings, model answers and methodology to be applied to tenders?

Probably not: a prudent contracting authority must continue to look to manage and reduce risk especially when we are in an economic climate which had contributed to the increase in procurement challenges. For example in *Varney* "Customer Satisfaction" was held to be award criteria and the more distinct topics beneath it were sub-criteria. What if there is a dispute about where the first layer of criteria sits? How relevant do sub-criteria need to be? What if the "award" criteria is found to be too vague? So the prudent contracting authority should continue to take all enquiries seriously and reply to them.

From a tenderer's perspective, the situation will remain that some will continue to make enquiries for tactical reasons to increase the scope of challenge later. Of course, if they do not, it is possible that the tenderer will miss the chance of complaining later about the information in the ITT.

Ps – Costs

Earlier in the year, the court had taken a similar pragmatic approach to that in *Varney* in the case of *Mears Ltd v Leeds City Council*²⁷. Mears had said that the Model Answers used by Leeds in carrying out the evaluation of the tenders included matters which should have been disclosed to tenderers. Mr Justice Ramsey held that:

- "(1) The contracting authority must disclose to tenderers those award criteria or sub-criteria which it intends to apply to the award.*
- (2) The contracting authority is obliged to disclose to tenderers any rules for the relative weighting of the selection criteria which it intends to use.*
- (3) The contracting authority could attach specific undisclosed weight to sub-criteria by dividing among those sub-criteria the points awarded to a particular criterion if that weighting:
 - (a) does not alter the criteria for the award of the contract set out in the contract documents or the contract notice;*
 - (b) does not contain elements which, if they had been known at the time the tenders were prepared, could have affected that preparation;*
 - (c) was not adopted on the basis of matters likely to give rise to discrimination against one of the tenderers.**
- (4) There is a distinction to be drawn between award criteria which are aimed at identifying the tender which is economically the most advantageous and criteria which are linked to the evaluation of the tenderers' ability to perform the contract in question.*
- (5) There is a level of assessment below the criteria, sub-criteria and weightings which the contracting authority may use in evaluating the award criteria which it does not have to disclose for a number of reasons. First, because it does not, on a reasonable view, introduce different or new criteria, sub-criteria or weightings. This aspect must be considered in the light of what would be reasonably foreseeable to a reasonably well-informed and normally diligent tenderer. Secondly, because it could not have affected the tenders. Thirdly, because it is not a matter aimed at identifying the most economically advantageous tender but instead is linked to the evaluation of the tenderers' ability to perform the contract in question...."*



The Judge considered the status of the Model Answers. He had no doubt that the intention was that the Model Answers were provided to the Evaluation Panel so that they were aware of particular aspects which might be expected to be in the answers. If the Model Answers introduced relevant new criteria, sub-criteria or weightings they should, in principle, have been disclosed. He then evaluated the complaints made by Mears and found that two Model Answers introduced criteria, sub-criteria or weightings which Leeds should have disclosed. The other Model Answers covered matters which would have been reasonably foreseeable and which a reasonably well-informed and diligent tenderer such as Mears might have been expected to deal with under this question in response to the relevant question. They dealt with aspects which were covered by the tender instructions and not new criteria and were within the margin of appreciation or discretion where the court will only disturb the contracting authority's decision if the authority has committed a manifest or clear error. The Judge therefore concluded that:

"Where, as is now common, the contracting authority provides those people who evaluate tenders with information such as model answers then, as shown in this case, there is generally no reason to disclose those. I accept that to have to do so would raise practical difficulties in being able to assess tenders when the tenderers had seen those model answers. However, the information such as model answers needs to be scrutinised to ensure that undisclosed criteria, sub-criteria and weightings are not introduced in this way."

This means that contracting authorities need to make it clear in their instructions to evaluators where they only intend their model answers to form non-prescriptive guidance for evaluators in identifying suggested qualities to enable a consistent approach to scoring. The model answers too need to be predictable from the question presented to the bidders. This would provide a defence to an argument that, as here in the case of some of the answers, the model answers were in fact applied as a comparative standard and so were part of the formal evaluation machinery.

Recently, Mr Justice Ramsey had to decide the question of costs²⁸. Both parties claimed to have been successful. Mears obtained judgment for damages to be assessed, albeit only on part of its claims, but did so in the face of a strongly asserted defence by Leeds. Leeds said they were the overwhelmingly successful party because they strike out and/or defeated almost all of Mears' claims and Mears did not succeed in obtaining an order setting aside the award of the relevant contract under the Procurement.

Mears sought an order for costs in their favour, alternatively an order for no lower than 80% to 90% of their costs and accordingly sought a payment on account of costs of £70,000, their costs inclusive of VAT being some £145,000. Leeds contended that Mears should pay 90% of their costs up to 22 December 2010 and 80% of their costs after 23 December 2010, save that Mears should pay all the costs of and occasioned by the amendment to the Particulars of Claim. Leeds' costs were some £217,000 excluding VAT.

The Judge considered that the appropriate starting point should be based on the fact that, overall, Mears were the successful party in obtaining a judgment against Leeds for damages to be assessed. Whilst it might be said that Leeds was successful in their defences to a number of claims and to the relief claimed, they were not successful in defending the claim on which Mears succeeded. That was the starting point. The Judge did have to take into consideration the extent to which Leeds were successful which meant that this was



a case where Mears have failed on a substantial part of the case and a part of the case on which clearly both parties have spent significant time and costs.

Leeds also claimed that it was unreasonable for Mears to delay issuing proceedings and to delay making an application for an interim injunction when it knew that the procurement was continuing towards completion. For example, in July 2010, Mears sought an undertaking that no contract award would be made by Leeds yet they delayed until 12 October 2010 before bringing proceedings, with Particulars of Claim being served on 1 November 2010 and the application for interim relief being issued on 3 November 2010. The Judge did not consider that the timing gives rise to conduct which should affect the order for costs. There was correspondence between the parties in which Mears was seeking and Leeds were providing further information relevant to the failure of Mears' tender. There was a period from mid September until mid October 2010 when there was little apparent progress but the Judge did not consider that Mears could be fairly criticised for delay whilst they were considering the next step and preparing proceedings or that there was any conduct in terms of delay during this period which merits being taken into account in considering the appropriate costs order.

Ultimately this was a case where, whilst Mears could be properly characterised as, overall, being the successful party, a proportionate costs order was appropriate to reflect the extent to which a successful party has not been selective in the points they have taken and should not recover all of their costs. Significant time and cost was spent in dealing with claims on which Mears did not succeed and it was neither just, fair nor reasonable that Mears should recover the costs of dealing with those claims, or that Leeds should bear those costs. The Judge concluded that Mears were entitled to 35% of their costs.

Conclusions – Looking to the future

The courts, particularly the TCC, are well set up to deal with these cases promptly. The cases suggest that the courts are increasingly taking a pragmatic and commercial approach to procurement claims. The number of cases where the contracting authority has succeeded in overturning the initial injunction obtained under the Remedies Directive is a testament to this. It is also clear that time limits are being tightened, claims must be made when the economic operator first knew, or ought to have known, that grounds for starting proceedings had arisen. You cannot wait and see if you win the bid or not.

And yet, change is in the air. Heide Ruehle MEP, spokesperson for the Committee on Internal Market and Consumer Protection, seems to agree. She has said that the procedures are too complex and too bureaucratic. The procurement rules need revision to remove legal uncertainties and the costs of legal challenges. Her solutions²⁹ include:

- *make it easier for public procurers and SMEs*
- *be clear about the messages*
- *"cheapest possible" criteria must be abandoned*
- *adopt "most sustainable and economic" criteria including life cycle cost*
- *more flexibility in procedures.*

The EU made it clear that it intends to use the report findings when it publishes its new legislative proposals at the end of 2011. The revision of EU Public Procurement Directives is one of 12 key actions identified in the Single Market Act, which:



“underpin a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs³⁰.”

Indeed, the beginnings of these proposals can be found in the European Parliament resolution of 25 October 2011³¹ on modernisation of public procurement - (2011/2048(INI)).

The resolution preamble begins as follows:

“A. whereas a properly functioning EU public procurement market is a key driver of growth and a cornerstone of the single market, and is, furthermore, fundamental to stimulating competition and innovation and to addressing fast-emerging environmental and social public-policy challenges, as well as quality-of-work issues including adequate pay, equality, social cohesion and inclusion, while achieving optimal value for citizens, businesses and taxpayers;

B. whereas European public procurement rules have contributed substantially to increased transparency and equal treatment, to combating corruption and to professionalising the procurement process;

C. whereas the current economic climate makes it more important than ever to ensure optimal efficiency in public spending, whilst limiting costs borne by businesses as much as possible, and a better functioning procurement market would help achieve these two objectives;”

The resolution then sets out the following six key tasks for the new legislation:

- (i) First task: improving legal clarity;
- (ii) Second task: developing the full potential of public procurement - value for money;
- (iii) Third task: simplifying the rules and allowing more flexible procedures;
- (iv) Fourth task: improving access for SMEs;
- (v) Fifth task: ensuring sound procedures and avoiding unfair advantages; and
- (vi) Sixth task: expanding the use of e-procurement.

The comments in relation to task two are of particular interest. The resolution confirms that in order to develop the full potential of public procurement, the criterion of lowest price should no longer be the determining one for the award of contracts, and should be replaced by the criterion of most economically advantageous tender, in terms of economic, social and environmental benefits – taking into account the entire life-cycle costs of the relevant goods, services or works, as well as the question of price.

It also notes that the current provisions on subcontracting should be strengthened, as the use of several levels of subcontracting can cause problems in terms of compliance with collective agreements, working conditions and health and safety standards. The suggestion is that public authorities be informed of all details relating to the use of subcontractors before a contract is concluded. It may also be that further rules on the award of subcontracts are needed, to avoid SME subcontractors being subject to conditions worse than those applicable to the main contractor awarded the public contract. The second task also calls

30 Evaluation Report: Impact and Effectiveness of EU Public Procurement Legislation

31 For details of the full resolution click here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20111025+SI+T+DOC+WORD+V0//EN&language=EN>



on the Commission to reassess the appropriate level of thresholds for supply and services contracts, and if necessary raise them, so as facilitate access to public procurement by, amongst others, not-for-profit and social-economy operators and SMEs.

The aims of the third task, namely “simplifying the rules and allowing more flexible procedures” begin by highlighting what are perceived by some as some of the difficulties with the current legislation:

“...the directives are often perceived as too detailed and that they have become increasingly technical and complex, while at the same time the legal risk of non-compliance has increased considerably for contracting authorities and suppliers alike; notes that the fear of challenge leads to a risk-averse approach, which stifles innovation and sustainable development, resulting far too often in contracting authorities opting for the cheapest price rather than the best value; asks for more space for negotiation and communication, combined with measures to assure transparency and to prevent abuse and discrimination, and urges that market consultation be explicitly allowed as a possible first step.”

The third task proposes and recommends the following:

- (i) The application of clear, transparent and flexible procedures, and allowing European businesses to compete on an equal footing throughout the Union;
- (ii) The use of clear, simple and flexible rules, reducing the level of detail and making procurement procedures simpler, less cumbersome, cheaper, more open to SMEs and more conducive to investment. The simplification of the rules on public procurement would make it possible to reduce the risk of error and to pay greater heed to the needs of small contracting authorities;
- (iii) An assessment should be made as to whether wider use of the negotiated procedure with prior EU-wide publication might be allowed so that contracting authorities and economic operators can communicate better, and supply and demand can be coordinated effectively;
- (iv) Reiterates the value of allowing alternative bids (or variants), as they are crucial to promoting and disseminating innovative solutions. Specifications referring to performance and functional requirements and the express admission of variants give tenderers the opportunity to propose innovative solutions.
- (v) Clarifications should be introduced into the regulatory framework on public procurement, particularly in relation to the contract execution phase (e.g. on the questions of ‘substantial modification’ of a contract in force, on changes concerning the contractor and on the termination of contracts);
- (vi) Asks that the Commission look into the possibility of allowing tenderers greater opportunity to rectify omissions in their bids;
- (vii) Contracting authorities should be able to benefit from previous experience with a tenderer on the basis of an official evaluation report;

Finally, here the resolution observes that only 1.4% of contracts are awarded to undertakings from another Member State and stresses that professionalisation and better training of those who award contracts, and of tenderers, would foster EU-wide competition and



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exploit more fully the advantages of an internal market for public contracts;

The fifth task's primary focus is corruption. The resolution, calls on the Commission to assess the problems associated with exceptionally low bids proposing that contracting authorities provide, in the event of abnormally low bids being received, for early and sufficient information to other bidders, in order to allow them to assess whether there is ground for initiating a review procedure.

Finally, the sixth task welcomes the proposed expansion of the use of e-procurement.

We shall see what happens in reality when Commission issues its legislative proposals for reforming the procurement rules at the end of 2011.

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November 2011