

K&L GATES

The clock is ticking: Are you ready for a challenge?

Developments in EU Public Procurement Law

Wednesday 28 November 2012

www.klgates.com

K&L GATES

Contract Ineffectiveness

Michael Bowsher QC - Monckton Chambers

www.klgates.com

K&L GATES

Proposals for the Reform of EU Directives on Public Procurement

Dr. Friedrich Ludwig Hausmann

Partner, K&L Gates Germany

Friedrich.hausmann@klgates.com

www.klgates.com

- The proposals by the EU Commission aim at an in-depth modernisation of the current EU public procurement legislation
- The proposals include:
 - Revision of Directive 2004/17/EC – COM/2011/0895 final – 2011/0439 (COD) *)
 - Revision of Directive 2004/18/EC – COM/2011/0896 final – 2011/0438 (COD) *)
 - New Directive on concessions – COM/2011/0897 final – 2011/0437 (COD) *)
- All of these proposals have been and continue to be under negotiation *)

*) This presentation reflects the compromise text of the Proposals published by the Council of the European Union as of 19 October 2012

- **Simpler and more flexible procedures**
- **Increase access for SMEs to public contracts**
- **Better governance and control that rules are properly applied in practice**
- **Stronger use of public procurement to achieve strategic political objectives such as social or environmental innovation**

- **New procurement procedures – innovation partnership**
- **Codification of case-law of the European Court of Justice**
- **Conflicts of interest**
- **Removal of the distinction between Part A and Part B services**
- **New Directive on concessions**

- The innovation partnership intends to spur research and innovation as the main drivers of future growth in Europe
- The innovation partnership is a new procurement procedure to:
 - Establish a long-term innovation partnership between the contracting authority and a private partner
 - Develop and subsequent purchase a new innovative product, service or works
- Innovation partnerships are proposed for the revised Directives 2004/18/EC and 2004/17/EC see proposed Art. 29 COM/2011/0896 and Art. 43 COM/2011/0895

- The proposals do not provide specific guidelines in which cases contracting authorities may apply an innovation partnership
- According to the proposals an innovation partnership may be applied if the contracting authority has a need to procure an innovative product, service or work that does not exist on the market and thus requires
 - research and
 - a long-term partnershipfor its development

- The proposals provide little guidance how the innovation partnership shall be awarded
- The proposals guidelines are limited to:
 - The innovation partnership contract shall be awarded in accordance with the rules for a competitive procedure with negotiations
 - Two phases:
 - Selection of participants
 - Bidding phase
 - In selecting candidates, contracting authorities shall pay particular attention to criteria concerning the candidates' capacity in the field of research and development of innovative solutions
 - The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender

-
- The proposals allow the contracting authorities a high degree of flexibility in structuring the Partnership
 - The Partnership shall be structured to provide:
 - for successive stages following the research process, possibly but not necessarily up to the manufacturing of the supply or the provision of the services
 - for intermediate targets to be attained by the partner and provide for payments in appropriate instalments
 - The contracting authority shall indicate the regime applicable to intellectual property rights
 - The contracting authority shall have the right to terminate the partnership after each of the contractually agreed stages, provided that the possibility and conditions for such termination have been indicated in the procurement documents

- **Modifications of contracts during their terms**
- **In-house transactions**

- ECJ, judgment of 16.9.2008 – Case C – 454/06 “Pressetext”:
 - Amendments to the provisions of a public contract during the term of the contract constitute a new award of a contract if they are material
 - An amendment may be regarded as being material when
 - It introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of other tenderers or for the acceptance of a tender other than the one initially accepted
 - it extends the scope of the contract considerably to encompass services not initially covered
 - it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract
 - As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded material

- The commission codifies the ECJs rulings but adds some specifications that provide for an increase in legal certainty (see Art. 72 COM/2011/0896; Art. 82 COM/2011/0895; Art 42 COM/2011/0897)
- Those specifications are:
 - The substitution of the contractual partner is not material in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, of another partner fulfilling the initial quality criteria, provided this does not entail other material changes or is aimed to circumvent the Directives
 - An amendment of the contract is not material if its value does not exceed the thresholds set out in Art. 4 (COM/2011/0896) and is below 10% of the price of the initial contract, provided that the overall nature of the contract is not altered
 - No material change if modifications have been provided for in clear, precise and unequivocal review clauses or options in the original contract
 - Special exemption in case modifications are necessary due to circumstances unforeseeable for a diligent contracting authority

Current case-law of the European Court of Justice

- A public contract may be awarded to a person without a procurement procedure if
 - contracting authority exercises control over the “person” in the same way as over its own department; and
 - The “person” is “substantially” active for the contracting authority or other legal persons controlled by the contracting authority (at least 80-90%)
- ECJ, judgement of 18.11.1999 – Case C-107/98 “Teckal”; ECJ, judgement of 11.1.2005 – Case C-26/03 “Stadt Halle”

No substantial changes to the current ECJ case-law, but an increase in legal certainty (see Art. 11 COM/2011/0896; Art. 21 COM/2011/0895; Art 15 COM/2011/0897)

- A contract awarded by a contracting authority to another legal entity shall fall outside the scope of the Directives if:
 - The contracting authority exercises over the legal entity a control which is similar to that which it exercises over its own departments; and
 - At least 85% of the activities of that legal entity are carried out for the controlling contracting authority or for other legal entities controlled by that contracting authority; and
 - There is no participation of private undertakings in the controlled legal entity at the time of the award of the contract
- From the moment any private participation takes place the ongoing contracts need to be opened to competition through regular procurement procedures

- A contracting authority exercises over a legal entity a control similar to that which it exercises over its own departments if it exercises (alone or jointly with another controlled legal entity) a decisive influence over both strategic objectives and significant decisions of the controlled legal entity
- To determine the percentage of activities by the legal entity for the contracting authority the average total turnover of the controlled legal entity with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration.

- The original proposals by the EU Commission to change Directives 2004/18/EC and 2004/17/EC included a new, specific conflicts of interest rule (see Art. 21 COM/2011/0896; Art 36 COM/2011/0895). The proposal defined in detail the situations and persons that may be affected by a conflict of interest as well as the necessary remedies.
- During the negotiations this specific conflicts of interest rule was reduced to a general obligation that “Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interests arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure equal treatment of all economic operators.”

- **The only specific guideline in the Proposals is:**

“The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.”
- **The proposal regarding a new Directive on concessions includes the same general conflicts of interest rule (Art. 36 para. 4 COM/2011/0897)**

- In the original Proposal of the EU Commission for a revised Directive 2004/18/EC the distinction between Part A and Part B services (Art. 20 of the Directive 2004/18/EC) was removed. The Commission explained:

“The results of the evaluation have shown that is no longer justified to restrict the full application of procurement law to a limited group of services”
- Nevertheless the Commission proposed a specific regime for social services and other specific services listed in Annex XVI imposing only the respect of basic principles of transparency and equal treatment (see Art. 74 COM/2011/0896)

- The compromise text by the Council of the European Union as of 19 October 2012 expands the types of services in Annex XVI and provides in particular that the Directive shall not apply to certain legal services
- The revised Art. 10 of the Proposal COM/2011/0896 provides that the Directive shall not apply for any of the following legal services:
 - (i) legal representation of a client in an arbitration or conciliation held in a Member State or in judicial proceedings before the national courts, tribunals or public authorities of a Member State by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;
 - (ia) legal representation of a client in an arbitration or conciliation held before an international arbitration or conciliation instance or in judicial proceedings before the international courts, tribunals or institutions by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;
 - (ii) document certification services which must be provided by notaries;
 - (iii) legal services provided by trustees, appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned;
 - (iv) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority;

ANNEX XVI – Services referred to in Art. 74

Commission Proposal as of 2011	Compromise Text as of 19 October 2012
Health and social services	Health, social and related services
Administrative educational, healthcare and cultural services	Administrative social, educational, healthcare and cultural services
Compulsory social security services	Compulsory social security services
Benefit services	Benefit services
Other community, social and personal services	Other community, social and personal services including services furnished by trade unions, political organisations, youth associations and other membership organisation services
Services furnished by trade unions	Religious services
Religious services	Hotel and restaurant services
	Legal services, if not excluded in Art. 10(ca)
	Other administrative and government services
	Provision of services to the community
	Prison related, public security and rescue services
	Investigation and security services
	International services

- **Status quo:**
 - Only works concessions are presently subject to limited rules and regulations within the scope of Directive 2004/18/EC
 - Any other concessions are presently not subject to EU secondary law provisions
 - Nevertheless the ECJ has ruled in an number of cases that contracting authorities concluding public services concessions need to comply with the fundamental rules of the EC Treaty – equal treatment, non-discrimination and transparency – (ECJ, judgements of 7.12.2000 – C-324/98; of 21.7.2005 – C-231/03; of 13.10.2005 – C458/03; of 13.11.2008 – C-324/07)
- The current situation does not provide for the necessary legal certainty
- The specific obligations and procedures a contracting authority has to comply with when awarding a public service concession on the grounds of the principles of equal treatment, non-discrimination and transparency set out by ECJ case-law are unclear

- The main objectives of the proposal for a Directive on concessions are:
 - To close loopholes in the legal framework governing the procurement of concessions
 - To provide the necessary legal certainty
- The Directive shall apply to works and public services concessions the value of which is equal or greater than 5.000.000 € (Art. 5 COM/2011/0897)
- The Proposal is based on the existing public procurement Directives but less comprehensive and detailed
- In Germany there is strong opposition against any kind of regulation regarding concessions. However, in the course of the negotiations in 2012 this fundamental opposition seems to have weakened

1. “In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, the need for which cannot be met by solutions already available on the market, provided that they correspond to the agreed performance levels and maximum costs. The contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities. The contracts shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a).
2. The innovation partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, which may include the manufacturing of the supply, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments. Based on those targets, the contracting authority may decide after each stage to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting authority has indicated in the procurement documents that and the conditions under which it may make use of these possibilities.

3. Unless otherwise provided for in this Article, the contract shall be awarded in accordance with the rules set out in the second sentence of the first subparagraph of Article 27(1), the second subparagraph of Article 27(1) and Article 27(3), (3a), (3b), (4) and (5). In selecting candidates, contracting authorities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions. They may limit the number of candidates that they will invite to participate in the procedure in accordance with Article 64. Only those economic operators invited by the contracting authority following its assessment of the information provided may submit research and innovation projects aimed at meeting the needs identified by the contracting authority. In the procurement documents, the contracting authority shall indicate the regime applicable to intellectual property rights. In the case of an innovation partnership with several partners, the contracting authority shall not reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.
4. The contracting authority shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The estimated value of supplies, services or works purchased shall not be disproportionate in relation to the investment for their development.”

1. “A substantial modification of the provisions of a public contract or a framework agreement during its term shall be considered as a new award for the purposes of this Directive and shall require a new procurement procedure in accordance with this Directive. In the cases referred to in paragraphs 3, 4 or 5, modifications shall not be considered as substantial.

2. A modification of a contract or a framework agreement during its term shall be considered substantial within the meaning of paragraph 1, where it renders the contract or the framework agreement materially different in character from the one initially concluded. In any case, without prejudice to paragraphs 3, 4 or 5, a modification shall be considered substantial where one of the following conditions is met:
 - a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of an offer other than that originally accepted or would have attracted additional participants in the procurement procedure;

 - b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;

 - c) the modification extends the scope of the contract or framework agreement considerably [...]

3. **Modifications shall not be considered substantial within the meaning of paragraph 1 where they have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement.**

4. **Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 4 and where it is below 10% of the initial contract value, provided that the modification does not alter the overall nature of the contract or framework agreement. Where several successive modifications are made, the value shall be assessed on the basis of the net cumulative value of the successive modifications.**

5. A modification shall not be considered to be substantial within the meaning of paragraph 1, where the following cumulative conditions are fulfilled:
 - a) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
 - b) the modification does not alter the overall nature of the contract;
 - c) any increase in price is not higher than 50 % of the value of the original contract or framework agreement.

Contracting authorities shall publish in the Official Journal of the European Union a notice on such modifications. Such notices shall contain the information set out in Annex VI part G and be published in accordance with Article 49.

6. Without prejudice to paragraph 3, the substitution of a new contractor for the one to which the contracting authority had initially awarded the contract shall be considered a substantial modification within the meaning of paragraph 1.

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.”

1. “A contract awarded by a contracting authority to another legal entity governed by private or public law shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:
 - a) the contracting authority exercises over the legal entity concerned a control which is similar to that which it exercises over its own departments.
 - b) at least 85% of the activities of that legal entity are carried out for the controlling contracting authority or for other legal entities controlled by that contracting authority.
 - c) there is no participation of private undertakings in the controlled legal entity.

A contracting authority shall be deemed to exercise over a legal entity a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal entity. The control may also be exercised by another entity, which is itself controlled in the same way by the contracting authority. For the determination of the percentage of activities referred to in point (b) of the first subparagraph the average total turnover of the controlled legal entity with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration. When, because of the date that legal entity was created or commenced activities or because of a reorganisation of its activities, the turnover is either not available for the preceding three years or no longer relevant, it will be sufficient to show that the turnover is credible, particularly by means of business projects.

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal entity controlled by the same contracting authority, provided that there is no participation of private undertakings in the legal entity being awarded the public contract.

3. A contracting authority, which does not exercise over a legal entity governed by private or public law control within the meaning of paragraph 1, may nevertheless award a public contract without applying this Directive to that legal entity where the following cumulative conditions are fulfilled:
 - a) the contracting authority exercises jointly with other contracting authorities over that legal entity a control which is similar to that which they exercise over their own departments;
 - b) at least 85% of the activities of that legal entity are carried out for the controlling contracting authorities or other legal entities controlled by the same contracting authorities;
 - c) there is no participation of private undertakings in the controlled legal entity.

For the purposes of point (a) of the first subparagraph, contracting authorities shall be deemed to exercise joint control over a legal entity where the following cumulative conditions are fulfilled:

- a) the decision-making bodies of the controlled legal entity are composed of representatives of all participating contracting authorities. Individual representatives may represent several or all of the participating contracting authorities;
- b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal entity;
- c) the controlled legal entity does not pursue any interests which are distinct from those of the controlling contracting authorities;
- d) the controlled legal entity does not receive from its activities for the controlling authorities or for other legal entities controlled by the same contracting authorities any revenues other than the reimbursement of actual costs.

For the determination of the percentage of activities referred to in point (b) of the first subparagraph the average total turnover of the controlled legal entity with respect to services, supplies and works for the three years preceding the contract award shall be taken into consideration. When, because of the date that legal entity was created or commenced activities or because of a reorganisation of its activities, the turnover is either not available for the preceding three years or no more relevant, it will be sufficient to show that the turnover is credible, particularly by means of business projects.

-
4. A contract between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled:
- a) the contract is concluded in a framework of genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;
 - b) the implementation of that cooperation is governed solely by considerations relating to the public interest;
 - c) the participating contracting authorities do not perform more than 15% of the activities concerned by the cooperation on the market;
 - d) the contract does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;
 - e) there is no participation of private undertakings in any of the contracting authorities involved.

For the determination of the percentage of activities referred to in point (c) of the first subparagraph the average total turnover of the contracting authority concerned with respect to services, supplies and works for the three years preceding the conclusion of the contract shall be taken into consideration. When, because of the date that contracting authority was created or commenced activities or because of a reorganisation of its activities, the turnover is either not available for the preceding three years or no more relevant, it will be sufficient to show that the turnover is credible, particularly by means of business projects.

5. The absence of participation of private undertakings referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the agreement.

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through procurement procedures.”

“Member States shall ensure that contracting authorities take appropriate measures to effectively prevent, identify and remedy conflicts of interests arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure equal treatment of all economic operators.

The concept of conflicts of interest shall at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.”

K&L GATES

Public Procurement in the Courts Three Recent Cases

Robert Hadley

Partner, K&L Gates London

robert.hadley@klgates.com

020 7360 8166

www.klgates.com

- Can non-economic operators interfere?
- When is the Turning Point?
- Can I ask whether you mean what you say?

**R (Unison) v NHS Wiltshire PCT
[2012] EWHC 624 (Admin)**

- Ten PCTs outsourced family health services without prior procurement procedure
- Trade union disapproved and sought to challenge decision

R (Unison) v NHS Wiltshire PCT [2012] EWHC 624 (Admin)

- Regulation 47 Public Contract Regulations 2006
 - “economic operators” have a right to bring private action for breach of the Regulations
 - can sue in the High Court
 - non-“economic operators”?
- Judicial Review
 - person with sufficient interest
 - can challenge public authority decision for breach of public law

R (Unison) v NHS Wiltshire PCT [2012] EWHC 624 (Admin)

Decision

- Can be a judicial review of procurement decisions
- Sufficient interest
 - Outcome would have been different, with
 - direct impact on applicant;
 - “Gravity of a departure from public law obligations...”

Turning Point Limited v Norfolk County Council [2012] EWHC 2121 (TCC)

Public Contracts Regulations 2006 Regulation 47D

- From 1 October 2011 must start Court action
 - “within 30 days beginning with the date when the economic operator first knew or ought to have known that grounds for starting proceedings had arisen”
- Court may extend where it considers there is “a good reason”

Turning Point Limited v Norfolk County Council [2012] EWHC 2121 (TCC)

- Contract for drug and alcohol treatment services
- Turning Point prequalified
- ITT provided no qualification or variants allowed
- Alleged failure by Council to provide adequate or complete information in the tender documentation
- Tenderers submitted questions; Council's allegedly inadequate answers
- Turning Point submitted a bid nevertheless
- Turning Point's tender excluded as non-compliant because qualified

Turning Point Limited v Norfolk County Council [2012] EWHC 2121 (TCC)

- Court decided that Turning Point was out of time
- “basic facts which clearly indicated an infringement of the Regulations”
- On its own case Turning Point knew these by the time it submitted its tender
- No extension – something beyond the operator’s control

Turning Point Limited v Norfolk County Council [2012] EWHC 2121 (TCC)

- If a contracting authority makes a mistake early in the tender process:
 - operator knows, or
 - operator ought to have known -
no challenge after 30 days; but
 - operator could not have known -
time limit not yet running

- Court will apply time limit strictly
- Can't wait for award or indication

SAG ELV Slovensko a.s. v Urad pre verejne obstaravanje [2012] EUECJ C-599/10

- What should/can a contracting authority do if faced with a tender of which it needs clarification?

Directive Article 2

- Equal treatment
- Non-discriminatory
- Transparent

SAG ELV Slovensko a.s. v Urad pre verejne obstaravanie [2012] EUECJ C-599/10

- Abnormally Low Tenders (Article 55)
- Imprecise/Breach of Technical Requirements (Article 51)

- Slovak law:
 - a contracting authority may ask a bidder to explain in writing its tender but it may not seek or accept a suggested change that would give the tender an advantage (i.e., no new negotiation)
 - Article 55 re abnormally low tenders

SAG ELV Slovensko a.s. v Urad pre verejne obstaravanje [2012] EUECJ C-599/10

- Slovakia
- Contract for highway toll collections
- Restricted Procedure
- Clarification sought of abnormally low pricing
- Bidders responded
- SAG ELV and another then excluded
 - Inadequate responses
 - Failed to meet conditions
- No clarification sought on conditions

SAG ELV Slovensko a.s. v Urad pre verejne obstaravanje [2012] EUECJ C-599/10

Abnormally low tenders

- Article 55 “shall, before it may reject...”
- An exchange of views, with the opportunity to show tender is genuine is a “fundamental requirement”
- Thus a contracting authority cannot choose not to question an abnormally low price
 - What if it is not minded to reject?
 - What if it doesn't realise?
- National court to judge request

SAG ELV Slovensko a.s. v Urad pre verejne obstaravanje [2012] EUECJ C-599/10

Imprecise tenders/Tenders not meeting technical requirements

- No amendment to tenders in restricted procedure
- No obligation to seek clarification
- No bar on clarification
 - “on an exceptional basis”
 - “mere clarification”, “obvious material errors”
 - not a new tender
- Equal and fair treatment

SAG ELV Slovensko a.s. v Urad pre verejne obstaravanje [2012] EUECJ C-599/10

Imprecise tenders/Tenders not meeting technical requirements

Practical Guidance

- Request clarification only after considered all tenders
- Request clarification in the same way from all tenderers in the same situation
 - Unless “objectively verifiable ground”
- Request clarification of all unclear/non-compliant parts

K&L GATES

Public Procurement in the Courts Three Recent Cases

Robert Hadley

Partner, London

robert.hadley@klgates.com

020 7360 8166

www.klgates.com

K&L GATES

Land development schemes

Sophie Charveron

Senior Associate, London

Sophie.charveron@klgates.com

020 7360 8154

www.klgates.com

UK Regulations

- Public Contracts Regulations 2006, amended by the Public Contracts (Amendment) Regulations 2009
- Utilities Contracts Regulations 2006, amended by the Utilities Contracts (Amendment) Regulations 2009

To what Contracts does the regime apply?

- Central government authorities:
 - Supply / services contracts over £113,057
 - Works contracts over £4,348,350
- Local authorities and other public sector authorities:
 - Supply / services contracts over £173,934
 - Works contracts over £4,348,350
- Current thresholds apply for two years from 01.01.12
- Different thresholds apply to Utilities

Works contracts are regulated by EU and UK procurement law

- A public works contract is:
 - either a contract for the carrying out or execution, or both the execution and design, of a 'work'; or
 - a contract under which a contracting authority engages a person to procure a work by any means.

Key principles

- EU Directive and UK Regulations apply to contracts for the execution of certain works, including construction and demolition of buildings.
- They require contracting authorities to treat all potential contractors equally and make no discrimination between them, as well as act in a transparent way

Works as in...

- Activities such as:
 - installation works of heating and electrical equipment
 - construction of buildings
 - construction of roads
 - Bridges
 - Tunnels
 - Hospitals
 - power station
 - railways and harbours; or
 - demolition and fitting-out works.

What about land development schemes?

- Land including:
- Contracts for the acquisition of land are expressly excluded. Reg 6(2)(e)
 - existing buildings or structures built on land
 - land covered with water
 - any estate, interest, easement, servitude or right in or over land
- Development agreements are not defined in the procurement directives or Regulations. Neither expressly included or excluded.

How did we use to treat land development schemes in the UK?

- Land development schemes were historically considered to be outside the scope of the procurement rules.
- It was more about the transfer of land, and less about the works or services procured to the contracting authority by the developer.

Progressive turn around

- Case law from ECJ and English courts started saying otherwise.
- Some land development schemes started being subject to public procurement law...
- ...when a land development scheme contains a mix of public construction works and land development and there is a legally binding obligation to build the public works

3 key questions to ask

- Question 1: is there a construction element in the proposed scheme as defined in the Regulations?
- Question 2: what is the principal object of the contract?
- Question 3: is there a legally enforceable obligation to carry out works or provide building / construction services?

UK OLD case law – Chalkhill

- *R v Brent London Borough Council ex parte O'Malley* (1998) “Chalkhill”
- Only a fraction of the work was for the contracting authority. Works were incidental to the land transfer

R v Brent - the “Chalkhill Case”

- Brent LB Council entered into a contract with a special purpose company for the development of a housing estate, the Chalkhill estate.
- Houses and flats were to be sold off to the private sector.
- The developer had to deliver a few community facilities, such as a public car park, school improvements and “stimulation of the local economy”.

Case law - ECJ

- Ordine degli Architetti delle province di Milano v Comune di Milano (2001) (“*La Scala*”)
- Jean Auroux v Commune de Roanne (2007)
- Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben (2010)
- Commission v Kingdom of Spain (2011)

OGC Guidance Note

- The OGC published guidance on the application of procurement rules to development agreements between local authorities or public bodies and private developers.
- Three questions:
 - Is a work or works required or specified by a contracting authority?
 - Is there an enforceable obligation in writing on a contractor to carry out that work?
 - Is there some pecuniary incentive for carrying out this work (not necessarily a cash payment?).

UK NEW case law –Tesco

- *R (on the application of Midlands Co-operative Society Ltd) v Birmingham City Council* (“**Tesco**”) (March 2012)
- Simple transfer of land is not subject to procurement rules

Tesco – simple transfer of land

- Birmingham City Council tendered a contract for the sale of a parcel of land to developers to provide a new bowling and community centre
- Two bidders: Tesco and Midlands Co-operative. Tesco won. Land sold to Tesco. Turned out that community centre would be relocated so Tesco wouldn't have to build it.
- Midlands went to court (JR as well).
- Court held that as Tesco was under no legally enforceable obligation to perform construction works: it was a “simple transfer of land”.

Tesco

- Tesco: “In considering whether the public procurement Regulations apply, one must look at the whole of the arrangements between the contracting authority and the contractor, and in particular: whether there is in reality a multi-stage award procedure which includes an obligation to perform works and is consequently subject to public procurement Regulations”.

UK Case law – Hounslow

- *AG Quidnet Hounslow LLP v Mayor and Burgesses of the LB of Hounslow* (September 2012)
- The substance of the agreement was for the grant of a long lease, which was not subject to public procurement Regulations.
- Court held that the proposed land development agreement did not impose an obligation on the private contractor to build works or provide services to the public authority.

Hounslow

- Council owned 60% of a parcel of land, next to a shopping centre owned by L&G
- Council entered into discussions with L&G about a possible redevelopment of the site. Quidnet, a developer who owns other shopping centre in Hounslow also approached the Council. Council entered into a lock-in agreement with L&G to grant L&G a long lease on the Council-owned site.

Hounslow

- Quidnet brought a JR action to challenge the Council's decision. Claimed the proposed agreement was a public works contract and ought to have followed an open tender procedure.
- The Court held that there was no obligation on L&G to develop the site or provide any services whatsoever.
- Not a concession contract, not a works contract. A "simple" long lease of land.

K&L GATES

Questions

Wednesday 28 November 2012

www.klgates.com