Client Alert.

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UK Public Procurement Law Digest: Limitation Period for Challenges – when does the clock start to tick?

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

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

WHAT IS THE CASE?

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

WHY IS THIS CASE IMPORTANT?

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

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

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[1] For further discussion on ECJ's judgment in *Uniplex*, see our previous update Limitation Period and The Need for Promptness .

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

WHAT HAPPENED IN THIS CASE?

This case concerns a PFI project initiated by the Greater Manchester Waste Disposal Authority ("**GMWDA**"). Hailed as one of the largest and most advanced projects of its kind, it involves the development of a network of state-of-the-art recycling facilities, comprising 36 plants on 23 sites across Greater Manchester, capable of handling 1.3 million tonnes of waste per annum.

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

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

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

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

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

Regulation 32(4)(b) of the Public Services Contracts Regulations 1993 provided that procurement challenges had to be commenced "…*promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought*." This requirement was mirrored in Regulation 47(7)(b) of the original Public Contracts Regulation 2006, which succeeded the 1993 Regulation, and can still be found in Regulation 47(D)(2) of the Public Contracts Regulation 2006 as last amended by the Public Contracts (Amendment) Regulations 2009.[2]

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

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

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

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

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

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

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

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

decision.

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

On this basis, one might also argue that the Court's decision in this case not to extend the limitation period contradicts the ECJ's guidance in *Uniplex* that the discretion granted to the Courts by the Regulations to extend the 3-month limitation period must be exercised in such a way to ensure that as much effective remedy as possible is made available to bidders who are affected by an unlawful decision.[6]

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

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

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