UK Public Procurement Law Digest

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Evaluation Criteria and Weighting: Disclosure and transparency are mandatory, not discretionary

In the past, it has been common for authorities to disclose only top-level evaluation criteria and weightings during the early stages of regulated public sector procurements. That approach may have to change in the light of a 2008 case. A Court has upheld a bidder's procurement challenge on the grounds that a contracting authority breached the procurement regulations because it did not disclose in the tender documents all of the contract award criteria and their respective weightings. The effect of this case will be to require authorities to decide on evaluation criteria (including, crucially, any sub-criteria) earlier in their procurement exercises, to disclose those criteria and sub-criteria, and to stick to them. Many authorities will regard this as a reduction in flexibility.

What is the case?

The case is *Letting International Limited v London Borough of Newham [2008] EWHC 1583*, a decision of the High Court in a claim brought by Letting International ("LI"), an aggrieved unsuccessful bidder in a series of procurements by London Borough of Newham ("LBN"). LI claimed that LBN had acted in breach of the Public Contracts Regulations 2006 ("Regulations"), and had failed to provide transparency in the operation of its procurement. The Court agreed with LI and upheld an injunction preventing the authority awarding any work under the improperly procured contracts. This case takes into account the latest approach of the European Court of Justice to the issue of transparency, as seen in cases such as *ATI ETC* Case C-331/04 and *Lianakis* Case C-532/06.

Why is this case important?

Prior to this case, it was common for contracting authorities to provide relatively little prior information to bidders about the applicable evaluation criteria and weightings, and to seek to develop the criteria and weightings during the subsequent stages of the public procurement process. This is particularly true in complex and large scale projects, especially under the competitive dialogue procedure.

This case makes it clear that, if a contracting authority fails to disclose any fact relating to the evaluation criteria which, had it been known at the time, could have affected the preparation of bidders' tenders, the authority would be in breach of the public procurement regulations and would be creating grounds for a procurement challenge.

As a matter of overriding principle, a contracting authority must disclose all the elements that it takes into account in identifying the most economically advantageous tender. For this reason, it must disclose the evaluation criteria and weightings that it intends to use in their entirety to the bidders.

This will require a change in approach for many contracting authorities which have, in the past, only disclosed a handful of top-level evaluation criteria (*e.g.*, quality, price, transition, security issues) and their high-level weightings (or even, in some cases, only an order of priority of the various criteria). In the future, authorities will be required to disclose much more information about sub-criteria, and to do so at an early stage.

The issue for an authority is where to stop: *e.g.*, does the requirement extend right down to the questions used by individual evaluators to populate the scoring table? The main question unanswered by the Court judgement is: when does a factor or scoring question cease to be an "award criteria" (which would need to disclosed) and become merely a method of scoring (which would not be required to be disclosed)?

Bidders will see this case as ensuring more transparency in procurement processes - and additional grounds for challenge if they lose. Authorities are likely to view the decision as diminishing their

flexibility and requiring them to accelerate the process of setting (and freezing) all aspects of the evaluation model.

The case also shows that an aggrieved bidder does not have to suffer actual loss in order to bring claims against a contracting authority. All that an aggrieved bidder has to show is the loss of a significant chance of obtaining the contract. In this case, the procurement concerned the award of a series of frameworks, with no guarantee of work under the awarded framework. But the Court held that the fact that the bidder was merely tendering for a framework contract does not preclude an aggrieved bidder from bringing a claim.

What happened in this case?

In March 2007, the authority, LBN, published an OJEU notice for framework contracts for the procurement, management and maintenance of leased properties. As is commonplace, the framework contracts were to be awarded to the "most economically advantageous" tender.

LI, a property management company, was one of the bidders that submitted a tender in response to the OJEU notice. The Invitation to Tender provided to bidders stated, amongst other things, that the criteria to be used in evaluating tenders comprised three elements:

- "Compliance with Specification", to be evaluated by assessing the quality of the solution proposed by the bidder to address five aspects of the specification, which in total had a 50% score allocation;
- "Pricing", which had a 40% score allocation; and
- "Suitability of Premises, Staffing and Working Conditions", which had a 10% score allocation.

No further details regarding the evaluation criteria were provided to the bidders, and LI duly submitted its tender to LBN. In November 2007, the authority informed LI that its tender was not successful.

Dissatisfied, LI sought explanation and information from LBN, and it transpired that:

- the weightings attached to each of the five specific aspects of the "Compliance with Specification" criterion were not equal and varied from 5% to 17% of the total score allocation;
- the overall criterion of "Compliance with Specification" in fact had 28 sub-criteria, each carrying its own proportion of the score; and
- in assessing each of such sub-criteria, LBN awarded 3 out of a maximum of 5 points to tenders which fully complied with its specification, and gave the maximum 5 points only to tenders which exceeded its specification.

LI subsequently brought a court action against LBN in November 2007 on the basis that, among other things, LBN failed to give sufficient information to bidders about the basis on which it would evaluate the tenders.

The Court pointed out that under both the Regulations and EU law, potential bidders had to be made aware of all the features to be taken into account by the contracting authority in identifying the most economically advantageous tender, as well as the relative importance of such features.

The Court held that the five specific aspects of "Compliance with Specification" and the 28 sub-criteria, as well as the marking scheme were matters which ought to have been disclosed to the bidders in the ITT, not just because of the requirement for transparency but also because to hold otherwise would have the alarming consequence of allowing a contracting authority to adjust the evaluation criteria and weighting however it liked, thus leaving the bidders without any remedy.

Such a consequence was clearly not acceptable because the division of award criteria into sub-criteria, and the allocation of weightings to the sub-criteria, resulted in a variation of the award criteria disclosed in the OJEU notice and procurement documents. In effect, the authority had introduced new features which, had they been disclosed, could have affected the preparation of bidders' tenders.

Having found that LBN failed to comply with the requirement for transparency, the Court then went on to consider whether or not the bidder had to show that it had suffered actual loss in order to make a claim. The Court had little difficulty in concluding that all that an aggrieved bidder had to show was that it suffered "the loss of a significant chance of obtaining the contract" as a result of the contracting authority's failure to comply with the requirements of the Regulations.

Morrison & Foerster

3 December 2008

Contract Variations and Amendments: What scope is there to amend an existing contract before a new contract (and competition) becomes necessary?

Most contracting authorities are well aware that there is limited scope to amend a contract previously awarded under the EU public procurement regime. It is generally accepted that whatever scope does exist depends upon the degree of flexibility built into the original Official Journal (OJEU) notice and other initiating documents. By structuring their procurements carefully, many contracting authorities reserve rights to extend the duration of an awarded contract or extend its scope to cover other advertised services.

It is also well known that certain types of material change to the scope of an existing contract, such as the addition of new services or extensions to the awarded term, which were not previously described in the procurement scope, will normally have to be put to a new competitive tendering procedure.

However, it is not clear how other less immediately obvious changes (such as changes to the pricing or contract terms and conditions) to an existing contract should be treated. In a recent landmark case, the European Court of Justice for the first time has provided guidance on this key issue. Contracting authorities and suppliers alike ought to consider this as a welcome clarification. But the possible downside of the decision is that it limits authorities' flexibility and makes contract re-negotiation more problematic, because some contract changes previously felt to be permissible may now be ruled off-limits.

What is the case?

The case of *presstext Nachrichtenagentur Gmbh v Republik Österreich (Bund) and others (Case C-454/06)*, a decision of the European Court of Justice ("**ECJ**"), arose from a claim brought by presstext Nachrichtenagentur ("**PN**"), a news agency that unsuccessfully sought to offer its services to the Austrian government. PN alleged that the various amendments made to the contract between the Austrian government and its incumbent provider of news agency service provider, the Austria Presse Agentur ("**APA**"), constituted an unlawful award of contract contrary to the EU procurement rules.

Why is this case important?

The decision of the ECJ in this case provides helpful clarification of the extent to which changes can be made to an existing public sector contract without initiating a new competitive tendering process.

Neither the EU public procurement regulations nor the UK implementing regulations set out express rules on when a proposed amendment to an existing public contract, in fact, constitutes an award of a new contract to which the open advertising and tender rules ought to apply. But, as a matter of general principle, the ECJ has now stated clearly that where changes are proposed to an existing contract, and those proposed changes result in a contract that is materially different in character from the original contract such as to demonstrate the intention of the parties to re-negotiate the essential terms of that contract, the contracting authority should initiate a new tender process in compliance with the EU procurement rules.

The ECJ has also provided guidance on what constitutes a material amendment and when a proposed contract "variation" ought, in fact, to be dealt with by way of a new contract procurement exercise. The key part of the ECJ ruling is that a change to an existing contract would constitute a "material difference" where:

- the change to be introduced into the contract conditions, had it been part of the initial tender, "*would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted*"; or

- the change would result in the scope of the original contract being extended "*considerably to encompass services not initially covered*"; or

- the change would result in a shift in "*the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract*".

To some extent, one might say that these three grounds are sensible, and accord with principles of fairness and transparency. After all, if a change is sufficiently minor that it would not have made a difference to the original award decision, or would not give significant advantage to the incumbent supplier, it would be disproportionate to treat that change as giving rise to a requirement to initiate a new competitive tendering process.

The first two elements of this test are largely unremarkable because most sensible contracting authorities have used these sorts of tests for many years to determine the legitimate scope for extension of existing contracts.

But the third test – relating to the shift in economic balance – potentially covers new ground and raises the possibility that contract changes previously regarded as being entirely within the ordinary course of dealings in the contract management phase might now be prohibited. Authorities must now be on their guard to ensure that significant contract changes are not made to existing contracts without first checking whether the proposed change is so material that it is impermissible, and in fact would require a new procurement process.

What happened in this case?

In 1994, prior to the accession of Austria to the EU, the Austrian government entered into an agreement with APA, a cooperative that historically provided various news agency services to the Austrian government and to which almost all of Austria's media outlets belonged.

The agreement allowed the federal authorities of Austria to issue press releases via APA, access and use current information provided by APA, and access APA's database of historical information and past press releases. Among other things, the agreement had the following features:

- the agreement was concluded for an indefinite period, with a waiver by both parties of their right to terminate the agreement until 31 December 1999;

- the services charges under the agreement included:

    - an annual charge, which related to the use of editorial articles and media archives; and

    - a usage charge based on per-minute unit price, which related to the use of online inquiries and which was described as "*a price corresponding to the lowest graduated consumer price of the official tariff… less 15%*";

- the charges were subject to indexation based on the consumer price index ("CPI") for 1986, or the relevant replacement index.

In 2000, APA established a wholly-owned subsidiary, APA-OTS (which took the form of a limited liability company), and entered into a contract with APA-OTS, whereby APA-OTS was bound to pass its annual profits back to APA and to follow the instructions given by APA in managing its business, whilst APA was contractually bound to make good any annual losses incurred by APA-OTS.

APA subsequently transferred to APA-OTS the operation of some of the services previously provided directly by APA under the 1994 agreement. The Austrian government was duly notified, and assurances were given that there would be no change in the overall service performed, and that APA was jointly and severally liable with APA-OTS. The Austrian government agreed to the transfer, and thereafter directed its payments to APA-OTS.

Following the introduction of APA-OTS, APA and the Austrian government entered into a supplemental agreement in 2001, amending the original agreement as follows:

- the annual charge was adjusted to reflect the conversion of Austrian Schilling into Euro, and the converted figure was rounded up to give a discount of 0.3%;
- the per-minute unit price used in calculating the usage charge was adjusted to reflect the conversion of Austrian Schilling into Euro;
- the basis of indexation was changed from the CPI for 1986 to the CPI for 1996; and
- the indexation mechanism was to be disregarded for 2002 - 2004, resulting in an effective price discount for that service equal to 2.94% for 2002 and 1.47% for 2003.

Subsequently, an additional supplemental agreement was signed in 2005, which further amended the original agreement as follows:

- the waiver of the right to terminate the agreement was renewed until December 2008; and
- the 15% rebate originally given in respect of the usage charge based on per-minute unit price for online inquiries was increased to 25%.

In 2004, PN, a relatively new entrant to the Austrian news agency market, unsuccessfully sought to offer its own news agency services to the Austrian government. Having failed to secure a contract with the Austrian government, PN subsequently brought legal proceedings against the Austrian government, APA, and APA-OTS, contending, among other things, that the changes made to the original agreement, including the introduction of APA-OTS as well as the two supplemental agreements signed in 2001 and 2005, constituted unlawful de facto award of contracts.

Directive 92/50/EEC on Public Services Contracts (now replaced by Directive 2004/18/EC – the prevailing EU procurement directive upon which the UK Public Sector Contracts Regulations 2006 is based) provided, among other things, that "*In awarding public service contracts or in organizing design contests, contracting authorities shall apply procedures adapted to the provisions of this Directive*" (Article 3(1)). The Austrian Court asked the ECJ for a ruling on whether or not the changes made to the original agreement amounted to a new "award" of contract for the purposes of Directive 92/50/EEC.

Having reviewed its previous judgments, the ECJ noted that as a general principle, amendments to an existing contract constitute an award of new public contract for the purposes of Directive 92/50/EEC when the amended contract is "*materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to re-negotiate the essential terms of that contract*".

As noted above, the ECJ proceeded to set out three tests for when a change to an existing contract might constitute a "material difference", *i.e.*, where the change:

- if included from the start would have allowed other bidders to bid, or might have changed the eventual award decision; or
- would result in the scope of the original contract being extended considerably to encompass services not initially covered; or
- would result in a shift in the economic balance of the contract in favour of the contractor.

The ECJ then considered the facts of the case, and concluded as follows:

(A) The introduction of APA-OTS into the arrangement between the Austrian government and APA was essentially the result of an internal reorganisation of APA that did not modify the original agreement in any fundamental way, particularly in light of the fact that APA retained significant control over APA-OTS, as well as the fact that APA was jointly and severally liable with APA-OTS, so long as the control of APA-OTS remained with the APA.

Here, it should be noted that the ECJ specifically held that the fact that there was no guarantee that APA's control over APA-OTS would not in the future be transferred to a third party, was irrelevant to the question of whether or not there was a new award of contract, although the ECJ did point out that different considerations may apply at the point in time when the transfer of control to a third party did occur in this type of situation. This raises the spectre that, in future, a "change in control" of a supplier under an awarded public contract might constitute an event that triggers a re-procurement.

(B) Those changes to contract price that were made purely as a result of the conversion of the stipulated currency into Euros did not materially change the original agreement, because that change was only an adjustment resulting from an external change in circumstances.

(C) While other changes to prices (such as changes resulting from rounding-off of the converted prices or the disapplication of indexation mechanism) could give rise to a new award of contract, this was not the case here, as the changes to the CPI were in keeping with the stipulation in the original contract to keep the indexation provision up-to-date, while the effect of rounding-off or price-fixing in this particular case was minimal. In any event, the changes were all to the detriment of the supplier, APA, which effectively consented to a reduction in prices.

(D) While an indefinite contract term could potentially be incompatible with the principles of EU law by impeding competition and hindering the application of the public procurement rules, there was nothing in EU law that specifically prohibited the conclusion of public service contracts for an indefinite period. Likewise, there was nothing that automatically outlawed an undertaking not to terminate for a given period where the contract was concluded for an indefinite period.

Even if the Austrian government had intended to terminate the agreement and put it out for a tender, the period of waiver (three years) envisaged in the second supplemental agreement had not been excessively long so as to prevent the Austrian government from making the necessary arrangements to terminate the contract and go to the market. Therefore, the second waiver that applied from 2005 to 2008 could not have been construed as a material change to the original agreement.

Conclusion

This case offers helpful guidance on what variations may – or may not – be permissible to existing contracts. Authorities will have to pay closer attention to changes made as part of contract management.

Obviously, much depends upon the circumstances of each case but, based upon the facts of this case, it is also possible to identify various types of changes that are less likely to constitute a material change and thus necessitate a new tender process:

- transfer of a contract from the incumbent supplier to a new supplier due to a corporate re-structuring or reorganisation of the incumbent supplier;

- changes to the financial terms of an existing contract that result from stipulations in the original agreement, such as the updating of consumer prices index to be used in the indexation of service charges;

- changes to the financial terms of an existing contract that are necessary as a result of external circumstances, such as the need to change the stipulated currencies into Euros;

- changes to the financial terms of an existing contract that are to the detriment of the incumbent supplier, such as changes that result in the contracting authority receiving a discount; or

- waiver of the right to terminate an existing contract, where the existing contract was initially entered into for an indefinite period.

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8 January 2009

Court Gives Guidance on Legal Remedies Available in respect of Improperly Awarded Framework Agreements

Two recent decisions made by the High Court in Northern Ireland demonstrates that, under certain circumstances, the remedy that a Court can grant to an aggrieved bidder may go beyond the award of mere damages and could include the setting aside of an already-awarded framework agreement.

What are the cases?

The cases are:

- *McLaughlin and Harvey Limited v Department of Finance and Personnel (No. 3) [2008] NIQB 122*, one of the series of decisions made by the Northern Irish High Court in respect of a claim brought by McLaughlin & Harvey Limited ("M&H"), a construction company that unsuccessfully tendered for a framework agreement relating to a series of construction projects that the Northern Irish Department of Finance and Personnel ("DFP") sought to implement over a four-year period at a cost of £500-800 million.

- *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 3 Remedies) [2008] NIQB 153*, one of the series of decisions made by the Northern Irish High Court in respect of a claim brought by a consortium of building contractors, who unsuccessfully tendered for a framework agreement relating to a series of construction projects which the Department of Education for Northern Ireland sought to implement over a two-year period at a cost of £550-600 million.

Why are these cases important?

Until now, most contracting authorities have assumed that the potential remedies to which they are exposed if they breach procurement law are either:

- damages and/or an injunction preventing the contract award going ahead – if the complaint is made before the contract has been signed; or

- damages only – if the complaint is made after the contract has been signed.

Once past the point of contract signature, authorities tend to breathe a sigh of relief and assume that they are immune from the risk of a Court order overturning the contract award, shielded by the language of the procurement regulations which, on the face of it, prevent the setting aside of contracts that have already been signed.

However, the Courts in these cases took the position that, if there has been a breach of procurement law, a Court is, in fact, within its rights to set aside a framework agreement that a contracting authority improperly enters into with one or more suppliers. In one of the cases, the Court did so despite the fact that specific contracts had been entered into under the framework agreement.

This means that there is now an even greater incentive for contracting authorities to ensure that as much transparency as possible is built into the procurement process, to avoid the costly and time-consuming consequence of having to re-run a tendering process. It also creates a ray of hope for bidders on framework procurements that, if they perceive that they have been disadvantaged by a procedural error, there may be an effective remedy available to them after all.

However, an aggrieved bidder that successfully challenges a contracting authority's decision should not expect to be automatically awarded a place on the framework that it failed to win in the first place. The Court in both of these two cases concluded that the right remedy was to cancel the entire framework arrangement, thus forcing the authority to re-run the entire process. In the *Henry Bros (Magherafelt) Ltd* case, this was despite the fact that a number of specific contracts had already been

entered into pursuant to the framework agreement. At a practical level, what an aggrieved bidder in this situation really wants is more likely that it should be added to the list of contactors on the framework list. Even if an unlawful award is successfully challenged, an aggrieved bidder may not derive much from its victory, particularly where the gap between it and the successful bidder(s) was more than marginal.

For authorities, one consequence of this case is that if there has been a genuine procedural error, and therefore a meaningful risk that the entire framework procurement could be overturned by a Court, it may be easier just to accede to a bidder's complaints and let all affected bidders through on to the framework list, rather than run the risk of having the entire framework cancelled.

What happened in these cases?

McLaughlin and Harvey Limited v Department of Finance and Personnel (No. 3)

In the *McLaughlin and Harvey Limited* case, DFP published an OJEU notice in March 2007, advertising its intention to award framework agreements in respect of a series of construction projects. M&H duly submitted its tender in October 2007, but it was unsuccessful and was notified accordingly by DFP in December 2007. M&H issued proceedings against DFP alleging, among other things, that DFP acted in breach of the procurement rules by failing to disclose the marking methodology, which constituted secret evaluation criteria, and the weightings associated with such secret evaluation criteria.

As noted in our previous Legal Update (see Sourcing Update, December 4, 2008), in conducting public procurement process, a contracting authority is required to disclose the evaluation criteria and sub-criteria that it intends to use as fully as possible in advance to the bidders. Having reviewed the relevant case laws (including the judgments of the European Court of Justice in *ATI ETC Case C-331/04* and *Lianakis Case C-532/06*), the Court held that DFP acted in breach of the procurement rules by failing to disclose 39 sub-criteria and their associated weightings in advance to the bidders.[1]

The Court then went on to consider the two remedies requested by M&H: namely, a declaration ordering DFP to add M&H to the list of preferred contractors under the framework agreement, and/or the setting aside of DFP's decision to award the framework agreement to five of M&H's competitors.

DFP contested M&H's requests primarily on the basis that the law did not empower the Court to grant any remedy other than damages, by relying on the Public Contracts Regulations 2006 ("PCR"), which implements in the UK the relevant EU Directives (including both Directive 2004/18/EC, the "Services Directive", and Directive 89/665/EEC, the "Remedies Directive"), and provides that "*the Court does not have power to order any remedy other than an award of damages … if the contract in relation to which the breach occurred has been entered into.*" (Regulation 47(9) of PCR)

Having reviewed the Directive and PCR, the Court decided that:

- under the Remedies Directive, all EU member states were required to make provisions in their national law a means to set aside unlawfully taken decisions and/or award damages, and the PCR specifically enabled a Court to "*order the setting aside of* [unlawfully made decision, or unlawfully taken action,] *or order the contracting authority to amend any document*" and/or "*award damages*"; and

- both the Services Directive and the PCR defined a framework agreement as something that established the terms on which one or more contracting authorities would award multiple contracts to one or more suppliers, and specifically differentiated the treatment of "framework agreement" from that of "public contracts".

[1] Readers interested in this aspect of the case are directed to the judgment in *McLaughlin and Harvey Limited v Department of Finance and Personnel (No. 2) [2008] NIQB 91*, where the Northern Irish High Court took an approach very similar to the approach taken by the English High Court in *Letting International Limited v London Borough of Newham [2008] EWHC 1583*, which is discussed in our previous Legal Update (see Sourcing Update, December 4, 2008).

The Court acknowledged that Regulation 47(9) of PCR qualified the extent to which the Court was entitled to set aside DFP's decision, but held that Regulation 47(9) did not prevent the setting aside of an already concluded framework agreement because the phrase "*the contract in relation to which the breach occurred has been entered into*" used in Regulation 47(9) referred to "public contract", as defined in PCR and including any specific contract entered into pursuant to a framework agreement, but *not* to "framework agreement" itself, because of the way in which PCR distinguished the two.

In so concluding, the Court said that: "*For the court to set aside a contract which may be partly or wholly performed would be contrary to principle and inappropriate. But the position is completely different with regard to a Framework Agreement. That consists of the pre-selection of certain economic operators who will be allowed to bid, without competition from parties outside the Framework Agreement, for specific contracts during the life time of the Framework Agreement.*"

However, the Court also noted that:

- acceding to M&H's request to add M&H to the list of successful bidders who were included in the framework agreement "*would have the effect of diluting the work for all five of the current parties under the Framework Agreement*", thereby introducing "*some element of unfairness to the best of the tenderers*"; and

- damages was "*manifestly an inferior remedy*" because:

  - it would take too long for the Court to make a reasonable estimate of the loss suffered by M&H (which needed to reflect the profits the successful bidders would have enjoyed under the framework agreement); and

  - it was clearly not in the public's interest, as paying the successful bidder(s) for the work it actually undertakes and then paying a percentage of profits such bidder(s) makes was "*in the most literal sense of the word a waste of money*", particularly in light of the overall value of the construction projects (some £800 million).

Therefore, on the particular facts of this case, the Court held that M&H's second preferred remedy, *i.e.*, the setting aside of DFP's decision to award the framework contract to five of M&H's competitors, which would lead to a re-run of the competition for the framework agreement (which in turn would be performed in a fairer and more transparent way, as indicated by the Court) was the fairer, more desirable and the appropriate remedy to be granted to M&H.

Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 3 Remedies)

In the *Henry Bros (Magherafelt) Ltd* case, the Court was concerned with a slightly different set of substantive issues, which will be the subject of a separate Morrison & Foerster Legal Update. But in respect of remedies, the Court followed exactly the same approach it took in the *McLaughlin and Harvey Limited* case in deciding to set aside the flawed award of the framework agreement.

One notable aspect of the *Henry Bros (Magherafelt) Ltd* case is the fact that a number of specific contracts had already been awarded under the framework agreement. For those specific contracts, the Court acknowledged that the claimant consortium could only claim damages, but otherwise the Court had no hesitation in holding that a re-run of the competition for the framework agreement was the appropriate remedy to be granted to the consortium of building contractors, commenting that "*in the case of framework agreements stricto sensu the restriction imposed by Article 47(9) has the potential to be much more damaging particularly to the public in whose interest the community principles of transparency, equality, non-discrimination and open competition are to be observed.*"

Morrison & Foerster

16 January 2009

Court rules on evaluation criteria and limitation periods in respect of framework agreement procurements.

A recent decision by the High Court in Northern Ireland highlights two interesting issues relevant to framework agreements. Firstly, in setting the evaluation criteria for a framework agreement procurement, a contracting authority may not rely solely on non-economic evaluation criteria. Secondly, in the event of a procurement challenge, the limitation period for bringing a claim does not always start at the point when the relevant flaw in a contracting authority's decision is first disclosed to the bidders.

What is the case?

The case is *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 2) [2008] NIQB 105*, a decision made by the Northern Irish High Court in respect of a claim brought by a consortium of building contractors, who unsuccessfully tendered for a framework agreement relating to a series of construction projects that the Department of Education for Northern Ireland ("DoE") sought to implement as part of the Northern Ireland Schools Modernisation Programme ("NISMP") over a two-year period at a cost of £550 – 600 million.

Why is this case important?

This case clarifies the degree of completeness required of the evaluation criteria adopted when an authority seeks to award a framework agreement. Specifically, the Court's decision makes it clear that a contracting authority which seeks to award a framework agreement to the bidder submitting the most economically advantageous tender has to ensure that its evaluation criteria include some assessment of the price or cost of the work to be undertaken, or services to be performed. Thus, while price is not a mandatory element of the "most economically advantageous tender" criterion, and while it is open to a contracting authority to adopt a series of predominantly non-economic evaluation criteria, price or cost must be a part of the evaluation in some form.

A contracting authority that does not require framework bidders to provide any price/cost information and instead relies solely on non-economical evaluation criteria such as fee percentage or qualitative assessment will run the risk of rendering its procurement process unlawful.

This case also indicates that, for the purposes of the time limit for bringing proceedings against contracting authorities, where the flawed decision (*e.g.*, a decision to adopt incorrect evaluation criteria) was capable of being remedied by the contracting authority prior to the submission of the final tender, the clock does not start until the contracting authority actually implements its decisions (*e.g.*, the flawed evaluation criteria are actually applied in selecting the successful bidders).

The contracting authority in this case had argued that more than three months had elapsed since the claimant's cause of action arose and, thus, under the procurement regulations its claim was time-barred and the Court ought not to extend the time limit for complaint. The Court quickly identified public policy reasons in exercising its discretion to extend the time limit, particularly in respect of large-scale public procurement projects that have a significant implication for the public in general.

What happened in this case?

In March 2007, DoE published an OJEU notice, advertising its intention to award framework agreements in respect of a series of construction projects relating to NISMP. The OJEU notice, among other things, stated that the framework agreement would last for two years, and be awarded to up to eight participants, and that the estimated total value of various construction projects to be awarded under the framework agreement was £550 – 650 million.

The ITT documents were issued in June 2007 and the deadline for the submission of tenders was in early August 2007. DoE provided information in response to requests for clarification made by the bidders at various stages of the procurement process. The selection of successful bidders was to be made on the basis of the most economically advantageous tenders, and the evaluation criteria adopted

by DoE consisted of 80% qualitative criteria, and 20% commercial criteria. Crucially, the assessment of commercial criteria was to be based on various fee percentages and did not require the bidders to submit any specific costing information.

Henry Bros (Magherafelt) Limited, which had formed a consortium (the "Consortium") together with three other building contractors, duly prepared and submitted a tender. However, the Consortium's tender was rejected by DoE in October 2007. A month later, the Consortium issued proceedings against DoE alleging, among other things, that DoE acted in breach of the procurement rules by failing to require the bidders to submit a price, or to produce representative costing examples or historic examples of pricing.

Before the Court, the Consortium argued that the assessment of the economic advantages of the different tenders was not possible without an analysis of the comparative price or cost of each tender, due to the very meaning of the words "economically advantageous". On the other hand, DoE argued, among other things, that:

- as the contracting authority, it had a wide discretion to choose the criteria to be applied and that there was no need for each of the assessment criteria it adopted to be economic in nature;

- in assessing which tender was the most economically advantageous, it was not necessary for a contracting authority to include any evaluation criteria relating to price because, in the construction industry, the basic cost of doing the work should not vary greatly from one contractor to another, due to the fact that different contractors would be sourcing their labour and materials from the same market, *i.e.*, Contractor A will pay the same for a cubic metre of concrete or a quantity of bricks as Contractor B; and

- the Consortium's claim was time-barred. Specifically, DoE argued that any alleged breach of procurement rules by DoE would have occurred, at the latest, in June 2007 which was the time when the relevant information regarding the evaluation criteria was disclosed to the bidders in the ITT documents. Therefore, DoE argued that the Consortium's claim, which was formally asserted in November 2007, was not made "*within 3 months from the date when grounds for the bringing of the proceedings first arose…*" (Regulation 47(7)(b) of Public Contracts Regulations "PCR")

The Court disagreed with DoE on these points, and concluded as follows:

Financial Evaluation Criteria

While nothing in the PCR restricts the type of evaluation criteria that a contracting authority can choose, and a contracting authority does indeed have a wide discretion in choosing the evaluation criteria, it is still not open to a contracting authority completely to omit criteria relating to price/cost for the purposes of assessing the most economically advantageous tender for framework agreements. This is because "*unless the cost or price of the relevant goods or service* [is] *fixed or not in dispute, it would be very difficult to reach any objective determination of what was or was not economically advantageous without some reasonably reliable indication of price or cost in relation to which other non-price advantages might be taken into account*".

In the opinion of the Court, a fee percentage could be part of valid evaluation criteria, but it could not be used on its own to determine the actual of cost of any individual project without the addition of further information such as rates and costs of materials because, depending on the circumstances, different contractors might be in a position to provide discounts and more advantageous prices, and also because not all contractors were equally efficient – in other words, capital costs would be a relevant element determining the most economically advantageous tender.

Accordingly, where the bidders were only required to submit such additional information at the secondary competition (*i.e.*, competition among the successful bidders for specific contract(s) to be awarded under the framework agreement), the omission of requirements for such additional

information at the primary competition stage rendered the primary competition (*i.e.*, competition among bidders for inclusion in the framework agreement) unlawful.

Time Limit for Claims

In the particular circumstances of this case, while there was a flaw in the evaluation criteria that DoE adopted and disclosed to the bidders, the actual breach of the PCR by DoE did not take place until DoE actually applied the flawed evaluation criteria to the submitted tenders, because, until that point, "*It was open to the Department to amend or otherwise modify the criteria and the manner in which they were to be applied at any stage prior to the impugned decision, a right that was specifically reserved* [in the information previously disclosed to the bidders, as well as the instructions given to the bidders who submitted their tender.]".

In the opinion of the Court, this case differed from a situation where a crucial part of the aggrieved bidder's claim was based on the contracting authority's failure to disclose the evaluation criteria before the tenders were submitted (*e.g.*, in the ITT documentation). In such case, it could legitimately be argued that a claim ought to be time-barred, but this was not so in this particular case.

The Court also took the view that, even if the Consortium's claim was time-barred, the Court was still entitled to exercise its discretion to extend the time limit under Regulation 47(7)(b) of PCR, because there was good reason for doing so. In so concluding, the Court noted that:

- due to its very nature and scale of the NISMP, it was "*a matter of considerable importance and public interest*" that any concerns about the legality of the tendering process for the NISMP was dealt with at the earliest opportunity;

- because the tendering procedures adopted by DoE in this case may well have been, or was about to be, used by the government in respect of other public projects, it was important that "*any potential defects are timeously remedies*"; and

- the merits of the parties' arguments were fully, exhaustively, and competently argued over a number of days by the parties, and "*it would be somewhat regrettable if the matter were to be ultimately resolved at this stage on the basis of a limitation issue*".

Having decided the substantive issues in the Consortium's favour, the Court went on to consider the remedies and held that the framework agreement had to be set aside. Readers interested in this aspect of the case are directed to the judgment in *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland (No. 3 Remedies) [2008] NIQB 153*, which is discussed in a previous section (see above).

Morrison & Foerster

2 February 2009

Freedom of Information: Public Sector Contracts are generally not exempt from disclosure under the UK Freedom of Information Act.

The UK's Freedom of Information Act 2000 was enacted in order to increase the accountability of public sector organisations. The consequence for companies contracting with government bodies may be that their pricing and other sensitive information is open to scrutiny by the public—and, by extension, their competitors.

Under FOIA, public bodies must disclose copies of any information held by them that is requested by members of the public, subject to a number of exemptions. When FOIA was first put in place, it was thought that a range of exemptions would protect commercial and confidential documents (such as contracts) from disclosure. Those exemptions have been narrowed over the years by the Information Commissioner's Office (ICO) and the Information Tribunal.

A recent decision of the Information Tribunal—based on a set of facts increasingly common to most public bodies—has clarified just how narrow the exemptions are in relation to contracts. In the future, most information within a public sector contract will likely have to be disclosed if an appropriate request is made. This has implications both for public bodies and for companies entering into public sector contracts which they believe contain sensitive commercial information, especially as to pricing.

What is the case?

The case is *Department of Health -v- Information Commissioner [2008] EA/2008/0018*. This is a decision of the Information Tribunal, which is the body with the jurisdiction to hear cases regarding the scope and content of FOIA. In this case, an individual made a request under the FOIA to the UK Department of Health (DoH) requesting a copy of a contract signed in 2003 between DoH and Methods Consulting Limited (Methods). The contract related to the provision of an electronic recruitment service for the NHS. As is typical, the contract included a broad confidentiality clause in fairly standard terms.

The DoH denied the request, withholding the information requested and refusing to disclose a copy of the contract. In doing so, the DoH relied on a number of exemptions in the FOIA, including in particular Section 41 (confidential information obtained from a third party), Section 43(1) (trade secrets) and Section 43(2) (prejudicial to commercial interests).

The Tribunal disagreed with DoH and held that the contract was very largely disclosable, although there were certain limited sections to which appropriate exemptions applied. This decision is consistent with the position adopted by the ICO in its dealings with other government departments which have received similar requests.

Why is this case important?

The case is a culmination of a number of cases, including in particular *Derry City Council -v- Information Commissioner* in 2006, which have narrowed significantly the scope of public bodies(and the private sector companies which contract with them) to keep confidential the contracts which they enter into.

The case supports the ICO's position that contracts cannot be looked at as a single entity and that FOIA overrides the provisions of the standard form of confidentiality clause included in most, if not all, public sector contracts. The general rule now is that public sector contracts should be assumed to be potentially always disclosable in response to a request under the FOIA regardless of whether that request comes from a member of the public, a journalist, or a potential competitor.

Impact on Authorities

Authorities are required to apply the individual exemptions under the FOIA to specific components of contracts; this requires an examination not just of individual schedules or clauses but of specific sentences and words within schedules. It is no longer justifiable to say: "The contract is confidential, so we can't disclose it."

Authorities must assess, in relation to each component part of the contract, whether a relevant exemption applies. This can mean withholding entire clauses or entire schedules but, in all likelihood, it means going through the contract to redact or delete specific words, phrases, or sentences which contain information covered by one of the applicable exemptions. It can be a laborious task and one which requires experienced judgement and a careful systematic approach. Unfortunately, the cost of considering and applying exemptions is not one that can be taken into account in deciding whether the cost of responding to a FOIA request exceeds the permitted threshold.

Authorities have the obligation under FOIA to take responsibility for this task, but most authorities choose to do so in consultation with the private sector contracting party. Authorities will typically allow the contractor to make suggestions for exemptions but, ultimately, the decision as to whether an exemption should be applied and words can be removed is for the authority to take. Well-advised authorities need to take care to avoid bidders or contractors unjustifiably claiming wide confidentiality or proprietary information protection over information which, when judged against the FOIA standards, is properly disclosable.

Impact on Government Contractors

For companies which regularly contract with UK government departments and other public bodies, the developing trend of cases under FOIA means that the companies need to take much greater care over the information included in contracts. Companies will need no reminding that a FOIA requestor is as likely to be a possible competitor as a private individual or journalist.

In most cases, there is relatively little choice as to whether sensitive information—such as pricing—is included in a contract. What is more controllable, however, is the audit trail which demonstrates how information comes to be included in a contract and careful record-keeping as to the nature of that information, *i.e.*, do you know where the sensitive bits are and can you quickly prove why they are sensitive?

Valid FOIA exemptions apply where data: is a trade secret; has been provided by a non-government party in confidence (*e.g.*, during a bid); or could prejudice commercial interests where disclosed. Companies entering into public sector contracts ought to have a clear record of the information that they have provided to the public body to be incorporated within the contract and also of the information which they believe constitutes a trade secret or which may be commercially sensitive.

The mere fact that a contract may have been negotiated and may contain a confidentiality clause does not make it exempt under FOIA. Bidders on government contracts should badge their data accordingly and make sure that they can quickly and rapidly identity for their government clients where the most sensitive data in a contract resides and why relevant exemptions apply.

What happened in this case?

The contract between DoH and Methods was agreed in 2003 and the service to which it related commenced in January 2005. In that same month, a private individual made a request under FOIA to DoH asking for a copy of the contract. After delaying for quite some time, DoH eventually refused to provide a copy of the contract on the basis that (it claimed) the contract fell primarily under the exemptions in Sections 41 and 43 of FOIA.

There are a couple of dozen FOIA exemptions but, in fact, sections 41 and 43 of FOIA are the most common exemptions typically applied to requests for disclosure of contracts, although a number of other potential exemptions might apply depending upon the nature of the services to be provided. For example, entities in the policing and security services often rely upon law enforcement grounds (Section 31). Also, certain data in a contract may relate to individuals in their work capacity, and authorities often take the view that the Section 40(2) (Data Protection) exemption applies to giving specific data about named individuals.

So, the fact that it focused on the scope of the Sections 41 and 43 exemptions made this DoH case typical of many cases in this area.

Section 41 (Information obtained in confidence)

The exemption in Section 41 of FOIA is in three parts:

- is "information obtained by a public authority from another person"—which really means, in this context, the other contracting party?
- would disclosure amount to a breach of confidence?
- since this exemption is a qualified one, does the public interest favour disclosure?

It is now well-established that a contract itself is not "information obtained by a public authority from another person": it is a negotiated document. Equally, most authorities—although, perhaps not surprisingly, fewer contractors; recognise that not all information provided during a bidding process has the necessary characteristics of confidence to fall within this exemption. Many bidders continue to claim confidentiality protection over the most generic types of information.

In this case, DoH argued that much of the sensitive information in the contract had been obtained from Methods, either because it had been compiled by Methods following the contractual negotiations or because it was based upon the technical specifications and details of methodologies being provided by Method. DoH relied on the *Derry City Council* case in which the Tribunal clarified that where contracts contained technical information, then, depending upon the circumstance, material of that nature could still be characterised as confidential information "obtained" by the public authority from the other party, and therefore could be redacted in any disclosed version.

Unfortunately, on the facts of the DoH case, the Tribunal held that the contract schedules had not been "obtained" from Method. The fact that the document was jointly negotiated was highly relevant. Even though some of the data may have been initially provided by Methods in its bid, the DoH had undertaken a detailed review of the all the proposals and made suggestions and changes to the specifications, and modifications taken from the invitation to tender and subsequent discussion. This was found to invalidate DoH's suggestion that the information was obtained from Methods.

Interestingly, the Tribunal commented that, as a point of general principle, it considers that, for the ICO or the Tribunal itself to wade through all the evidence of a negotiation, working out who had an original idea and at what point it was tinkered with sufficiently that it became someone else's idea, would be an impossible task. The Tribunal it feels that, even in a case such as this where there are minutes of meetings, it was still impractical to designate ownership to each clause. Worryingly, this could be taken as a sign that the Tribunal is trying to rule out Section 41 exemptions completely in cases involving negotiated contracts. This presents practical problems for the parties to a contract unless they made a very clear note, at the time of entering into a contract, of where data has been clearly provided by the contractor and has found its way into the eventual contract.

Section 43 (trade secrets and commercially sensitive information)

Section 43(1) of FOIA provides that information is exempt if it constitutes a trade secret. A trade secret implies the information is more restricted than information that is merely "commercially

sensitive". The implication is that something needs to be technical, unique and achieved with a degree of difficulty and investment—the recipe for Coca-Cola being the classic example. In this case, the Tribunal did not feel the need to try to decipher whether any information fell within the trade secret category, primarily because of the approach taken to the alternative category of "commercially sensitive information".

Section 43(2) of FOIA relates to commercially sensitive information. Information is exempt if its disclosure under the Act would prejudice the commercial interest of any person. Ultimately, after a long analysis, the Tribunal accepted that there is merit in the argument that disclosure of certain information, particularly around Methods' pricing, would reduce Methods' commercial advantage and might diminish the number and quality of companies willing to tender for public sector work.

Unfortunately for the parties, most of the contract ultimately was not found to be potentially prejudicial to Methods commercial interests and therefore had to be disclosed. It is clear that the Tribunal applied a narrow definition to "prejudicial to commercial interests".

The exemption under Section 43(2) is one of the hardest exemptions for authorities to judge. Often, information such as details of how pricing has been formulated, a winning bidder's solution, and service levels on offer may prejudice the contractor's commercial interest if publicly disclosed. In each case, the authority has to balance the public interest in favour of and against disclosure. Many contractors take a very wide view of what might be commercially sensitive and against their interests if disclosed. Authorities have to tread a fine line between balancing their contractor's interests and the interests of compliance with their statutory duty under the FOIA.

In the DoH case, the only sections that the Tribunal sanctioned to be withheld under this exemption were:

- certain sections of the service requirement that had been provided by Methods and which demonstrated a truly novel approach;
- sections stating what level of marketing expertise Methods was prepared to commit to the project;
- detailed pricing information, although not the general structure of the pricing mechanism itself;
- key working assumptions applied by Methods in the calculation of its solution; and
- list of security standards that might be useful to those wishing to sabotage or hack the system.

This section of the case illustrates the difficult job that authorities face in trying to make a decision as to what aspects of a contract are genuinely commercially sensitive to a bidder. The prevailing principle at the moment is that the assumption ought to be that very few things are genuinely commercially sensitive, unless a special argument can be made in all the circumstances of the case.

Morrison & Foerster

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UK Prepares for Implementation of the New Remedies Directive

UK central and local government bodies need to be ready for the increased scrutiny to which their internal processes and procedures will be subjected under the new public procurement remedies regime, which is due to be implemented in the UK by 20 December 2009. The Office of Government Commerce has just published details of the proposed changes to the remedies regime.

1. What is the development?

In December 2007, the EU issued a new directive designed to improve the effectiveness of review procedures concerning the award of public contracts (the "**New Remedies Directive**").[2] The New Remedies Directive, which amends the existing public procurement remedies regime, needs to be implemented in EU member states by 20 December 2009.

In the UK, the New Remedies Directive will be implemented by way of amendments to Public Contracts Regulations 2006 ("**PCR**") and Utilities Contracts Regulations 2006 ("**UCR**"), the two regulations that implement the controlling EU directives in the UK.

On 30 April 2009, the UK's Office of Government Commerce ("**OGC**") which oversees, among other things, the procurement activities by public bodies in the UK and the implementation of public procurement law, published details of the draft amendments that it proposes to make to PCR and UCR; it also invited comments from interested parties.

2. Why is this development important?

The implementation of the New Remedies Directive will result in a comprehensive overhaul of the existing remedies regime set out in the PCR (and also the regime for utilities set out in the UCR, but there is little difference between the two regimes). Some of these changes will have a profound consequence for the bidders and the contracting authorities alike. Contracting authorities in particular need to ensure that their internal processes and procedures are ready for the increased scrutiny to which they will be subjected under the new regime.

Most importantly, once the proposed regulations are implemented in the UK:

a. a public body will no longer be able to assume that the courts in the UK are limited to awarding damages in respect of an improperly concluded contract;

b. the set-aside of contracts will become mandatory in certain prescribed instances of impropriety;

c. public bodies will face the prospect of being fined for breach of the procurement rules, or having the terms of an improperly awarded contract shortened; and

d. a contracting authority will be compelled to suspend its procurement process where an aggrieved bidder challenges the contracting authority's decision.

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

3. What are the changes introduced by this development?

[2] Directive 2007/66/EC of 11 December 2007.

Among other things, the New Remedies Directive amends the existing European directive, which currently governs remedies in public procurement (other than in a utilities context). The New Remedies Directive changes the way in which aggrieved bidders may challenge a contracting authority's decision, and the ultimate redress that aggrieved bidders may seek from the courts, in a number of important ways.

3.1 Current remedies regime

Under Regulation 32 of PCR, once a contracting authority has decided to whom it intends to award a contract or framework agreement, it must notify all of the bidders (including the unsuccessful ones) of its decision using "*the most rapid means of communication practicable*", and then allow at least 10 days to elapse before it actually concludes the contract or framework agreement.

The purpose of this 10-day standstill period is to allow the aggrieved bidder(s) to challenge the contracting authority's decision to not award the contract or framework agreement to him or her. However, the 10-day standstill period does not apply to all contract awards, and notably, it does not apply to award of specific contracts under a framework agreement, nor does it apply to award of contracts that relate to procurement of services that are not fully covered by the Public Contracts Directives (e.g., the so-called "Part B" services under PCR).

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

After it has received the explanation from the contracting authority, if it is dissatisfied with the explanation, an aggrieved bidder may challenge the contracting authority's decision in the High Court under Regulation 47 of PCR, on the ground that the contracting authority breached its statutory duty to comply with the provisions of PCR. However, in most cases, such challenge will need to be launched within three months from the date when the grounds for challenge first arose, and crucially, "*the Court does not have power to order any remedy other than an award of damages… if the contract in relation to which the breach occurred has been entered into.*"

Under certain circumstances, particularly in respect of framework agreements, a court may still take the view that it is entitled to grant to an aggrieved bidder a remedy that goes beyond the award of mere damages, including the setting aside of an already-awarded framework agreement,[3] but generally speaking, under the existing remedies regime, an aggrieved bidder has very little time within which to prepare and mount a legal challenge, and if it does not act promptly, it cannot expect to receive any meaningful remedy.

3.2 The remedies regime under the New Remedies Directive – mandatory changes

The changes to be introduced by the New Remedies Directive consist of two types of changes; namely, the compulsory changes that must be implemented by all EU member states, and the discretionary changes that may or may not be implemented by EU member states. The key mandatory changes that will affect the existing remedies regime in the UK are as follows:

3.2.1 Under the new regime, where a legal challenge is brought by an aggrieved bidder (whether an application for an interim injunction or a full review of the contracting authority's decision), a contracting authority can no longer conclude a contract with the successful bidder until the relevant court proceedings are concluded.

3.2.2 The standstill period, which is an EU-wide mandatory obligation under the new regime, is already a part of the current remedies regime in the UK. However, under the new regime:

[3] For further discussion on this point, see Sourcing Update, January 15, 2009

(a) a contracting authority will be required to give "*a precise statement of the exact standstill period applicable*" when it notifies the bidders of its decision; and

(b) the minimum standstill period[4] could be either 10 days or 15 days, depending on the method of communication the contracting authority uses to notify the bidders of its final decision (10 days if fax or email is used, and 15 days if other means of communication, e.g. postal mail, is used). This means that a contracting authority in the UK will have the option to use a less expeditious method of communication at the expense of having a longer standstill period.

3.2.3 The new regime extends the powers of the courts to set aside a flawed decision made by a contracting authority. Crucially, under the new regime, the courts must set a contract aside where:

(a) the contract was awarded without the contracting authority publishing a contract notice, in spite of a requirement to do so; and

(b) the contracting authority: (i) commits a breach of the procedural rules set out in the Public Contracts Directive, which breach deprives the aggrieved bidder of its chances of success; and (ii) the contracting authority fails to comply with procedural requirements of the new regime (e.g., standstill period, prohibition on conclusion of contract before the determination of outcome of a legal challenge), which failure deprives the aggrieved bidder of the chance to pursue pre-contractual remedies.

3.3 The remedies regime under the New Remedies Directive – discretionary changes

In light of the responses it received to the first round of public consultation, the OGC decided not to implement a number of the optional changes set out in the New Remedies Directive. For example, the OGC decided not to implement the option to require aggrieved bidders to ask the contracting authority to review its decision before initiating a formal legal challenge. Therefore, not all of the potential changes set out in the New Remedies Directive will be implemented in the UK.

The optional changes that the OGC has decided to implement and that will affect existing remedies regime in the UK are as follows:

3.3.1 The option to derogate from the mandatory standstill period where: (i) no prior publication of contract notice is required under the Public Contracts Directive Public Contracts Directives (e.g., the "Part B" services under PCR); (ii) the bidder who wins the contract was the only bidder; and (iii) specific contracts that exceed the prescribed threshold value are called off under a framework agreement or a dynamic purchasing system. The OGC's decision to implement this optional derogation means that the aforementioned mandatory set-aside by the courts of flawed decisions (see paragraph 3.2.3 above) will also apply to the call-off of specific contracts under a framework agreement or a dynamic purchasing system.

3.3.2 In situations where the courts are empowered to set aside a contract, two options were available: either a retrospective cancellation (i.e., annulment of *all* contractual obligations), or a prospective cancellation (i.e., annulment of future, unperformed contractual obligations only). The OGC decided *against* retrospective cancellation,[5] and has instead opted to implement the option for prospective cancellation only, which will have to be accompanied by the alternative penalties described at paragraph 3.3.4 below.

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4 In implementing the mandatory standstill period, the OGC had the option to extend the minimum standstill period prescribed by the New Remedies Directive, but the OGC concluded that the minimum standstill period did not have to be extended because such extension "*could detrimentally affect large numbers of straightforward procurements*".

5 It is to be noted that none of the respondents to the OGC's first round of public consultation supported the option for retrospective cancellation. Whether or not any of the other EU member states opts for this rather draconian option remains to be seen.

3.3.3 The option to grant the courts discretion not to set aside an illegally awarded contract, even in circumstances where the courts would otherwise be obliged to set it aside (see paragraph 3.2.3 above), if "*overriding reasons relating to a general interest require that the effects of the contract should be maintained*". Any courts that exercise this discretion must also apply the alternative penalties described at paragraph 3.3.4 below.

3.3.4 In addition to the power to set aside a contract, the new regime will provide for the option to enable courts to impose alternative penalties, namely "*the imposition of fines on the contracting authority*" and "*the shortening of the duration of the contract*", where the contracting authority fails to comply with procedural requirements of the new regime (e.g., standstill period, prohibition on conclusion of contract before the determination of outcome of a legal challenge). OGC decided that mere breaches of procedural rules do not warrant the draconian penalty of contract cancellation and only the alternative penalties of fines and/or contract shortening may be considered in such situations.[6] Here, it is to be noted that:

(a) these alternative penalties must be imposed where the Courts exercise the discretion to not set aside a contract even where it could be set aside (see paragraph 3.3.3 above);

(b) a fine to be imposed as an alternative penalty will have to be imposed in addition to any damages the courts may award to an aggrieved bidder, and cannot be substituted with an award of damages; and

(c) a fine has to be imposed as an alternative penalty *in addition to* prospective cancellation of contracts (see paragraph 3.3.2 above).

3.3.5 The option to impose a time limit on the making of the relevant application, where an aggrieved bidder seeks the mandatory set-aside of contract (see paragraph 3.2.3 above).[7] OGC decided to impose the minimum time limit prescribed by the New Remedies Directive, which is:

(a) 30 days following the publication of contract award notice;

(b) 30 days after the contracting authority notified the bidders of its final decision; or

(c) six months following the conclusion of the contract in question, where the contracting authority failed to publicise the award of contract or otherwise failed to notify the relevant bidders.

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6 Interestingly, this decision by the OGC is made in spite of the majority of the respondents to the OGC's first round of public consultation that preferred to give the courts discretion to decide the appropriate penalty to be imposed in cases of breaches of procedural rules under the new regime.

7 Where an aggrieved bidder does not seek the mandatory set-aside of contract, the member states are free to impose a time limit on the making of the application as they sees fit, provided that it is at least 10 or 15 days long (see 3.2.2(b) above). The OGC has not specifically dealt with this aspect of the New Remedies Directive, and therefore, the current position in the UK whereby an aggrieved bidder is required to make an application to the courts "*promptly and in any event within 3 months*" is basically going to remain the same, although it is worth noting that the draft regulations proposed by the OGC makes it clear that applications in such circumstances (i.e., where the bidder does not seek the set-aside of contract) need not be made within the 10- or 15-day period.

Court Rules on the Flexibility that Public Authorities are Required to give to Bidders who Do Not Comply with the Rules

Under UK and EU procurement rules, if a bidder a submits a tender that doesn't fully comply with the awarding authority's bid instructions, does the awarding authority have any discretion to admit that flawed tender? A recent decision by the High Court in England indicates that an authority does have such discretion, although it is not a discretion that the contracting authority is required to exercise, particularly where the cause of the non-compliance lies with the bidder. Authorities are within their rights to use even minor instances of technical non-compliance by bidders to reject otherwise valid tenders.

What is the case?

The case is *J B Leadbitter & Co Ltd v Devon County Council [2009] EWHC 930*, a decision made by the English High Court in respect of a claim brought by a building contractor, whose tender was rejected by the contracting authority on the basis that it was not properly submitted in accordance with the contracting authority's express instructions. The court held that the contract authority was within its rights to reject the incorrect tender.

Why is this case important?

The basic rules of the EU and UK public procurement regime require that a contracting authority must act in accordance with the principles of transparency, equal treatment, and non-discrimination. This means that a contracting authority has to apply its criteria for decision making strictly and equally to all bidders and, if it makes any exception, the contracting authority would be expected to grant the same exception equally to all bidders.

This case shows that these well-recognised rules are further augmented by the requirement that the contracting authority must act proportionately in making its procurement decisions. The proportionality principle manifests itself in a discretion to overlook some types of breach by bidders of the rules of individual procurements. So, a contracting authority may, in some circumstances, exercise its discretion to allow bids to stand even if they are technically non-compliant, e.g., by accepting a tender that is submitted after the prescribed deadline.

However, a bidder should not expect that a contracting authority is always obliged to exercise its discretion in respect of a non-compliant tender, particularly where a bidder has only itself to blame for the non-compliance. Authorities can stick tightly to the rules – and bidders must beware of any failure on their part to adhere strictly to those rules.

This case clearly shows that a contracting authority is not required to exercise any discretion it may have in such circumstances, as the requirement to act proportionally cannot override the requirement to treat all bidders equally in a non-discriminatory fashion and to act transparently. Authorities can, if they choose, continue to use apparently minor, technical non-compliance by bidders to reject tenders.

What happened in this case?

In July 2008, Devon County Council ("Devon") published a contract notice in the *Official Journal of the European Union*, inviting expressions of interest to tender for a four-year framework agreement under which construction projects could be procured by various public bodies in the South West of England. The framework was envisaged to have 12 participating contractors.

J B Leadbitter & Co Ltd ("Leadbitter") was one of the 25 contractors who expressed an interest in participating, and was duly invited to tender. The Invitation to Tender ("ITT"), which was issued in November 2008, included a number of express instructions:

- tenders had to include a minimum of four completed case studies;

- each tender, complete with any attachments, had to be submitted electronically by uploading them to the specified online portal;

- bidders had only one opportunity to complete the submission of their tenders, and the onus was on each bidder to ensure that all documents were correctly uploaded (the ITT, as well as the covering letter that accompanied it, made it clear that an incomplete set of documents would render a tender invalid);

- the deadline for the submission of the tender was noon on 16 January 2009 (which was subsequently extended to 3 p.m. for all bidders);

- if a material and genuine error was discovered during the evaluation, the relevant bidder was to be given the opportunity to confirm or correct the error in its tender; and

- if absolutely necessary, limited supplementary information (excluding any main element of the tender, such as the case studies) could be submitted in a prescribed manner prior to the deadline.

On 16 January 2009, Leadbitter submitted its tender around noon but, shortly before the revised 3 p.m. deadline, it realised that it had forgotten (due to an error on its part) to include the case studies in its tender. Unable to submit the missing case studies electronically, Leadbitter emailed the case studies to Devon, acknowledging that it was not in compliance with the ITT instructions, but nevertheless asking Devon to allow the case studies to be taken into account.

Devon refused to accede to this request, noting that if it did not enforce the requirements set out in the ITT, it would lay itself open to claims that it was not being fair and transparent. Leadbitter subsequently issued proceedings against Devon alleging, amongst other things, that there was a duty on Devon to act proportionately in making its procurement decision and that Devon acted disproportionately by refusing to waive the strict requirement for compliance with the ITT instructions and refusing to accept its case studies.

Devon sought to argue that there was no such duty because, whilst the EU Directive which underpins the UK procurement regime imposes an express duty of equal treatment, non-discrimination, and transparency on contracting authorities, the same Directive did not impose an express obligation on contracting authorities to act proportionately.

The court referred to a series of cases on this issue, and noted that any decision that a contracting authority makes in its procurement process is indeed subject to the principle of proportionality, as noted in a recital to the Directive, despite the absence of express reference to it in the operative terms of the Directive and the regulations implementing it in the UK.

The court then concluded that, since the strict requirements relating to the submission of tenders in this particular case applied equally to all bidders and that the requirements were clearly and well understood by Leadbitter itself, Devon was within its right to reject Leadbitter's tender because "*Fairness to all tenderers, as well as equal treatment and transparency, required that these key features should be observed*". Thus, if an authority is minded to exercise some discretion to act proportionately and overlook a bidder's technical non-compliance, it must do so equally, fairly, and transparently to all bidders.

The court accepted that "*There may be circumstances where proportionality will, exceptionally, require the acceptance of the late submission of the whole or significant portions of a tender*", but took the view that even if such a discretion existed, "*there is no requirement to do so, particularly where, as here, it results from a fault on the part of the tenderer*".

Morrison & Foerster

3 June 2009

Summary – Why MoFo?

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

Alistair Maughan, Partner and Chair of the Global Sourcing Group

Academic Background:

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

Years of experience in matters relevant to public procurement projects:

17 years experience.

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

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

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

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

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

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

Professional qualifications and/or recognition/awards and publications:

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

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