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HUGH JAMES

Public Procurement Update
September 2010

PUBLIC PROCUREMENT UPDATE

Legal and regulatory updates

Welcome to Septembers issue of the Hugh James Public Procurement Update

This month we will be considering the Uniplex judgment and the limitation period in the 2006 Regulations, some recent procurement and commercial contract cases and a brief look at the European Commissions comprehensive review of procurement legislation and an overview on the aggregation rules.

In team news, congratulations to Samantha Belsey who qualified into the team on 1st September as an assistant solicitor and welcome to Natalie Smith who has joined the team as a trainee solicitor. If you have any burning issues or areas that you would like us to focus on, please get in contact with one of the team and we will look to cover the topic in our next issue.

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In Focus

Uniplex decision and the limitation period in the 2006 Regulations

Regulation 47(7)(b) of the Public Contract Regulations 2006 (the “Regulations”) require that proceedings in the High Court must be “brought promptly and in any event within three 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”.

With the current climate giving rise to an increase in procurement challenges and the changes brought in by the new Remedies Directive, the question of when the limitation period starts to run has become more pertinent. On 28 January 2010, the European Court of Justice handed down a judgment on a reference for a preliminary ruling from the High Court of England and Wales, in relation to limitation periods for bringing challenges for breach of the public procurement rules (Case C-406/08 - Uniplex (UK) Limited v NHS Business Services Authority, judgment of 28 January 2010).

The Facts

NHS Business Services advertised for a framework agreement for the supply of haemostats to the NHS. Uniplex was an unsuccessful tenderer and began proceedings in the High Court for damages, on the grounds that NHS Business Services had breached the procurement rules. The High Court stayed the proceedings in order to refer several questions to the ECJ. The High Court requested clarification as to whether the limitation period provided for in the Regulations ran from when the tenderer knew or ought to have known that the procedure or award was in breach of the Regulations, or from the date of the actual breach. The High Court also requested guidance as to how it should apply the requirement for the proceedings to be brought promptly, and whether any discretion existed to allow an extension of the national limitation period.



The Judgment

The ECJ's view was that a tenderer was not in a position to bring proceedings merely on being informed that its application or tender has been rejected. Being informed that a tender has been unsuccessful does not provide adequate information to enable it to establish whether there has been a breach of the procurement rules. The unsuccessful tenderer can only form an opinion as to whether the procurement process has been carried out appropriately or not, once it has been told of the reasons for the tender being unsuccessful.

On this basis, the limitation period can only start to run on the date the claimant knew, or ought to have known, of the alleged infringement. This view was supported by the wording of the 2004 EU procurement directive and Directive 2007/66 (the new Remedies Directive) which provides that the decision of the contracting authority is to be communicated to each candidate or tenderer, accompanied by a summary of the relevant reasons and that the period for making an application for review expires only after a specified number of days following that communication.

The ECJ clarified that whilst it is appropriate to have a limitation period, as otherwise there would never be contractual certainty, such limitation must be in compliance with the requirements of legal certainty. The period should be sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations and must not make it impossible or excessively difficult to exercise the right.

The ECJ was of the opinion that the wording included in the Regulations gave rise to uncertainty because of the possibility that a court could dismiss a claim as being out of time even before the expiry of the three month period, if

it could be found that the action had not been brought "promptly". Additionally, the limitation period in England and

Wales was essentially at the discretion of the courts and therefore was not predictable. The ECJ consequently concluded that the EU Directive had not been effectively transposed into UK law.

The ECJ stated that it was for the national court to interpret the wording in the Regulations as far as possible in a manner which accords with the EU Directive, therefore:

- "the national court dealing with the case must, as far as is at all possible, interpret the national provisions governing the limitation period in such a way as to ensure that the period begins to run only 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;
- If the national provisions at issue do not lend themselves to such an interpretation, that court is bound, in exercise of the discretion conferred on it, to extend the period for bringing proceedings in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the limitation period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules.
- In any event, if the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying those provisions, in order to apply Community law fully and to protect the rights conferred on individuals by EU law."



Impact

In response to the ECJ judgment the UK has adopted new regulations to implement the 2007 Directive. These new regulations maintained the current requirement that challenges must be started promptly and in any event within three months beginning with the date when grounds for starting the proceedings first arose. However, the new regulations clarify that proceedings need not be started before the end of the standstill period introduced by the Directive.

Whilst the wording was not amended, it is clear that the courts should not apply the “promptly” requirement to exclude any actions that were brought within the stated three month period from when they knew or ought to have known about the alleged breach of the rules. The clarification is also of significance

as the approach previously taken by the courts was to consider the date on which the unlawful act occurred as the relevant starting date.

The Uniplex judgment was applied in the case of *Sita UK Ltd v Greater Manchester Waste Disposal Authority*, reported in our last procurement newsletter. In this case the High Court struck out a challenge to a public procurement procedure. Greater Manchester WDA successfully argued that an action for damages brought by an unsuccessful bidder had been brought outside the three month time limit from when it knew or ought to have known that there had been an alleged infringement of the procurement rules, and concluded that there was no reason for the court to exercise its discretion to extend the time limit.



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Case Law Update

Montpellier Estates v Leeds City Council [2010]

This recent interim hearing involved an application on the part of the Authority to strike out certain aspects of Montpellier Estates' particulars of claim in respect of Montpellier's claim against Leeds for breach of the Public Contracts Regulations 2006.

Montpellier claimed to have been treated unfairly by the local authority in relation to the authority's procurement to locate and develop a site for a concert arena and related facilities.

Whilst this was only an interim hearing and there is still a long way to go in this matter, the judgment is worthy of note as the judge re-affirmed the possibility of a public body having breached an implied contract, even in situations where there has been no breach of the procurement regulations.

Whilst the judge did not rule on the legality of the way in which the Authority terminated the procurement, the judge did confirm a public authority's wide discretion to terminate a procurement process.

[Find out more](#)



Lobster Group Ltd v Heidelberg Graphic Equipment Ltd & Another [2009]

In this case the High Court considered whether a number of exclusion clauses included in certain agreements relating to the hire of a printing press were enforceable and reasonable under the Unfair Contract Terms Act 1977.

In arriving at this decision, the judge took into account various factors including insurance held by the Customer in respect of these types of losses, the fact that Lobster Group originally intended to purchase the equipment rather than hire it and the business experience of the parties.

Whilst the outcome of this decision may not have gone entirely Lobster's way, it does limit the effect of certain exclusion clauses and provides a much more favourable attitude towards the customer. Parties should be aware that it will generally not be considered reasonable to exclude the implied term of satisfactory quality, and a party can not provide for repair or replacement to be the only remedy if goods are not of satisfactory quality. Customers must be able to claim for any losses incurred in the event the supplier fails to repair or replace the equipment.

[Find out more](#)

Graeme Grant v Russell Bragg [2009]

The Court of Appeal considered the High Court's decision in this case, which concerned whether a contract which was never signed could still be enforced. The case involved a dispute regarding the enforceability of a shareholders agreement buy-out which had been triggered following one party's long absence from work due to sickness.

Following a chain of events and correspondence between the parties, the High Court had said that the email exchange formed a contract that bound the parties, even though neither of them had signed the document itself and the original intention was that the contract would be signed.

The Court of Appeal overturned the decision of the High Court, establishing that the first instance judge had erred on the facts.

Despite the Court of Appeal finding that the unsigned contract was unenforceable and not therefore legally binding, this case highlights that individuals negotiating a contract must still be cautious and ensure that any communications between the negotiating parties prior to signature could not create a legally enforceable agreement.

[Find out more](#)

Legislation and Policy Update

Insolvency news flash

A recent high-profile insolvency of Connaught Plc with significant public sector contracts may be a timely reminder of the need to consider including insolvency clauses in commercial contracts. The main points to consider are the ability to terminate a contract on the other party's insolvency and whether it is possible to secure any outstanding sums or obligations.

Dealing first with termination, contracts do not terminate automatically on the liquidation or administration of the other party unless there is a provision in the contract to that effect. When negotiating, a party should consider whether there should be an automatic termination provision or whether insolvency should constitute an event of default, which would entitle the other party to terminate. One or the other should invariably be included.

The second point in relation to securing outstanding sums or obligations may be harder to negotiate. Contracting parties who are requested to provide security such as a bond or bank guarantee of their obligations will usually resist the request, but these are preferable in most cases to parent company indemnities since the insolvency of a major trading company will often bring down the whole group. To avoid being an unsecured creditor, which usually means no recovery or pennies in the pound, the best time to request or demand security is at the outset rather than a long way down the line when other creditors may be pressing.



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Overview of the Aggregation Rules

The aggregation rules exist to prevent public bodies splitting up their purchases into separate contracts in order to evade the application of the public procurement rules. Whilst in principle, the relevant value for threshold purposes is the value of each individual contract, in certain situations a public body has an obligation to add together the value of separate purchases to determine if the relevant threshold has been met.

The aggregation rules apply to contracts which have “similar characteristics” and are for the same “type” of goods or services. In determining which contracts have similar characteristics, the appropriate test to consider is whether the same providers would be likely to be interested in the contracts. When considering whether goods or services are of the same type, this probably is the case if the goods or services are available from the same supplier or service provider.

In accordance with Reg 8 (13) Public Contracts Regulations 2006, public bodies will need to consider the aggregation rules whenever they intend to procure goods or services via a series of contracts, or pursuant to one contract which is stated to be renewable (renewals are treated as a series of separate contracts for the purpose of the aggregation rules).

The aggregation may be calculated in one of two different ways. The first method is to take the aggregate of the value of the consideration payable under the contracts during the previous year (either the last financial year or the 12 month period immediately preceding the date of the OJEU notice) and by adjusting that amount to take account of any expected

changes in quantity and cost of the goods to be purchased or hired or services to be provided. This method can therefore only be used where the authority has procured the same goods or services previously.

The second method is to estimate the aggregated value which the contracting authority expects to be payable in the period of 12 months from the first date of the delivery of the goods to be purchased or hired, or in the case of public services contracts, from the first date on which the services will be performed; or the financial year if that is longer than 12 months. For any contracts which are of a definitive term of more than 12 months, the authority must aggregate the value of the consideration during the whole period of the contract, not just the first 12 months.

Which of these two methods is to be used is a matter for the authority; however the authority should not use this choice in method to intentionally avoid the application of the regulations.

It is recognised that in some situations it is extremely difficult for authorities to determine the exact volume of goods or services it will require over a given period. However, authorities should scrutinise their planned procurements to assess whether similar requirements is likely to be needed in the near future, and therefore should be aggregated to ensure the procurement rules are not breached.



European Update

In April of this year, the European Commission announced in its Single Market News publication that it was undertaking a comprehensive review of EU procurement legislation amid concerns that the legislation is inflexible, inadequate to address the financial concerns of local authorities throughout Europe, and in need of modernisation to better allow for the transition to e-tendering and new methods of financing or delivering public infrastructures.

The Commission stated “this evaluation, to be completed in spring 2011, will examine the effectiveness of EU rules in promoting open, contestable and sound procurement.” The review will also seek to clarify how contracting authorities can take into account environmental, social or other policy considerations when awarding contracts. The Commission insisted that any eventual adjustments “should not come at the expense of transparent and contestable procurement markets. These principles have served us well so far and should remain the cornerstones of EU procurement policy.”

In an attempt to influence the outcome of the above review, the European Parliament Committee on the internal market and consumer protection commissioned a report by Heide Ruhle (The Ruhle Report) which comments upon new developments in public procurement and their impact upon the public procurement regime. The report highlights that “the European public procurement directives are reducing the scope for action and making the process of awarding contracts slower and more costly.”

Whilst the report calls for the Commission to address “the legal and practical shortcomings in the way the directives have been transposed into national law” and the legal uncertainties, the report does not advocate any immediate legislative changes to the directives for two main reasons. Firstly, the recent transposition of the Remedies directive means its practical impact upon public procurement can not yet be assessed. Secondly, the financial crisis being faced by Member States and the financial implications which will flow down to public bodies as a result of the fiscal environment means any changes will only create further uncertainty and delay at a very difficult time.



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