Contractors – qualification criteria for European public sector projects

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A. INTRODUCTION

1. As recently as 1990, under English law clients appeared to have almost unlimited power in the conduct of tendering exercises for the letting of contracts.

   - The client/owner might simply withdraw from the project altogether, with or without explanation or might significantly amend the specification.
   - The owner might reject any tenderer, or all of them, on any criterion or none. The lowest bidder might be ignored, with or without reason. Some tenderers could even receive preferential treatment, including assistance.
   - Contractors were regarded as being largely without protection in the tendering process. They could be exposed to high costs and arbitrary decision-making without obvious remedy, beyond refusal to participate in future exercises.

2. At the beginning of the 1990s, important legal changes occurred, which have continued to develop up to the present time. They can be summarised in the form of two strands:

(1) Tender Contracts

3. In *Blackpool Aero Club v Blackpool Borough Council* [1990] 3 All ER 25, noting that the tender procedure was "heavily weighted in favour of the invitor", whereas the tenderer is commonly "put to considerable labour and expense in preparing a tender, ordinarily without recompense if he is unsuccessful", the court proposed a minimum level of protection for the contractor. The basis of this protection was the tender contract, described by the court as "a contractual duty to consider".

4. So in the early 1990s, the editors of the Building Law Reports were able to state that "a party which submits a competitive tender for public works has some protection. A tenderer whose offer is in due form is entitled, not as a matter of expectation but of contractual right, to be sure that his tender will be opened and considered with all other conforming tenders, or at least that his tender will be considered if others are". (*Fairclough v Borough Council of Port Talbot* (1992) 62 BLR 86).

5. This was a modest level of protection referring solely to the mechanics of procedure, but in the last 17 years, the law on tender contracts has developed. For example, in the case of *Harmon v House of Commons* (1999) 67 Con. L.R. 1, the Judge considered that it was now clear in English law that in the public sector, where competitive tenders are sought and a response received, an implied contract comes into existence whereby the prospective employer agrees to consider all tenders fairly.

(2) European Procurement Regulations

6. Coincidentally, at about the same time as these common law developments were beginning in the English courts, Parliament was enacting a raft of subsidiary legislation in the form of Regulations, implementing European Union Directives on

works contracts, supplies contracts and services contracts in the public sector. The main components were:

- The Public Works Contracts Regulations 1991
- The Public Supply Contracts Regulations 1991 and 1995
- The Utilities Supply and Works Contracts Regulations 1992
- The Utilities Supply and Works Contracts (Amendment) Regulations 1993
- The Public Services Contracts Regulations 1993
- The Utilities Contracts Regulations 1996.

7. The purpose of the Directives and thus the Regulations was to create a framework of objective, non-discriminatory criteria and procedures for the award of public sector contracts. The Regulations were to be enforced through the provision of remedies under the Remedies Directives. These comprise both non-financial remedies, prohibiting breach of the Regulations, and financial remedies, offering the prospect of compensation for a party suffering loss through breach.

8. This regime has been further developed, notably by the 2006 implementation of the latest EU directives, now considered in more detail.

B. THE 2006 REGULATIONS – THE UK EXPERIENCE

9. The latest European Directives (nos. 17 and 18 of 2004) have been implemented in the UK by:

- The Public Contracts Regulations 2006; and
- The Utilities Contracts Regulations 2006.

These Regulations apply to tenders commenced on or after 31 January 2006 and take the place of the previous Regulations, which dealt separately with the 3 categories of contracts (works, services and supply). Different considerations continue to apply to the different types of contract: e.g. different thresholds for the application of the Regulations; and some services contracts only attract part of the regime in the Regulations. Utilities contracts continue to be dealt with separately from public contracts.

Procedures and contract award

10. Under the Regulations, there are 4 procedures for selecting a contractor to whom to award a contract:

(1) Open procedure.
(2) Restrictive procedure.
(3) Negotiated procedure.
(4) Competitive dialogue.

All 4 procedures apply to public contracts. Only the first 3 apply to utilities contracts. However, a utility has a free choice whether to use any of the first 3 procedures, whereas a contracting authority under the Public Contract Regulations can only use the third and fourth procedures in certain limited circumstances.

11. The new competitive dialogue procedure can only be used for particularly complex contracts which are defined as contracts where the employer is not objectively able to (a) define the technical means capable of satisfying its needs or objectives; or (b)

specify either the legal or financial make-up of a project or both; or (c) achieve the requirements of both (a) and (b). Under this procedure, the employer conducts a dialogue with the tenderers with the aim of developing one or more alternative solutions capable of meeting its requirements. It is possible to limit the number of tenderers participating in the competitive dialogue to three.

12. Under previous Regulations in the UK, the negotiated procedure was frequently used for the procurement of PFI contracts. However, the competitive dialogue procedure has now taken over from the negotiated procedure for PFI contracts. The advice from the Commission and, internally, from the Office of Government Commerce, has been that the negotiated procedure should now only be used in exceptional cases and that the use of the competitive dialogue procedure needs to be justified. In the UK, the new procedure has already been used, for example, in relation to the Olympics. There is a concern, however, that it may lead to higher bid costs than other procedures.

13. The Regulations deal with certain steps in the operation of each procedure, although the detail differs between the 4 different types of procedure. Key steps in which there have been recent developments include:

- Evaluation of tenders and award of the contract.
- Notifying the award of the contract.

Evaluation of tenders

14. There are 2 possible bases on which tenders can be evaluated under the Regulations:

(1) Lowest price.

(2) Most economically advantageous offer.

The principles of transparency, non-discrimination and equal treatment must be applied to the evaluation of tenders.

15. The Regulations set out a non-exhaustive list of criteria which an employer may use to determine which offer is most economically advantageous. The criteria must be identified in the contract notice or tender documents, must be linked to the subject matter of the contract and be objective. They include:

- Quality.
- Price.
- Technical merit.
- Aesthetic and functional characteristics.
- Environmental characteristics.
- Running costs.
- Cost effectiveness.
- After sales service and technical assistance.
- Delivery date.
- Delivery period and period for completion.

16. Employers often apply weightings to the different criteria they use to award the contract. So, for example, if there are 4 criteria: price, technical merit, quality and delivery period, the weightings could be price (40%), technical merit (30%), quality

(20%) and delivery period (10%). An important development in the new Regulations relates to weightings. Under previous Regulations, the criteria had to be disclosed, where possible in descending order of importance. The extent to which weightings were required to be disclosed to the tenderers was not clear, although there was some ECJ caselaw on the position. Under the new Regulations, the position is slightly clearer in that the contracting authority must either state the weightings, or state a range of minimum and maximum weightings. In limited cases, if it is not possible to do this, the criteria must be listed in descending order of importance.

Notification of contract award

17. Once a decision has been made, using the criteria identified in the contract notice/tender documents, the tenderers must be notified of the decision. The notice to each tenderer should include the criteria for the award of the contract, the scores obtained by the successful tenderer and the tenderer to whom the notice is sent and the name of the successful tenderer.

18. The contract cannot be awarded for 10 days after sending the notice. This "standstill period" has been introduced as the result of the ECJ decision in decision in Case C-81/98 *Alcatel* [1999] ECR I-7671 and is to allow unsuccessful tenderers the opportunity to challenge the decision before the contract is awarded. An unsuccessful contractor who believes that the procedures have been breached, and that it should have been awarded the contract or that it has lost a real chance of being awarded the contract, can apply for an injunction in the UK courts to prevent the contract being awarded. Once the contract has been awarded, the only remedy a disappointed contractor has is damages.

Claims by unsuccessful tenderers

19. Contracting authorities and utilities owe a duty to comply with the Regulations and other enforceable Community obligations to unsuccessful tenderers or contractors who would have liked to tender. A disappointed tenderer, who believes that it was not awarded the contract as a result of a breach or breaches of the Regulations and/or principles of European law, may make a claim against the contracting authority/utility by starting proceedings in the High Court.

20. The case of *Harmon v House of Commons* (1999) 67 Con. L.R. 1 was an extreme example of a tender process which breached the Regulations. The tender was for windows for a new parliamentary building in London; the contract was awarded to a UK owned contractor. Breaches established included:

(1) Failure to identify the relevant criteria for contract award or to set out their order of importance.

(2) Entering into post-tender negotiations with the ultimately successful contractor.

(3) Encouraging, or permitting to continue, a policy that the contract should be awarded to a UK owned contractor.

(4) Applying arbitrary methods to favour the ultimately successful contractor at the expense of Harmon.

21. There are essentially two types of claims which an unsuccessful tenderer may make:

- Injunction.
- Damages.

Time limits

22. A key prior issue, however, is the question of time limits. There are 2 important time limits for claims made for breach of the Regulations.

3 month limit

23. The Regulations provide that proceedings must be brought:

> *"……promptly and in any event within 3 months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period within which proceedings may be brought."*

This can cause difficulty, since grounds for bringing proceedings may arise long before the contract award decision is notified. For example, the grounds may include a failure to identify the criteria or a change in the tender procedure which took place months before completion of the tender process. The date on which the grounds arise is unaffected by the tenderer's knowledge of the grounds. However, his knowledge will be relevant to his right to an extension of time. A Judge has a discretion whether to grant an extension of time: factors will include the length of and reasons for delay; the extent to which each party is to blame for any delay; and whether the defendant has been or will be prejudiced by the delay or grant of an extension of time. The English Courts have taken a fairly strict approach to these issues: see e.g. *Matra v Home Office* [1999] BLR 112 CA; *Jobsin.co.uk v Dept of Health* [2001] Eu LR 685 CA; *BSF Group Ltd v Secretary of State for Defence* [2006] AER (D) 274.

10 day period for interim injunctions

24. In addition, if an unsuccessful tenderer wants to apply for an interim injunction (to prevent the award of the contract pending the full hearing of its claim by the Court), it has 10 days from the date of notification of the employer's decision on contract award to commence Court proceedings. Once the contract has been placed, a losing tenderer's only remedy is damages. It is then too late for it to force the employer to re-open the tender process and give it another chance to win the contract. The position under the old Regulations was that a losing tenderer might not find out that it had lost until the contract had already been placed elsewhere. The ECJ was unhappy about this and, as a result of the decision in Case C-81/98 *Alcatel* [1999] ECR I-7671, a mandatory 10 day standstill period was introduced between notification of the decision to award the contract and the actual award of the contract. This period is now included in the 2006 Regulations and allows the losing tenderer the opportunity to challenge the decision by seeking an interim injunction preventing the award of the contract, if necessary. However, even if the tenderer does bring proceedings for an injunction within 10 days of the notification, it may still be outside the 3 months time limit referred to above and therefore have no remedy: see e.g. *BSF Group Limited* [2006] AER (D) 274.

Injunctions

25. As set out above, after a tenderer has been notified that it has not been awarded the contract, it has a 10 day period in which to decide whether to apply for an injunction to prevent the contract being awarded to the successful tenderer. In order to decide whether or not to bring a claim, the tenderer will need as much information as possible about the evaluation process. The notification of the decision must include information about the losing and winning tenderers' scores. Employers often also hold de-briefing meetings with unsuccessful contractors. In addition, there are provisions in the Regulations enabling the losing tenderer to obtain further details within the 10 day period about the characteristics and relative advantages of the successful tender. A disappointed tenderer may also wish to make a request for information under the Freedom of Information Act 2000.

26. It is not always easy to obtain an injunction. It is necessary to show that the claim is a reasonable one: see e.g. *BSF Group Limited,* in which an injunction was not granted, the Judge having described some of BSF's complaints about the tender process as "at best, weak"; also in *DeVilbiss Medequip Ltd v NHS Purchasing and Supply Agency* [2005] EWHC 1757, the Court refused an injunction on the basis that there was no serious case to be tried. Recently in the UK, the Courts considered the granting of an injunction where inadequate information had been provided by the employer at and after contract award, so that the contractor was unable to assess the extent of any breaches of the Regulations: *Rapiscan Systems Limited v Commissioners of HM's Revenue and Customs* [2006] EWHC 2067.

Damages

27. If the losing contractor does not apply for or does not obtain an injunction, he may still have a claim for damages. The usual claims made as a result of defects in a procurement procedure are for:

    (1) Wasted tender costs; and

    (2) Loss of profit on the lost contract.

28. The principles applicable to damages claims were considered in the *Harman* case. If a tenderer can show that it would/should have been awarded the contract, if the breach had not been committed, it will be awarded its wasted tender costs and any loss of profit it can prove it would have made. In some factual situations, it may be easy to show that the disappointed contractor would/should have won the contract e.g. if the award criterion is lowest price or if there were only 2 contractors and one was unfairly eliminated. This was the case in the recent Northern Irish decision (not a case to which the Regulations applied) of *J&A Developments v Edina Manufacturing* (2007) CILL 2417.

29. In other situations, however, a tenderer may only be able to show that it has lost a chance of being awarded the contract. In this case, the award of damages will be made on the basis of English "loss of a chance" cases: see the *Harmon* case which referred to *Allied Maples Group Ltd v Simmons & Simmons* [1995] 4 AER 907, Court of Appeal. In order to succeed in an award of damages, the lost chance must be *"a real or substantial chance as opposed to a speculative one"*. As the Judge said in the *Harmon* case:

"....potential claimants..could not merely establish an infringement in order to recover the cost of preparing a bid or of participating in an award procedure where they would never have been runners in the race at all. Otherwise, a contracting authority who slipped up and had to compensate someone who had a real chance of being awarded the contact would also have to compensate all the other tenderers."

In relation to loss of profit, the Judge in the *Harmon* case considered that it was necessary to consider both Harman's chances of winning the contract and the probability of it recovering all its anticipated profit. He considered that Harman had had a 70% chance of winning the contract. He considered that the probability of the profit being earned if Harman had won the contract was 50%, taking into account the risks and hazards inherent in construction work. He therefore assessed the loss of profit claim at 35% of Harman's total anticipated profit.

C. CONCLUSION

25. The law on procurement through tendering in the public sector has come a long way since 1990, mainly through the implementation of European Directives, but also through common law developments. As a result of the European Directives:

- Specified procedures have to be followed, although the new competitive dialogue procedure offers a degree of flexibility necessary for complex projects, such as those which are funded by PFI.
- The criteria by which tenders are judged are transparent, objective and are applied equally between tenderers.
- The intention is to promote fair competition in the public interest. This has restricted the extent to which long-term relationships can be built up, as happens through the partnering process in the private sector, although framework agreements make it possible for arrangements of up to 4 years to be put in place governing how contracts will be awarded as between public sector client and a contractor.
- Contractors are entitled to know what criteria will be utilised and what is meant by award criteria such as "most economically advantageous".

30. In a recent appeal case from New Zealand heard by the Privy Council in London, *Pratt Contractors v Transit New Zealand* [2003] UK PC 83, it was held that the Tender Evaluation Team was entitled to take into account "a history of involving costly litigation procedures" in deciding against a controversial contractor tendering for a highways project. Under the European regulatory regime, such a subjective consideration, not advertised as a criterion, would be very eligible for challenge.

31. Ultimately, public sector clients under English law have to observe the criteria and procedures established. They do so not merely because of a desire to promote free competition and transparency, but because the contractors who submit tenders for their projects now have power. They have common law rights under tender contracts and they have specific remedies, both financial and non-financial for breach of European regulations. The experience in the English legal system has been that contractors can rely upon a fairer process, while ensuring that process continues to provide a challenge for public sector clients.