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"Case Law Update: a Resume of the Most Significant Cases on Procurement"

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1. Most cases under the procurement Directives and Regulations have been brought by the Commission. There are very few private actions, probably for the following reasons:
   i) Cost – quite a few potential causes of action would involve witness trials; loss of speculative profits not necessarily large, nor seen as an imperative for litigation
   ii) Fear of blacklisting by contractors, not just by the contracting authority concerned, but in the relevant industry generally;
   iii) Proof of the certain loss of the contract difficult: "MEAT" very discretionary;
   iv) Proof of "risk of loss" in respect of earlier breaches easier but damages low and/or uncertain;
   v) Injunctive relief largely pointless: claimant unlikely to win or want to win a retender;
   vi) Time bar provides (increasing) difficulties, particularly for contractors unfamiliar with the remedies provisions.
2. The cases brought by the Commission tend to reflect policy issues rather than the specific issues of relevance to tenderers or contracting authorities. Typical Commission cases include proceedings brought for the failure to advertise a procurement altogether, and the failure of a Member State to implement the Directives adequately or at all. Frequently these are flagrant breaches, the judgments shedding no light on the many difficult areas which arise in practice.
3. Three of the issues of current interest are excluded from this paper because they have been covered earlier in the conference: (i) remedies (limitation period and damages) (ii) definition of a contracting authority (iii) the application of the provisions for thresholds. I have also not considered the provisions relating to the rejection of abnormally low tenders

General principles

4. The underlying purpose of the Directives is the opening up tendering throughout the Community NOT

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delivering cheaper procurement to the public sector, or otherwise improving its efficiency. The latter may be regarded as a beneficial outcome, and the application of the Directives and Regulations are probably regarded as an important tool by government in delivering such efficiencies. However it is important to bear the distinction in mind in considering the law and the authorities, which clearly reflect this distinction.

5. The central underlying principle of the Directives was expressed by the Court in Case C-243/89 *Commission v Storebaelt* ([1993] ECR I-3353, paragraph 33):

"On this issue, it need only be observed that, although the directive makes no express mention of the principle of equal treatment of tenderers, the duty to observe that principle lies at the very heart of the [works] directive whose purpose is, according to the ninth recital in its preamble, to ensure in particular the development of effective competition in the field of public contracts and which, in Title IV, lays down criteria for selection and for award of the contracts, by means of which such competition is to be ensured."

This represents a useful reference for the otherwise elusive underlying requirement of "fairness" in the Directives (Article 4(2) of the Utilities Directive provides for the application of a general principle of non-discrimination). Other useful cases on general principles include: Cases C-27/28/29/86 *CEI v Autoroutes des Ardennes* (Bellini) [1987] ECR 3347; Case C-31/87 *Beentjes v Netherlands* [1988] ECR 4635; Case C-87/94 *Commission v Belgium* (Walloon buses) [1996] ECR I-2043;

Aspects of "fairness"

6. There have been a number of examples of "fairness" between tenderers explored in the authorities. It may also be relevant to look at "fairness" in tendering cases which have been the subject of judicial review, for example *Camelot* (see below). The following represents a rather approximate classification of some public procurement cases relating to the concept of "fairness".

Discrimination on grounds of nationality:

7. Discrimination on grounds of nationality goes to the heart of the Directives' purpose so it is not surprising that the Commission has taken a number of cases on this point. These cases all represent obvious cases of discrimination, except, perhaps, *Dundalk*: Case 45/87 *Commission v Ireland* (Dundalk) [1988] ECR 4929 which considers the extent to which a contracting authority must consider non-national specifications (Irish water pipes were specified according to local standards which measured the external diameter, all other European pipe standards refer to internal diameter). Also Case C-31/87 *Beentjes v Netherlands* [1988] ECR 4635 – the employment of the long-term unemployed could be discriminatory if it could only be satisfied by contractors of that member State;

8. See also the following cases where the Court found discrimination: Case C-243/89 *Commission v Storebaelt* [1993] ECR I-3353 (Danish content to be taken into account); Case C-21/88 *Du Pont de Nemours* [1990] ECR I-889 (regional preference); Case C-272/91 Commission v Italy (the lottery) [1994] ECR I-1409 (tenderers for the lottery must be publicly owned); Case 360/89 *Commission v Italy* [1992] ECR I-3401 (preference given to tenderers with offices in the region); Case 3/88 *Commission v Italy* [1989] ECR 4035 (tenderers must be government owned); *Fagtun v Byggingarnefnd Borgarholtsskola* [1999] 2 CMLR 960 (Icelandic roofing materials to be used); Case 76/81 *Transporoute v Minister of Public Works* [1982] ECR 417 (establishment permit in contracting state required); Case C-225/98

Commission v France [2000] ECR I-7445 (local suppliers favoured); *Harmon Facades v Corporate Officer of the House of Commons* 67 Con LR 1 (UK firm favoured).

Discrimination in technical specifications:

9. The avoidance of discrimination in technical specifications is as important to the Commission as discrimination on grounds of nationality as it generally has the same effect. *Dundalk*, although not decided on "procurement" grounds, also provides some useful principles relating to how far a contracting authority must go in considering alternative technical specifications: In Case C-359/93 *Commission v Netherlands* [1995] ECR I-157 the operating system for a meteorological station operating system was described as "UNIX" without "or equivalent" (the fact that the Commission had similarly advertised a procurement of its own was no defence!): In *R v Avon CC ex p Terry Adams* ([1994] Env LR 442), CA (not a public procurement decision) the Council could not manipulate the tender specifications to favour one contractor over another.

The use of the negotiated procedure without advertisement.

10. There has been a tendency amongst contracting authorities to fail to appreciate the importance of the distinction between the negotiated procedure with and without advertisement. Only the latter automatically and seriously deprives other contractors from the possibility of obtaining the work. I know of no case in which a contracting authority has succeeded in winning a case in which their use of the procedure without advertisement has been the subject of proceedings. On the other hand although there has been much criticism of contracting authorities for using the negotiated procedure (*with* advertisement), rather than the restricted procedure, this has not led to litigation.

Urgency

11. The Directives provide that advertisement may be avoided on grounds of urgency only when the urgency is "unforeseeable", not merely "unforeseen", however inconvenient the outcome (and the outcome often has been demonstrated to be extremely inconvenient and costly): student buildings would not be ready in time if advertisement required: Case C-24/91 *Commission v Spain* (*Madrid University*) [1992] ECR I-1989; urgent need for incinerators foreseeable – no account taken by the court of resultant health risk: Case C-24/91, *La Spezia* 194/88R ECR [1988] 5467; there must be a causal link between the unforeseen events and the urgency: Case C-318/94 *Commission v Germany* (River Ems) [1996] ECR I-1949.

Technical grounds

12. In Case C-57/94 *Commission v Italy* (Ascoli-Mare) [1995] ECR I-1249 "technical reasons", other grounds for the use of the negotiated procedure without advertisement, did not include the management difficulties of awarding a subsequent construction phase to a different contractor.

Change in specifications during the procurement procedure:

13. The Commission has been remarkably reluctant to take any cases on this frequently occurring point to the Court. Practitioners have assumed that changes in the specifications *are* permitted if they are provided equally to all tenderers and if they would not have affected the list of those who would have responded in the first place. It is probably fair to say that this advice is based on the fact that it prevents any cause of action arising, as no party can show a loss, rather than because it is a proper interpretation of the Directive. Some Commission and judicial support for

this approach is, however, to be found in Case C-243/89 *Commision v Storebaelt* [1993] ECR I-3353.

Change of procedure not permitted after advertisement

14. Sometimes a restricted procedure is used when the negotiated procedure would have been more appropriate. In Case C-87/94 *Commission v Belgium* (Walloon buses) [1996] ECR I-2043 no change was permitted, even though the utility would have been free to use the negotiated procedure. Not surprisingly, though, a contracting authority or utility is not bound to follow the procedures when it purports to be doing so if it was never bound by them in the first place: Case 45/87 *Commission v Ireland (Dundalk)* [1988] ECR 4929 but see *Telaustria*, in which a contracting authority was still bound at least to advertise a procurement even if it was not covered by the Directives (*Telaustria v Telekom Austria* [2000] ECR).

Information required at the first stage of a restricted or negotiated procedure.

15. The Directives set out the type of information that may be requested of tenderers with a view to excluding them or, by implication, deciding on their suitability for the next round. Careful reading of the Directives shows that the categories are not limited to those actually set out (as confirmed in Cases C-27/28/29/86 *CEI v Autoroutes des Ardennes* (Bellini) [1987] ECR 3347). This is a difficult area. Obviously any conditions which discriminate on grounds of nationality must be excluded.

Information which has been held to be acceptable:

16. Information as to the total work a contractor could manage at any one time: Cases C-27/28/29/86 *CEI v Autoroutes des Ardennes* (Bellini) [1987] ECR 3347; previous experience; technical capacity: Case C-31/87 *Beentjes v Netherlands* [1988] ECR 4635; health and safety standards: *General Building & Maintenance v Greenwich LBC* Times March 9th 1993; sales over the past three years: Case C-362/90 *Commission v Italy* [1992] ECR I-2353.

Information required of tenderers held to be unacceptable:

17. A proportion of sales to public authorities over the past three years: Case C-362/90 *Commission v Italy* [1992] ECR I-2353

Information withheld from tenderers

18. Refusal to provide information on the availability of council facilities in a contract for waste collection until after award unfair (by comparison to the position of the direct labour force's own tender). The decision was not intended to limit the Council's right to choose the most economically viable bid: *R v Secretary of State for the Environment ex p Bury* [1998] 2 CMLR 787.

There must be no post-tender negotiations:

19. This is another difficult area in respect of the negotiated procedure, where typically negotiations continue with a "preferred contractor". There are no authorities directly on this point. However, information and clarifications requested from one tenderer were held unlawful after submission of tenders: Case C-87/94 *Commission v Belgium (Walloon buses)* [1996] ECR I-2043;: Commission not obliged to seek to correct an obvious arithmetic error in a tender – it could have led to a change in the substance of the tender, although correction of obvious errors not necessarily unfair: Case T-19/95 *Adia v Commission* ECR II-321 (a judicial review); changes to the specification after tendering which gave the in-house team an advantage not unfair since such

changes were contemplated in the invitation to tender, but the removal of some work was. Nor did the changes amount to negotiations rather than clarification: *Resource Management Services v Westminster City Council* [1999] 2 CMLR 849.

Information to be given to unsuccessful tenderers after award:

20. This is an important area as it provides most of the evidence on which proceedings are likely to be brought: Case T-19/65 *Adia v the Commission* [1996] ECR II-321 (a judicial review in which the Court declined to comment on similarity with public procurement provisions; limited detail was sufficient for Adia to work out that a systematic error in the tender was the cause of the loss of the tender); Case C-359/93 *Commission v Netherlands* (UNIX) [1995] ECR I-157.

"Most economically advantageous tender"

21. The application of the criteria rarely offer scope for complaint. A difficult area is the application of measures offering social benefits, particularly local employment. The application *may* include a calculation of the effect on the contracting authority of redundancy costs – "objective", and not discriminatory even if different tenderers differently affected (*R v Portsmouth City Council ex p Bonaco,* HC, 6th June 1995); reliability and continuity of supply: Case C-324/93 *R v Home Department ex p Evans* [1995] ECR I-563, [1995] All ER 481.
22. Criteria *may not* include suitability for a subsequent contract: restricting tenderers for a housing maintenance contract to those to whom the housing stock may be transferred at a later date was not relevant in deciding the award of that contract. Similarly breaking the contract into smaller units in anticipation of such a transfer not lawful – it could discourage some larger tenderers and the attainment of economies of scale: *R v Home Office ex Harrow* [1996] 2 CMLR 524, Times 16th January 1996.
23. *Changes to the award criteria:* changes are probably alright if all tenderers treated fairly: Case T-126/95 *Dumez* [1995] ECR II-2863, Case C-87/94 *Commission v Belgium* (Walloon buses) [1996] ECR I-2043.
24. *Criteria must be stated:* post tender negotiations with one tenderer introduced new possibilities denied others Case C-87/94 *Commission v Belgium* (Walloon buses) [1996] ECR I-2043; if no criteria stated, then "lowest price" must apply: *R v Portsmouth City Council ex p Bonaco* 81 BLR 1, 59 Con LR 114, [1997] CLC 407 (CA) and *Resource Management Services v Westminster City Council* [1999] 2 CMLR 849.
25. *Tenders cannot be accepted which do not meet minimum criteria*: winning tenderer submitted a bid for a bridge on the basis of a different form of construction: Case C-243/89 *Commision v Storebaelt* [1993] ECR I-3353.
26. *Tenderer has no claim if successful tenderer cannot legally fulfil contract:* the contracting authority is not obliged to check whether the tenderers can lawfully fulfil their contracts: Case T-139/99 *Alsace cars v European Parliament* [2000] ECR II-2849.

Does the contracting authority have to award a contract if there is at least one conforming tender?

27. The procurement regime does *not* require a contracting authority to proceed with a procedure and award a contract to a clear winner (although it may have to as a matter of contract law – see below): Case T-203/96 *Embassy Limousines v European Parliament* [1998] ECR II-4239. The contracting authority can always annul the procedure; any exclusion of a contractor which would have been unlawful under the first procedure cannot assist claimant in winning the new procedure. If there is only one conforming tender it can be rejected: Case C-27/98

Metalmeccanica vAmt der Salzburger Landregierung [1999] ECR I-5697], BUT see judgment awaited in Case C-92/00.

Whether a contract is for works/services/supplies

28. Whether works or services: Case C-331/92 *Gestion Hotelera v Canarias* [1994] I-ECR 1343; whether Part A or B services: Case C-76/97 *Togel* [1998] ECR I-5357; concessions for services not covered: Case C-324/98 *Telaustria Verlags v Telekom Austria* [2000] ECR ....

Other remedies:

29. Other remedies may be useful if (a) the short limitation period has expired (b) it is difficult to attach perceived unfairness to a specific breach.
30. Judicial review is sometimes appropriate because a judicially reviewable decision is involved as well as a public procurement issue. Occasionally it has been used erroneously, or because the tendering exercise arises out of a specific statutory provision: no definite conclusions can be drawn as to whether it might provide an alternative remedy where there is unfairness unrelated to a specific breach of the Directives/Regulations. In chronological order:
    a) *R v London Borough of Enfield ex p Unwin* ([1989] 46 Build LR 1), DC, and *R v Bristol City Council ex p Barrett* (QBD, 6 July 2000): judicial review available in respect of the removal of a contractor from an approved tender list.
    b) *R v Lord Chancellor ex p Hibbet & Saunders* ([1993] COD 276) (Divisional Court); this was a services contract before Services Directive came into force. The Court held that judicial review was not available – not a public law issue.
    c) *Mass Energy v Birmingham City Council*, ([1993] Env. L.R 298), (CA) leave refused in respect of a complaint concerning post tender negotiations where the original bid was not compliant arising out of a statutory obligation to put work out to tender (Part 2 EPA 1960): that provided no duty to act fairly – only commercially, although a duty to act without discrimination arose under the same provisions. The court noted that private rights (eg of a contractual kind) might exist.
    d) *R v Avon CC ex p Terry Adams* ([1994] Env LR 442), CA: the Council could prefer one method of waste disposal to another on environmental grounds, and was bound by statute to consider such factors, but it could not manipulate the tender specifications to favour one contractor and ignore fair consideration of other legitimate bids.
    e) *Williams v Blackman* ([1995] 1 WLR 102), PC: statutory obligations with respect to tendering susceptible to JR (Barbados).
    f) *R v Tower Hamlets ex p Luck* ([1999] COD 294), (CA). Leave for judicial review refused – insufficient grounds for a claim based on *Wednesbury* unreasonableness, but a writ action under the Regulations would continue.
    g) *R v National Lottery Commission ex p Camelot* ([2001] EMLR 3). Camelot's right to judicial review apparently not challenged; arguably a very high degree of fairness required by Judge although the National Lottery Act 1993 does not require a competition.

Breach of an express or implied contract

31. The possibility that a contractual or similar relationship may arise out of the tendering procedure itself provides a potential cause of action when a claim under the procurement regime is time barred, or where a procedure is abandoned even though there is a clear winner. There are two relatively recent and important

authorities in particular, one House of Lords, the second Court of Appeal, in which the Court considered whether the tendering procedure itself involved enforceable undertakings on the part of the party seeking offers. It should be borne in mind that the outcome depends upon the detailed analysis of offer and acceptance in each particular case.

32. In the first, (*Harvela*), a company was offered for sale to the highest bidder; one of the two tenderers offered a certain sum in excess of whatever sum was bid by the other. The seller was unsure to which, if either, he was bound. The Court held the seller *was* bound to sell to the highest bidder, whichever that might be (in fact the referential bid failed), although there was no analysis of the precise contractual or other basis by which the seller was so bound: *Harvela Investments Ltd v Royal Trust Co. of Canada* [1986] AC 207, particularly pages 224-233.

33. Unfortunately this case was not considered by the court in the second case, *Blackpool*, which concerned whether a tender should have been considered which was put into the Council's post box by the required time, though the post box was cleared later and the tender disregarded. The Court held that a contract with very limited terms existed, partly because those involved in the tendering process were a small group of parties known to each other: *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195; [1990] 3 All ER 25.

34. The extent, if any, of this possible basis for a remedy remains untested in the context of public procurement. Its possible effect is often sensibly negated in part by a term in the tender document which expressly excludes any obligation on the part of the contracting authority to make an award. This would not have helped in the *Blackpool* case, unless the alleged breach had been brought early enough to enable the Council to avoid entering into a contract with the apparently successful tenderer.

Some other cases which may be of relevance:

35. *Fairclough Building v BC of Port Talbot* 62 BLR 82: the Council correctly failed to consider a tender when there was a potential conflict of interest between that tenderer and a relevant member of council staff.

36. *MJB Enterprises Ltd v Defence Construction (1951) Ltd* (2000) 2TCLR 235; (1999) 15 Const. LJ 455 (Canada): obligations at the tender stage depended on the intention of the parties, inferred in this case from clear stipulation that tenders must be compliant and the tender documents non-negotiable. The winning tenderer added a manuscript note qualifying the price if a more expensive material was required and should have been disqualified.

37. *Spencer v Harding* (1870) LR 5 CP 561: there was no enforceable undertaking to sell to the highest bidder – if there had been the reward cases would have applied; *South Hetton Coal v Haswell* [1898] 1 Ch 465: a referential bid (see *Harvela* above) need not be accepted; *Barry v Davies* [2000] WLR 27th October: collateral contract between auctioneer and the highest bidder that the goods would be sold to that bidder.

38. *Southampton City Council v Academy Cleaning Services* The Times 11th June 1993: the Council's tender documents required a performance bond, and standard terms incorporated by reference required a holding company guarantee. Academy submitted a bid which was accepted, but refused to supply a guarantee (only a bond). The Council claimed a binding contract. There was no binding contract, the Council's expenditure on the tender did not amount to consideration.

Misrepresentation

39. In theory a claim for misrepresentation may lie against a contracting authority that expresses an intention to conduct a procurement in some particular way, but fails to do so, when that representation has been acted on by a tenderer to his detriment. Generally damages would be limited to the costs of preparing the tender, which may partly explain why there have been no procurement cases on this point.

Other EU Treaty obligations

40. All cases on discrimination on grounds of nationality are likely to be pursued under the general Treaty obligations of Article 28 (formerly Article 30) and Article 12 (formerly Article 6), as well as under the procurement Directives.

41. In addition the European Court has held that in a case where a contract was outside the scope of the Directives (a services concession contract) the general Treaty obligation of the contracting authority in respect of non-discrimination required that authority to advertise the procurement in order to ensure adequate transparency in respect of non-discrimination: Case C-324/98 *Telaustria v Telekom Austria* [2000] ECR; see also a similar finding in respect of transparency at paragraph 31 of Case C-275/98 *Unitron Scandinavia v 3-S* [1999] ECR I-8291 in respect of Article 2(2) of the supplies Directive 93/36/EEC, which requires contracting authorities to ensure non-discrimination in respect of any supply contracts let by concessionaires.

Harmon Facades v Corporate Officer of the House of Commons 67 Con LR 1

42. The main interest in this case arises out of the finding that a public official was found to have committed the tort of misfeasance in public office in deliberately avoiding taking advice on the principle of non-discrimination in public procurement in favouring a British supplier, knowing what the advice was likely to be. Apart from the warning to public officials in respect of their procurement responsibilities, the detailed findings have been superseded by a subsequent House of Lords case in which their Lordships took the opportunity to review and restate the principles on which the tort is based: *Three Rivers District Council v Governor and Company of the Bank of England* [2000] 2 WLR 1220.

Severn Trent v Welsh Water, HC, 10th October 2000

43. A complicated case, the main conclusion of which can be summarised as preventing, in a sell-off of a part of a company which had provided services to another part of the company, the part subject to the sale being sold with a contract in place to continue to provide the services as before. Without that possibility the sell-off becomes the sale of shell company rather than a going concern. Langley J held that to interpret the "seeking of offers", which triggers the Regulations, as excluding such an arrangement from their effect would be to emasculate the Regulations.

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