



Public Procurement ~ Case Law Update

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PUBLIC PROCUREMENT CASES SINCE 1ST APRIL 2004: SHORT SUMMARIES

The following are short summaries of the recent procurement cases. A number of the Court's conclusions are based on some rather exceptional circumstances and should be read with the particular facts. The European judgments appear first.

1. Case C-212/02 *Commission v Austria* 24 June 2004

The ECJ confirmed the findings in *Alcatel* (which had been somewhat obscure) that provision had to be made in national legislation for a review procedure whereby an unsuccessful tenderer may have an award or a decision set aside by the relevant tribunal, even when a contract has been entered into.

2. Case C-385/02 *Commission v Italy* 14 September 2004

Works intended to control flood waters were to be let in lots as and when money became available. There had been no advertisement for the subsequent lots, though there had been for the initial works.

The ECJ agreed that there could be technical reasons why one contractor should be responsible for all the works, but that argument had not been adequately demonstrated. In particular, the initial contract notices had provided for the possibility that subsequent lots would be let to the same contractor, which the government characterised as a "contractual obligation". The court held "... the Government has failed to establish that such an obligation exists. On the contrary ... [the authority] was not obliged to award subsequent lots to the contractors undertaking the original lots of works, but merely had the option of doing so". This undermined the "technical reasons" for the use of the negotiated procedure since it was clearly envisaged that other contractors could be used.

Similarly grounds of "urgency" were rejected – there was no urgency.

Thirdly, the Government relied on the exclusion for the repetition of existing works, permitted under Article 7(3)(e). However, "this procedure may only be adopted during the three years following the *conclusion of the original contract*". The court held that "the conclusion of the original contract" meant the entering into of the contract, not the completion of the works.

3. Case C-126/03 *Commission v Germany* 18 November 2004

The City of Munich was awarded a contract for waste disposal under a proper procurement procedure. It entrusted transport of waste to another company without tendering.

(i) The ECJ rejected arguments that the City of Munich was not a contracting authority; (ii) there was adequate time for the City of Munich to advertise under the Directives for a sub-contractor and still name the sub-contractor in the tender which it won.

4. Case C-26/03 *Stadt Halle v RPL Recyclingpark Lochau* 11 January 2005

A contract for recycling waste was not advertised – it was assumed to have been awarded to an “in-house” organisation because the contracting authority had an interest in that organisation.

The ECJ held (i) the procurement obligations applied in respect of contracting authorities even in respect of contracts outside the obligation of “meeting needs in the public interest”; (ii) a claim in respect of a decision not to advertise according to the Directives falls within the procurement remedies – “any act of a contracting authority adopted in relation to a public service contract within the material scope of Directive 92/50 and capable of producing legal effects constitutes a decision amenable to review ... regardless of whether that act is adopted outside a formal award procedure or as part of such a procedure” (§34). Acts merely preparatory to a procurement exercise, or a preliminary study of the market, are excluded (§35); (iii) the Directives apply when a contracting authority enters into a contract with a legally distinct undertaking in which it has an interest.

5. Case C-84/03 *Commission v Spain* 13 January 2005

Spain had failed properly to implement the Directives by (i) providing for extra circumstances in which the negotiated procedure could be used, and (ii) the exclusion of some public contracts (co-operation agreements) from the implementing legislation.

6. Case C-340/02 *Commission v France* 14 October 2004

The service provider had contracted to carry out a feasibility study for a sewage treatment plant. The OJ Notice regarding that contract had provided that the candidate whose solution was successful in the design contest for the first phase may be invited to participate in the second phase (which involved a range of services up to the planning and execution of the works themselves).

The French government argued that this notice released the contracting authority from the need to publish a fresh notice and enabled it to contract directly with the provider under the first phase contract. The Court rejected this argument. The obligation of transparency requires a fresh procedure.

The Court also rejected an argument that in this case a negotiated procedure could be adopted because only the winner of the original design contest could be awarded the contract. The terms of the exception refer to a contract which “follows a design contest” and that implies that there must be a direct function link between the contest and the contract awarded. That link did not exist.

7. Cases C-21/03 & C-34/03 *Fabricom v Etat belge* 3 March 2005

Belgian law provides that no person who has helped to develop a procurement procedure may tender for it, and no undertaking connected to such a person may do so unless it establishes that it has not obtained an unfair advantage. Fabricom claimed that this provision discriminated against it as a regular utility sector contractor.

The ECJ held that the principle was correct in relation to equal treatment, however the first provision went too far – a person must be able to demonstrate that their participation would not distort competition. Further, the contracting authority was not required, and indeed ought not, to delay making a decision on the acceptability of such a tenderer until the end of the procedure.

8. Case T-303/04 *European Dynamics v Commission* (10 November 2004); Case T-447/04R *Capgemini Nederland BV v Commission* (13 January 2005).

These were cases against the European Commission in respect of their own procurements and were subject to judicial review. Injunctions were not urgently required “to avoid serious and irredeemable damage” (English courts will, by contrast, be likely to regard damages as an inadequate remedy where what is lost is a chance of success).

9. Case C-394/02 *Commission v Greece* 24 February 2005 OPINION

A contract for the treatment and transport of waste was awarded without advertisement. (i) The Advocate General has rejected an argument that no third party was affected: a third party might have been affected, but in any event the failure of a Member State to fulfil its obligations is independent of any issue of damages. (ii) He has also rejected a claim that there were technical reasons for awarding the contract to a particular contractor – although the contract involved a “rare” requirement there was no indication that only one contractor could carry out that requirement. (iii) Finally urgency was not established. Even if the contracting authority was given little time to implement the requirement of another responsible body it was incumbent on Member States to ensure that legislation did allow sufficient time to ensure compliance with the Directives.

Non European cases

10. *Denfleat International Ltd v NHS Purchasing and Supply Agency* Admin Ct. 26 January 2005

This was a challenge to operation of a framework agreement for supply of a drug. The decision turns on a narrow point of interpretation of the pricing provision of a framework agreement and is of little particular interest to procurement law.

There is a short review in the judgment as to how provisions of Directive 2004/18/EC concerning framework agreements might be applicable before their implementation, including comment on the OGC guidance on the subject.

11. *Holleran v Severn Trent Water* QBD, 4 November 2004

Holleran were excluded from a procurement procedure for which they had failed, in substance, to apply at the relevant time, and about which they claimed they were inadequately informed.

(i) “Grounds first arise” when the unlawful decision was taken. The Judge held that the substantive alleged breach was the dispatch of the notice to the OJEU on 12th May, (rather than its publication on 20th May). Proceedings were issued on 10th November, (as soon as advice was sought), well beyond the three month limit. The judge dismissed Holleran’s attempts to find later breaches in order to bring the actual claim within a three month period. Even in respect of the later alleged breaches the judge expressed the view that the

requirement to bring proceedings promptly required that they should have been brought within a few days of the relevant events, not just within three months.

(ii) The Judge set out the importance of the letter before action, noting that even in the absence of any statutory provision for a specific period of time between it and beginning proceedings, it was not an “empty formality”. That letter therefore had to be sent “pre-promptly” to give the contracting authority or utility an opportunity to remedy the defect (§§46-49).

(iii) The Judge considered whether there were grounds for extending time (§§50-55). The scope of “good reason” could not be defined or circumscribed; relevant factors might include the length and reasons for the delay, the extent to which the claimant or defendant contributed to the delay, and prejudice. Ignorance of the law or the exercise of commercial judgment were not grounds for extension of time. The delay in issuing proceedings was accounted for by Holleran’s other commitments in connection with other procurements. Perhaps of greatest interest in *Holleran* is the issue of prejudice. The Judge held “the effect of a damages claim on a complex contracts process and its unsettling disruption of it is prejudice enough”. He seemed to indicate that since the re-running of the competition after the announcement of the successful candidates would have been difficult an extension of time would amount to prejudice even in a damages claim.

12. *R (on the application of Cherwell District Council) v Home Office* CA 28 October 2004

A “design, build and operate” contract for an asylum centre to be carried out by a private contractor on Crown land was a development “by or on behalf of the Crown” for planning purposes (not necessarily relevant to procurement law).

13. *Cookson & Clegg v Ministry of Defence* 21 January 2005

The Claimants started effectively identical proceedings for judicial review and under the Public Supply Contracts Regulations 1995. The Court held that in commercial disputes parallel proceedings could not be continued since it led to a waste of resources, including those of the courts. It was customary in such a case to refuse judicial review, and in any event it was barely conceivable that if a claim did not succeed under the Regulations, a court could find the decision unfair, irrational or perverse.

14. *SIAC Construction Ltd v National Roads Authority* High Court of Ireland 16 July 2004

Proceedings under the relevant Irish legislation must be started at “the earliest opportunity”, and within three months unless the court extends the time. The judge found in this case that grounds first arose on 10 August 2001 and 14 October 2003, both outside the three month time limit. The applicant had to show reasons to explain the delay and a justifiable excuse. Lack of prejudice to the other party was not sufficient. As to the first claim, the use of the negotiated procedure, no good reason was given (the reason given involved linking it to the later claim) - it was an example of a contractor “having its cake and eating it” since it had been happy with the procedure until it had lost.

As to the second claim, it was clear the claimant knew the relevant facts months before proceedings were instituted in April 2004. A change of solicitors was not a good reason for an extension of time. The judge reviewed a number of English and Irish cases on the limitation period.

15. *Express Medicals v Network Rail* QBD TCC 28 May 2004

In all cases involving the disclosure of confidential information (regardless of whether it is in some formal sense confidential, for example as a result of a contractual agreement) the court must weigh the public interest, usually “in disposing fairly of the matter”, against the strength and value of the interest in preserving confidentiality. The judge provides a short survey of the case law.

Often redactions will provide a satisfactory solution. In *Express Medicals* the judge regarded the information sought in unredacted form as a fishing expedition – it was alleged that the individuals provided by the successful tenderer in the tender document intended to service the contract may not have had the qualifications claimed, but no evidence was advanced to support that suspicion.

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