Landmark CHAMBERS

Public procurement update

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Overview of procurement law

- Directive 2004/24/EU ("Public Contracts Directive"), implemented by Public Contracts Regulations 2015
- Associated EU and domestic legislation for procrement utilities, concessions and defence & security.
- Procedural requirements (eg. OJEU advertising) whenever a "contracting authority" seeks offers in relation to a proposed contract for "works", "supply" or "service contract" where the contract is above a specificed threshold.
- Aim = *"to ensure that public bodies award certain contracts above a minimum value only after fair competition, and that the award is made to the person offering the lowest price or making the most economically advantageous offer":* per Lord Hope in ***Risk Management Partners v. Brent LBC*** (2011)
  - The Directive will be construed purposively in pursance of that aim

Recent issues

- When is procurement necessary?
  - A particularly thorny issue in relation to arrangements between local authorities and the private sector relating to development e.g. urban regeneration
- Remedies & procedure for challenging alleged breaches of the Regs/PCD

When is procurement necessary?

Definition of public contracts

- Art 2(1)(a): "'Public contracts' are contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive."
- The definition of "contracting authority" plainly includes local government
- "Economic operators" can include public bodies if they participate in the economic market: see ***Auroux v. Roanne*** & ***Teckal***

Public supply contracts

- Defined in Art 2(8) as contracts in writing for consideration for the purchase, lease, rental or hire-purchase of goods
- "Consideration" is interpreted broadly: see the Commission Guidance
- Clever arrangements such as providing that the goods don't become the property of the contracting authority until the end of the contractual relationship are unlikely to succeed in avoiding the scope of the Directive: see ***Commission v Italy*** (1994)
- EUR 134,000 threshold

Public services contracts

- Defined in Art 2(9) as public contracts having as their object the provision of *"services"* other than *"works"*.
- *"Service"* not defined. Likely to be interpreted broadly (c.f. start up loans delivery partners)
- Note the "***Teckal*** exemption": contracting of services to public sector joint venture (local authority resource sharing) is caught unless:
  - the contracting authority exercises control over the contractor *"which is similar to that which it exercises over its own departments"*; and
  - the contractor *"carries out the essential part of its activities with the controlling local authority or authorities"*
- EUR 207,000 threshold

Public works contracts - meaning

- Defined by Art 2(6) as a *"public contract having as their object one of the following:*

  (a) the execution, or both the design and execution of works related to one of the activities within the meaning of Annex II;

  (b) the execution, or both the design and execution, of a work

  (c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work."

A 'work' is defined in Art 2(7) as *"the outcome of building or civil engineering works taken as a whole which is sufficient of itself to fulfil an economic or technical function."*

- EUR 5,186,000 threshold

Public works contracts – meaning (2)

- Contracts for the acquisition or rental of land are excluded under Art 10(a) - but not if the main object of the contract is works and the transfer is ancillary to that.
- The Regulations will be interpreted in accordance with the Directive.
- Note: early cases refer to older versions of the Directive but still relevant.

Principles from the pre-2016 case law (1)

- The main purpose of the agreement will determine whether or not it is a contract for public works: ***Auroux***, ***Gestion Hotelera***, ***Commission v. Spain***
- Where the agreement involves works which are not the main object of the contract but are incidental to another object which is outside the scope of the Directive, the Directive does not apply: ***Gestion Hotelera***
- To be a *"work"* a development must be sufficient to fulfil an economic or technical function for the contracting authority's immediate benefit, and something more than simply achieving a beneficial development in the public interest is required:

Principles from the pre-2016 case law (2)

- the contracting authority needs to derive an actual economic benefit from the scheme as it did in ***Auroux*** (financial contribution, assumption of risk)
- not necessary that the contracting authority must be/remain the owner of all or part of the land on which the works take place (<u>but</u> if it is, then this criterion is satisfied)

- To fall within the scope of the Directive, the contract needs to place the contractor under a "direct or indirect" legally enforceable obligation to carry out the works in question (***Flensburg***; ***Midlands Co-Op –*** 'Grampian' style wording)

Principles from the pre-2016 case law (3)

- *"The requirements specified by the contracting authority"* criterion is not met by the mere fact that a development must comply with the local authority's planning policies and objectives
  - *"The authority must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design"* (***Helmut Müller*** para. 67).
  - Precisely where the dividing line lies in practice remains unclear. The level of specification does not appear to have to be rigorous. In ***Auroux***, it was sufficient that "*the work referred to by the agreement is the leisure centre as a whole, including the construction of a multiplex cinema, service premises for leisure activities, a car park and, possibly, a hotel."* (para. 42).

The Faraday Case

The Faraday Case (1)

- ***R (Faraday Development Ltd.) v. West Berkshire Council*** [2016] EWHC 2166 (Admin), PTA pending before CoA.
- Development Agreement between WBC and St Modwen *"to facilitate the comprehensive regeneration"* of London Road Industrial Estate in Newbury, the freehold of which WBC owned.
- Contract (deliberately designed to avoid procurement) provided for:
  - Planning and design stage – direct and enforceable obligations on SM to prepare project plans (business plan + masterplan – in accordance with outline versions appended to the contract) for the approval of a steering group comprised of 2 WBC representatives and 2 SM representatives, then to prepare a budget for infrastructure costs, and then an application for outline planning permission in accordance with the project plans

The Faraday Case (2)

- If satisfactory permission was granted, then SM was then obliged to prepare for the steering group's approval (i) an estate management strategy and (ii) a development strategy for each plot. Following such approval, SM was then obliged to obtain reserved matters approval for the work covered by each development strategy.
- At that point, SM was entitled (but not obliged) to serve an acquisition notice for each plot – WBC would then be obliged to transfer either a ground lease (commercial plots) or freehold (residential plots) and would then be under a contractual obligation to undertake the development of that plot (without procurement).
- If SM elected not to serve an acquisition notice for any plot, WBC kept the benefit of the design services provided for that plot.

The Faraday Case: judgment

Holgate J: this was not a public works or public services contract.

- Did not impose an enforceable obligation to undertake works
- The design services (for which there was an enforceable obligation) were not a main purpose of the contract. Viewing the transaction as a whole, the main purposes of the contract were (i) to regenerate the site and (ii) to increase the Council's financial income for it.
- An option to acquire land interests which if exercised would render the contractor obliged to undertake works was not an *"indirect obligation"*
  - This is the case even if there was evidence that the contractor was highly unlikely not to exercise that option and thus become legally obliged to undertake works.
- A general anti-avoidance approach to interpreting and applying the Directive and Regulations was not justified.

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- An option to acquire land interests which if exercised would render the contractor obliged to undertake works was not an *"indirect obligation"* as the contractor was entitled to walk away without exercising the option
  - This is the case even if there was evidence that the contractor was highly unlikely not to exercise that option and thus become legally obliged to undertake works.
- A general anti-avoidance approach to interpreting and applying the Directive and Regulations was not justified.

The Faraday Case: implications

- Goes further than ***Helmut Muller*** and ***Birmingham***:
  - There were no obligations at all in those cases
  - Here there were directly enforceable obligations for services, options which if triggered would generate enforceable obligations for works, and an acknowledge intention to design the contract to as to avoid the requirements of the Regs/PCD.

Does this create a loophole? E.g.:

- a contract for the supply of fuel with deliveries to start a month after the contract, with a clause that allowed the supplier to serve notice up to a fortnight before first delivery that it did not wish to proceed with the contract.
- A contract conditional on the contractor providing a parent company guarantee, with no obligation upon it to procure such a guarantee.

The Faraday Case: grounds of appeal

- A conditional/contingent obligation of this nature is still a *"direct or indirect obligation"* - nothing in the CJEU jurisprudence indicates otherwise
- Holgate J.'s analysis puts form over substance
- At minimum, the DA committed the council to entering into a future contract (the lease or freehold sale) which would contain a works obligation, without procurement – i.e. an agreement to enter into an unlawful contract.
- Holgate J.'s rejection of an anti-avoidance principle overlooked Article 18 of the PCD: *"The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive."*

Enforcement and remedies

The statutory remedy for 'economic operators'

- See Chapter 6 of the 2015 Regulations (implementing rules originally introduced by the Remedies Directive 97/66/EC).
  - Regs 89-104 deal with the time limits, procedure and remedies.
  - Proceedings in the High Court (TCC)
- Remedy available to "any economic operator which, in consequence of [breach of procurement law] *suffers or risks suffering loss or damage*": Reg. 88.
- *"Economic operator"* defined by Reg. 2(1) as:

  "any person or public entity or group of such persons and entities, including any temporary association of undertakings, which offers the execution of works or a work, the supply of products or the provision of services on the market."
- Members of the public are <u>not</u> economic operators (but see later re. JR)
- A claimant unsure if it is an economic operator may be well advised to bring parallel claims: 2015 Regs + JR. (See Section 5.7 of Admin Court Guide 2017 – transfer of JR to TCC envisaged).

Automatic interim suspensions

- Reg. 95 provides that where a claim has been commenced under the Regs, the contracting authority is aware of it, and the contract has not been entered into, the authority is *"required to refrain from entering the contract"* until the court orders otherwise (or until the claim is determined).
- On an application to lift the automatic suspension, the ***American Cyanamid*** principles apply:
  - Is there a serious issue to be tried?
  - If so, will damages be an adequate remedy for either party?
  - If not, where does the balance of convenience lie?
- Recent issue: (in)adequacy of damages where the claimant is a not for profit company and/or risks unquantifiable reputational damage: ***Kent Community Health NHS Foundation Trust v. NHS Swale CCG*** (2016), ***Perinatal Institute v. Healthcare Quality Partnership*** (2016).

Judicial review (1)

- Available to a claimant unable to rely on the remedies provided to economic operators under the Regs?
- S.31(3) Senior Courts Act 1981 – applicant for JR must have *"sufficient interest in the matter to which the application relates"*
- ***R (Chandler) v. Camden LBC*** [2010] 1 CMLR 19 (obiter):

  "an individual who has a sufficient interest in compliance with the public procurement regime in the sense that he is affected in some identifiable way, but is not himself an economic operator who could pursue remedies under reg.47 , can bring judicial review proceedings to prevent non-compliance … He may have such an interest if he can show that performance of the competitive tendering procedure in the Directive or of the obligation under the Treaty might have led to a different outcome that would have had a direct impact on him. We can also envisage cases where the gravity of a departure from public law obligations may justify the grant of a public law remedy in any event."

Judicial review (2)

- The Claimant in ***Chandler*** failed because:

  "*Mrs Chandler is not challenging the Secretary of State's decision because of any interest that she has in the observance of the public procurement regime but because she is opposed to the institution of academy schools. She is thus attempting, or seeking to use the public procurement regime for a purpose for which it was not created."*
- ***R (Law Society) v. Legal Services Commission*** [2007] EWHC 1848 (Admin) per Beatson J.: Law Society had sufficient interest to bring a procurement JR re. legal aid reform as it was *"a participant in the LSC's consideration of the reform of legal aid"* and *"the professional body that represents all solicitors and has statutory functions relating to the profession."*

Judicial review (3)

- ***R (Unison) v. NHS Wiltshire PCT*** [2012] EWHC 624: procurement challenge by a trade union to outsourcing of certain NHS services to the private sector. Eady J.: a trade union bringing a procurement JR needed, in order to have standing, to show that its members are affected in some identifiable way by the breach.
- ***R (Gottlieb) v. Winchester City Council*** [2015] EWHC 231 per Lang J – claimant objector to a proposed urban redevelopment held to have standing to bring a procurement JR of the modification of a development agreement relating to that development:

  "In contrast (to Mrs Chandler), the Claimant in this case does not pursue any ulterior motive. He seeks what the procurement process is intended to provide, namely, an open competition to allow Winchester to select the development which best fulfils its needs."

Judicial review (4)

- The case-law and the underlying principles was recently reviewed by Dove J. in ***R (Wylde) v. Waverley BC*** [2017] EWHC 466 (Admin).
- A challenge to the modification of a development agreement relating to the redevelopment of Farnham Town Centre by Crest Nicholson.
- The claimants were opponents of the developers, who claimed standing as local taxpayers and councillors who wished for a further competitive tendering exercise to take place in the hope that would result in an alternative developer with alternative proposals.
- The Council and the developer argued that:
  - Contrary to the obiter in ***Chandler***, the contract was not amenable to JR at all (Dove J. did not decide this issue); alternatively
  - In any event, applying ***Chandler*** the Claimants lacked standing and insofar as ***Gottlieb*** suggested otherwise it was plainly wrong and should not be followed (Dove J. agreed).

Judicial review (5)

- What was a *"sufficient interest"* so as to generate standing for JR depended on the statutory context – the interest had to be in the fulfilment of the purpose of the legislation in issue.
- That approach *"leads to a much more restrictive qualification for standing in procurement cases than would apply in judicial review generally"* [39]
- The purpose of the of the Regs. & PCD was:

  "firstly, to provide for an open and transparent system for the competition for public contracts in the interests of securing a fair and efficient market for those contracts and secondly, to provide a bespoke system of remedies for those parties who are directly involved in competing for such contracts and participating in the market for them. This regime is quite clearly tightly focused on those directly engaged with and actively seeking the benefit of obtaining public contracts that fall within the scope of the 2006 Regulations."

Judicial review (6)

- *"The public interest is no doubt served by these aims and objectives of the 2006 Regulations (for instance, by fostering value for money and the objective evaluation of bids for public works), but that is very different from saying that it follows that any member of the public could have an interest in the enforcement of those Regulations which should be recognised by the grant of standing in judicial review. It is in my view entirely consistent with the purpose of the Regulations to confine standing in any judicial review claim brought outside the extensive range of remedies available to economic operators, and by a person who is not an economic operator, to only those who "can show that performance of the competitive tendering procedure… might have led to a different outcome that would have had a direct impact on him".*
- ***Law Society*** correctly decided; ***Gottlieb*** wrongly decided.

Judicial review (7)

- Conclusion in the present case on the facts:

  "...these claimants are unable to demonstrate any direct impact upon them which would arise from the conduct of a competitive tendering exercise. Not only are they not economic operators, but they are not remotely approximate to any economic operator, nor could they begin to demonstrate any interest in the procurement process which might be akin to or a proxy for status as an economic operator. Whilst, therefore, I have no doubt that the concerns and objectives of the claimants are entirely genuine and expressed by them in the public interest, that observation, and their interest as either council tax or rate payers or as members of local authorities, are not sufficient to establish that they were within the Chandler test and thus they do not have standing to bring this claim."

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