Landmark CHAMBERS

Public Procurement in the Infrastructure Context

Key legal risks to the procurement of infrastructure projects and how to mitigate them

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What are the particular risk areas which apply to the procurement of infrastructure contracts?

- Bid design
- Procurement rules and the EU Structural and Investment funding
- Change management during project lifecycle
- Automatic suspensions – the application of *American Cyanamid* to infrastructure contracts
- Third party challenges

(1) BID DESIGN FOR INFRASTRUCTURE PROCUREMENT

Restrictive effect of threshold or qualification criteria and the lesson learnt from *EnergySolutions EU Ltd v Nuclear Decommissioning Authority* [2016] EWHC 1988 (TCC)

- NDA: non-departmental public body established under the Energy Act 2004
- Public procurement competition undertaken for award of £14bn contract for the decommissioning of 12 former nuclear sites
- EnergySolutions EU Limited (now called ATK Energy EU Limited) was incumbent parent body organisation for site licence companies operating 10 Magnox sites (2 other sites were research sites)
- Bid process commenced in 2012, using competitive dialogue procedure under the 2006 PCRs

EnergySolutions EU Limited v NDA Judgment No. 2 (Liability) [2016] EWHC 1988 (TCC)

- Fraser J held that CFP should have been disqualified for failing two threshold requirements
- No principle that once disqualification criteria employed they should be construed generously or leniently in favour of the bidder
- Although there is a margin of appreciation to be applied at point of assessment, no separate stage of "reluctance to interfere' if manifest error identified
- Principle of proportionality may in exceptional circumstances provide some scope to depart from rules of a procurement competition, but no grounds to re-write SORR or scoring matrix (at [898])

(2) Additional institutional investor rules and their application to beneficiaries

- Beneficiaries of EU Structural and Investment Funds have to disburse funds in accordance with EU law including procurement law, even if not a contracting authority.
- Article 6 of **Regulation 1303/2013**: operations supported by ESI funds shall comply with applicable Union law and the national law relating to its application.
- See also **Regulation 13 PCRs**
- Public procurement principles imported into funding agreements: see **DCLG ESIF Procurement Guidance, Chapter 6.**

Guidance on ESIF funding rules

- **Commission's ESIF Procurement Guidance (October 2015)**: "Guidance for practitioners on the avoidance of the most common errors in public procurement of projects funded by the European Structural and Investment Funds"

- See also **DCLG Procurement Law ESIF Guidance Note** (December 2015)

The Commission's Communication on large infrastructure projects

- **EC Communication COM (2017) 573 Final** (3 October 2017) on "*helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects*"
  - "*National authorities and contracting authorities/entities have the option to use the mechanism on a voluntary basis to raise questions with the Commission and receive an assessment of a project's compatibility with the EU regulatory framework before taking important steps eg, launching a call for tender of the main project works*"
  - "On the basis of the information provided, the competent Commission services will deliver its views on the compatibility of the project's procurement plan with EU procurement legislation, or of the specific issues raised by the national authorities in a letter"
  - Note FN 10, page 4: "*The views expressed by the Commission services in their assessment are not legally binding on those using the mechanism or on the Commission, and are without prejudice to the interpretation of the rules by the CJEU*".

(3) CHANGE MANAGEMENT DURING PROJECT LIFESPAN

Change management during project life cycle: how safe is the Regulation 72 PCR safe harbour?

"Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Part in any of the following cases:—

(a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses or options, provided that such clauses—

(i) state the scope and nature of possible modifications or options as well as the conditions under which they may be used, and

(ii) do not provide for modifications or options that would alter the overall nature of the contract or the framework agreement"

Insolvency of the contractor: which regulation to rely on to avoid further advertising?

- **Regulation 72(1)(d) PCRs**:

where a new contractor replaces the one to which the contracting authority had initially awarded the contract as a consequence of—

(i) an unequivocal review clause or option in conformity with sub-paragraph (a), or (ii) universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator ***that fulfils the criteria for qualitative selection initially established****, provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Part;*

- **Regulation 32(c) PCRs**:

(c) insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with.

(4) The application of *American Cyanamid* to automatic standstill of infrastructure contracts

Key principles summarised by Coulson J in **Covanta Energy Ltd v Merseyside Waste Disposal Authority [**2013] EWHC 2922 (TCC):

a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so;

(b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages;

(c) If damages are difficult to assess, or if they involve a speculative ascertainment of the value of a loss of a chance, then that may not be sufficient to prevent an interim injunction;

(d) In procurement cases, the availability of a remedy of review before the contract was entered into, is not relevant to the issue as to the adequacy of damages, although it is relevant to the balance of convenience;

(e) There are a number of procurement cases in which the difficulty of assessing damages based on the loss of a chance and the speculative or 'discounted' nature of the ascertainment, has been a factor which the court has taken into account in concluding that damages would not be an adequate remedy. There are also cases where, on the facts, damages have been held to be an adequate remedy and the injunction therefore refused.

American Cyanamid (2): Coulson J's identification of the public interest in *Covanta*

"If Covanta did not obtain an injunction but were successful at trial, their financial claim, however it is ascertained, is likely to be considerable, and much larger than MWDA have the resources to meet. Covanta say their loss of profit is in the order of £160 million. Whatever the final amount of any damages claim, the money would have to be paid for by the customers, namely those on whose behalf MWDA collect waste. Essentially, therefore, those taxpayers would be paying for this service twice over: one payment to SITA to actually perform the service pursuant to the RRC, and one payment to Covanta who (on this hypothesis) were unfairly denied the opportunity of providing that same service. **It cannot be in the public interest for taxpayers to make two payments for one service.** (at [51]).*"*

American Cyanamid (3): the contrasting approach in *Alstom*

- Stuart-Smith J rejected the public interest in public procurements being carried out as a factor in **Alstom Transport UK Ltd v London Underground Ltd, Transport for London** [2017] EWGC 1521 (TCC):

> *"Of course, setting aside the automatic suspension at a time when the Court does not know what the final outcome of the Claimants' allegations will be gives rise to the possibility that the Defendant will end up paying a contract sum to the successful tenderer and damages to the aggrieved Claimant. However, that possibility is not a reason for maintaining the automatic suspension if it is otherwise inappropriate to do so. On the contrary, the prospect of paying damages as well as a contract price if it breaches its obligations is an integral part of the scheme under the Regulations for encouraging proper and principled procurements since it is to be assumed that contracting authorities will (in general) wish to avoid double payment* (at [39]).

American Cyanamid (4): the contrasting approach in *Alstom*

- **Alstom Transport UK Ltd v London Underground Ltd, Transport for London** [2017] EWGC 1521 (TCC):

> *"I do not accept that the undoubted public interest in procurements being carried out properly tends of itself to support the maintenance of the automatic suspension…I remain of the view that the appropriate course is for the Court to apply established principles and that it will only be in an exceptional case that it can be said that the application of American Cyanamid principles fails to give adequate support to the public interest in procurements being carried out properly* (at [39]).

(5) THIRD PARTY CHALLENGES

Standing in procurement challenges: the *Chandler* criteria

R (on the application of Chandler) v Secretary of State [2009] EWCA Civ 1011 :

"The failure to comply with the regulations is an unlawful act, whether or not there is no economic operator who wishes to bring proceedings under reg 47 , and thus a paradigm situation in which a public body should be subject to review by the court. **We incline to the view that 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 with the regulations or the obligations derived from the Treaty, especially before any infringement takes place** (see generally Mass Energy v Birmingham CC [1994] Env LR 298, 306 cf Kathro , where Richards J held that the claimants were not affected in any way by the choice of tendering procedure). 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. However, while the court is in general bound to ask itself why a public law remedy is necessary when private law remedies are available, once permission to bring judicial review proceedings has been given, then, unless it is appropriate to deal with standing as a preliminary issue, there is likely to be little point in spending valuable court time and costs on the issue of standing. In that situation, we would not encourage the court to embark on a complex argument about standing. This will especially be the case where standing is a borderline issue.

Standing in procurement challenges (2)

- Eady J in **R (on the application of Unison) v NHS Wiltshire PCT and others** [2012] EWHC 624:
  - "Given the statutory structure of the Regulations, and the underlying policy as embodied in the corresponding European Directive, it is likely that breaches of the Regulations are more often going to give rise to private rather than public law remedies, which are going to be relatively rare. It is thus important to focus carefully upon the suggested criteria in the Chandler case and not to interpret them too freely… **there seems to be no previous example of a trade union seeking a public law remedy in the context of these Regulations or their predecessors, but that is no reason to suppose that it is not legally possible**. One can envisage circumstances in which a breach of the Regulations could so affect the members of a union that the law should afford a remedy in public law. I am not concerned at this stage, however, to speculate about possible scenarios, but rather to investigate whether the Court of Appeal criteria have been shown to apply on the present facts.
- **Gottlieb** at [51]:
  - The Claimant, in his capacity as a resident, council tax payer, and City Councillor, has a legitimate interest in seeking to ensure that the elected authority of which he is a member complies with the law, spends public funds wisely, and secures through open competition the most appropriate development scheme for the City of Winchester. He has been closely involved in the consideration of this scheme at different stages, both as a Councillor and as a long-standing proponent of the widely-held view that alternative development schemes should be considered on this site…It is well-established that a direct financial or legal interest is not required to establish standing to bring a claim for judicial review…**Although there is a specific remedy for economic operators under the 2006 Regulations, this does not preclude claims for judicial review by those who are not economic operators** (e.g. R (Law Society) v Legal Services Commission [2007] EWCA Civ 1264).

Approach to standing in planning/environmental cases: *Walton*

Lord Hope in **Walton v The Scottish Ministers** [2012] UKSC 44 :

> "152. I think, with respect, that the Extra Division take too narrow a view of the situations in which it is permissible for an individual to challenge a scheme or order on grounds relating to the protection of the environment. An individual may be personally affected in his private interests by the environmental issues to which an application for planning permission may give rise. Noise and disturbance to the visual amenity of his property are some obvious examples. But some environmental issues that can properly be raised by an individual are not of that character. Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual's property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? **That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone**. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.

The restrictive approach in *Wylde*

- Dove J in **Wylde v Waverley BC** [2017] EWHC 466 (Admin) at [39] – [40];
  - "Thus it is the purpose of the legislation, its aims and objectives, that are the important question, rather than the ultimate motivation of the claimant (unless motivated by ill-will or other improper purpose), and it is the purpose of the legislation which was at the heart of those decisions…the conventional approach, focused upon the purpose and policy of legislation being invoked, leads to a much more restrictive qualification for standing in procurement cases than would apply in judicial review generally….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".** The context of the 2006 Regulations is therefore in clear contrast to the context of environmental law cases (see paragraph 23 above), but the rationale for the approach to considering the grant of standing, based on the purpose of the legislation, is similar"