

Procurement, innovation and judicial review

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Why innovate?

- Modernise public services more quickly
- Generate efficiency savings
- Boost markets

New service to combat dehydration in elderly patients in Denmark

Can the innovation partnership procedure help?

- Need for innovative product or service or works not currently available on the market
- Select partners on a competitive basis and have them develop collaboratively an innovative solution tailored to requirements
- Health and welfare, energy, waste, technology

The nay-sayers

- No real difference from competitive dialogue
- All for the benefit of the supplier
- Anti-competitive
- Conflict with State aid rules in relation to innovation

Underpinnings (1)

- understanding the statutory frameworks that govern the subject matter of the contract
- public consultation
- market engagement
- skill gaps
- Public Services (Social Value) Act 2012

Underpinnings (2)

- use feedback from consultation and engagement
- clear outcome-based requirements
- whole life services
- scaling up and building demand

Underpinnings (3)

- transparency and a public version of the procurement strategy
- award criteria linked to economic advantages of innovation

Regulations risks and how to avoid them

- equal treatment of bidders, particularly in relation to the provision of information
- care with confidential information received from bidders
- successive stages only if provided for in initial documents
- no cherry-picking of aspects of different bidders' proposals
- clear and transparent evaluation methodologies

Judicial review risks and how to avoid them

- Wider class of potential claimants and the generous approach towards standing
- Ultra vires
- Hybrid actions
- Range of remedies

Automatic Suspension & the Interim Position

Rose Grogan

Automatic Suspension I

- Key question is the adequacy of damages: is it just in all circumstances that the Claimant be confined to his remedy of damages?
- If damages are difficult to assess, or require speculative ascertainment of the value of loss of a chance then they may not be sufficient to prevent an interim injunction.
- Balance of convenience brings in other factors:
 - Alternative remedy
 - Public Interest (cuts both ways)

Automatic Suspension II

Damages: is loss of a chance really that difficult to assess?

- *NATS (Services) Limited v Gatwick Airport Ltd* [2014] EWHC 3133
- *OpenView Security Solutions Ltd v Merton LBC* [2015] EWHC 2694

Automatic Suspension III

Is it relevant that the bidder is a not-for-profit company?

- *Bristol Missing Link Ltd v Bristol City Council* [2015] EWHC 876
- *Counted4 Community Interest Co v Sunderland City Council* [2015] EWHC 3898
- *Kent Community Health NHS Foundation Trust v NHS Swale CCG and others* [2016] EWHC 1393

Automatic Suspension II

Public Interest

- *Solent NHS Trust v Hampshire CC* [2015] EWHC 457
- *Counted4 Community Interest Co v Sunderland City Council* [2015] EWHC 3898
- *Kent Community Health NHS Foundation Trust v NHS Swale CCG and others* [2016] EWHC 1393

Automatic Suspension: Tactics

- Disclosure: when to disclose more than the statutory minimum
- Serious issue to be tried: tactical use of submissions
- Expedited trial: what factors should be considered in pressing for a quick trial
- Settlement following an interim hearing

Timing and Remedies

- Do you have to bring a claim within the standstill period in order to recover damages?
- *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2016] PTSR 689
 - Answer: no
 - No additional test that breach has to be sufficiently serious. Damages are not discretionary for breach of PCR.

Brexit, State aid & Procurement

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State aid & Procurement Law

Interrelation:

1. Compliance with public procurement rules excludes undue economic advantage in the award of public contract
2. Recipients of State aid cannot be excluded from public tenders automatically
3. Audit of procurement & state aid position at the same time – particularly common in regeneration schemes

State aid & Procurement Law

Features & Tactics

1. Investigation as to continued (or completed) state aid compliance can include auditing procurement compliance
2. Separate points and separate recovery decisions – imperative not to settle as one bundle
3. Provide as full a case as possible early; engage with DCLG as to what evidence they need to see to close the audit

State aid & Procurement Law

Features & Tactics

4. Retention of records/people with knowledge usually the weakness; consider during lifespan of project and review at end of project
5. Hardest issue is where funds have been applied wrongly or have not been separated where they should've been; consider early and consider appropriate accounting for project as a whole regardless of state aid & procurement obligations

Brexit & Procurement Law

- Advisory referendum
- Business as usual until Article 50 TEU is triggered
- Time frame for Brexit uncertain
 - Notification under Article 50 TEU
 - 2 year long stop, can be agreed as longer

Brexit & Procurement Law

Procurement after Brexit:

- Norwegian model/EEA membership
 - Expect full compliance with EU law
- No single market access
 - UK likely to have domestic procurement legislation
 - Depends on what trade agreements are concluded

Brexit & Procurement Law

No full single market access

- Bilateral agreements
- Free trade agreement
- Government Procurement Agreement (GPA)

Brexit & Procurement Law

Access to EU procurements for UK entities

- January 2016 revised proposal for regulation on third country goods and services access to internal market for public procurement (International Procurement Instrument)
- Revision of 2012 proposal
- Proposal does not allow the market to be closed, but allows price penalties.

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