Procurement and construction: What’s new?

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What are we covering today?

• Directives old and new – a recap
• The big picture: what’s changing and why
• Remedies:
  – Recent decisions under the UK Regulations
  – Remedies outside the regulations: judicial review and implied contracts
• The new contracting procedures in practice
• Focus on the new SME provisions
• Post contract variations
New legislation for old

• 2004 Directives
  – 2004/18/EC (public sector);
  – 2004/17/EC (“special sectors” – utilities etc)

• 2006 Regulations
  – PCR 2006; UCR 2006 (and separate defence/security regime)

• Remedies Directive
  – 2007/66/EC; “alphabet soup” additions to 2006Regs (47-47P)

• 2014 Directives
  – 2014/24/EU (public sector); 2014/25/EU (utilities); 2014/23/EU (concession contracts – new!). Must transpose by 17.4.16

• 2015 Regulations
  – PCR 2015 Implement public sector Directive; consolidate remedies provisions; implement Young review
The main changes (1)

• Commission (and UK) agenda:
  – reduce burdens, encourage SMEs.
  – But touchstones of transparency, proportionality, non-discrimination remain

• Reducing procedural burdens for tenderers:
  – Simplified “single European document” procedure and shift to online procurement by 2018
  – Self-declaration: supporting docs only required from winner
  – Shorter periods/deadlines
  – “Beneficiary services” contracts (>€750k)

• Measures aimed at SMEs:
  – CAs encouraged to disaggregate into lots
  – CA cannot impose qualifying condition of turnover > 2x contract value
The main changes (2)

• Greater freedom for CAs:
  – Co-operation between authorities
  – Reduced publicity obligations for sub-national authorities
  – Looser constraints on Competitive Procedure with Negotiation and Competitive Dialogue
  – New “Innovation Partnership” procedure
  – Procurement as “policy strategy instrument”: environment and “social integration” policies; lifecycle cost (CO₂ etc)

• Cartels and conflicts:
  – “Abnormally low price” tenders
  – Red card – exclusion of bidders from future competitions

• Post-contract:
  – Variations: guidance on Pressetext principle
Remedies: what’s happening in the courts?

• 2015 Regulations, regs 86-104
  – No change, but courts have been busy. A quick recap…

• Pre-contract remedies (reg 97)
  – Where proceedings brought within 10/15 day standstill period
  – Automatic suspension – court’s discretion to lift (regs 95, 96)
  – Court may set aside decision, order amendment, award damages, grant injunction (reg 97(2), (3))

• Post-contract remedies – (regs 98-103)
  – Declaration of ineffectiveness/civil penalty in serious cases
  – Damages, but no other remedy
  – 30 days from knowledge of grounds (but not before 10/15 days from decision). For ineffectiveness, 30 days from notification

• Outside regulations: judicial review, implied contract
Remedies under the Regulations (1)

• Lifting the automatic suspension (regs 95, 96):
  – Now established that “interests” test under Remedies Directive adequately served by *American Cyanamid* test. “Serious question to be tried” + “balance of convenience”: *NATS (Services) v. Gatwick Airport* [2014] EWHC 3133 (TCC); *Group M v. Cabinet Office* [2014] EWHC 3659 (TCC)
  – Adequacy of damages? Complexity of assessment does not itself make damages inadequate. But *cf.* where nature of breach requires *speculation about the counterfactual*; and/or bidder faces *reputational harm in market*: *NATS v. Gatwick*
  – Public interest in concluding the new contract? *
Remedies under the Regulations (2)

- Technical/unfair attempts to defeat claims:
- Damages and the standstill period
  - Does failure to bring proceedings within the standstill period equate to failure to mitigate loss? Not in itself unreasonable since expressly permitted by regs, but argument might succeed on facts. Damages not discretionary. *Energy Solutions Ltd v. Nuclear Decommissioning Authority* [2015] EWHC 73 (TCC)

- Disclosure
  - CA refusing disclosure but attempting to rely on corresponding evidence to lift stay: *Bristol Missing Link v. Bristol City Council* [2015] EWHC 876 (TCC)

- Service of claim form (reg. 94(1), (5)): 7 days or 5?
  - *Heron Bros Ltd. v. Central Beds Council* [2015] EWHC 604 (TCC) – purposive construction: OK if step required by CPR taken even if actual or deemed service not completed
Remedies outside the Regulations: Judicial review

• Why use JR and when?
  – Breach of PCRegs may also involve a public law error
  – Previously, more generous time limit (promptly/3 months)
  – Avoid reg. 98(2)(d) restriction on remedies in post-contract case
  – Famously deployed by Virgin Trains in 2012 challenge to West Coast franchise tender (NB arguably outside PCRegs)
  – But time limits assimilated in 2013 – 30 days

• Claims by non-economic operators?
  – Courts have taken restrictive view of third party standing and delay: *R (Chandler) v. Secretary of State for Children, Schools & Families* [2009] EWCA Civ 1011
  – Signs of a thaw re. standing: *R (RMT and others) v. SSfT* (2014); *R (Gottlieb) v. Winchester CC* [2015] EWHC 231
Remedies outside the Regulations: Implied contract

- **Blackpool & Fylde Aero Club v. Blackpool Borough Council** [1990] 1 WLR 1195, CA:
  - Implied contractual obligation to consider a timely and conforming tender
  - Left open whether duty of care owed to tenderers

- **Available against private contracting bodies:**
  - *Warren v. British Boxing Board of Control* (20.5.14, QBD)

- **May inform/influence standard required of CAs under the Regs:**
The new contract procedures in practice

• Over to Tim!
Focus on SMEs

• Disaggregation
  – The new rules re. value and lots – reg. 46
  – Are CAs bound to disaggregate?
  – Publish policy on disaggregation as part of procurement strategy

• “Policy strategy instrument” – reg. 67 award criteria
  – “Criteria such as qualitative, environmental or and/or social aspects, linked to the subject-matter of the contract.” Must ensure “possibility of effective competition” and be adequately defined in contract specification
  – Supplier diversity? Local labour?

• How should larger operators respond?
Post-contract variation

• Pressetext and material variations

• *R (Gottlieb) v. Winchester CC* [2015] EWHC 231:
  – Local councillor challenged authority’s decision to vary a development agreement on viability grounds without inviting tenders
  – Decision held to breach 2006 Regs

• Does attempt to codify in reg 72 assist?