



# Public Procurement Newsletter

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### Ask a question

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**Public procurement is a rapidly developing area of law and there is a growing body of case law and legislation, which governs public tendering procedures for contracts. This is the latest edition of our newsletter, which briefly summarises key recent developments.**

### The EU & Competition team

The team advises on all aspects of UK and EU competition and regulatory law and on related areas, including merger control, anti-dumping, customs and origin legislation, state aid, public procurement and EU rules on the free movement of goods and services.

To find out more about the team, and our capabilities [click here](#).

Editor: Rachel Bickler

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## UK DEVELOPMENTS

### Ministry of Defence consults on implementation of Defence Procurement Directive

The Defence Procurement Directive (2009/81/EC) introduces new procurement rules for contracting authorities and other entities which purchase military and other equipment or related works and services for sensitive defence or security purposes. The new rules are due to be implemented in the UK by 20 August 2011. The Ministry of Defence (MoD) is consulting on stakeholder views. An initial consultation took place in spring 2010, the responses to which will be used to inform the drafting of the implementing Regulations. A second consultation will take place later in the year, based on an initial draft. Among the issues currently being debated is how to ensure that the rules adequately cover security of information and of supply, and the permitted duration of framework agreements.

*Related item:*

#### **Defence Procurement Directive**

To read our briefing on the new Directive, [click here](#).

### OGC publishes Guidelines on the new Remedies Regulations

The UK's Office of Government Commerce (OGC) has published new Guidance on the remedies for breach of the procurement rules. The Guidance is in three parts and covers:

- the UK's transitional policy, which is to apply the new rules to procurement processes beginning on or after 20 December 2009;
- changes to the 'standstill' process which applies between the award of a contract and its conclusion and the information disclosure requirements for tenderers and candidates; and

*Related item:*

#### **OGC Guidance on the new Remedies Regulations**

To access the OGC Guidance on the new Remedies Regulations click [here](#).

- an explanation of the new remedies rules, in particular, the circumstances in which a contract can be declared ineffective and financial penalties imposed.

### OGC Guidelines on time limits for challenge post-*Uniplex*

Following the recent European Court of Justice ruling in *Uniplex* (see details below) the Office of Government Procurement has issued a guidance note for public authorities on the implications to the time limits for when a bidder may bring a challenge in the High Court for breach of procurement law. Under the Public Contracts Regulations and the Utilities Contracts Regulations, such proceedings must be brought *'promptly and in any event, within three months of the date when the grounds of the proceedings first arose'*. The ECJ has advised the High Court that it must interpret this to mean that the period runs from the date on which the claimant knew or ought to have known of the breach of the procurement rules. The OGC has announced that the Regulations will be amended to give more precision as to what is meant by 'promptly'.

*Related item:*

**OGC PPN – Time Limits for challenges under the Public Procurement Regulations**

Please click [here](#) to access the PPN

### Sita's challenge against Greater Manchester brought too late rules High Court

On 29 March 2010, the High Court struck out a challenge to the award of a waste disposal contract on the basis that it was brought outside the three-month time limit. The significance of this case is that it is the first time the High Court has applied the principles established by the European Court of Justice in its recent ruling in the *Uniplex* case (see below). Sita UK Limited (Sita) brought the case against the Greater Manchester Waste Disposal Authority (GMWDA) alleging that the tender procedure was not in conformity with the procurement rules and making a claim of over £90m in damages. Under the Public Contracts Regulations 2006, legal challenges must be brought "promptly" or in any events within three months, unless there are grounds to extend that limit. The High Court concluded that Sita had sufficient knowledge of a possible breach of the procurement rules by 8 April 2009 but did not issue proceedings until 27 August 2009. The Judge concluded that the requisite standard should be *"knowledge of the facts which apparently clearly indicate, though they need not absolutely prove, an infringement"*. Accordingly, by the time the action commenced the proceedings were out of time.

Time begins when the claimant has knowledge of facts which apparently clearly indicate, though they need not absolutely prove, an infringement

### Action for damages dismissed by a Scottish Court

An action for damages brought against Inverclyde Council for breach of the Public Service Contracts Regulations 1993 (the Regulations) was dismissed by the Scottish Court of Session on 3 March 2010. The case (*Gillen & Anor v Inverclyde Council*) was brought by an unsuccessful bidder for contracts which were awarded in August 2006. The Court of Session found that one of the bidders, Mr Gillen, had failed to send the Council a valid 'letter before action' since the

The 'letter before action' failed to identify the alleged breach and did not adequately put the Council on notice of the intention to sue

letter he had sent did not identify the alleged breach of the Regulations and it did not put the Council on notice that he intended to sue. The case was also barred for having been brought outside the three-month time limit. In addition, the Court was not prepared to use its discretion to extend the time limit, since Mr Gillen was deemed to have had all the facts necessary at his disposal after receiving a full report from the Scottish Audit Office in January 2008.

## EU LEGISLATIVE DEVELOPMENTS

### Review of the procurement rules

The European Commission is currently examining the effectiveness of the procurement rules and considering possible changes to the legislation and application of the rules. The political debate over the content of the review has already begun. On 10 May 2010, former Commissioner Mario Monti published a report on a new strategy for the single market which among other things, contains recommendations on reform of the procurement rules. The European Parliament's Committee on the Internal Market has also published a Resolution calling on the Commission to conduct a review of the rules. The Resolution highlights a number of important Judgments of the European Court of Justice which have provided clarification on issues such as co-operation between public bodies, public-private partnerships, service concessions and the application of the rules to land development schemes.

The Commission has already launched a public consultation on the treatment of works and services concessions under procurement law. Other topics likely to be debated over the coming months as part of the review of the procurement rules are:

- whether the rules should be modernised and made simpler;
- how to promote access to public tenders for small and medium-sized companies;
- review of the list of 'Part B' services currently excluded from the full application of the procurement rules; and
- the extent to which the procurement rules could be used to achieve EU policy such as environmental aims, fostering innovation and promoting social and employment objectives.

*Related item:*

#### **European Commission's consultation on concessions**

For access to the online consultation on the application of procurement law to works and services concessions click [here](#).

## CASES BEFORE THE EUROPEAN COURT OF JUSTICE

### ECJ critical of English court limitation on when proceedings may be brought

In its ruling in the *Uniplex* case (C-406/08), the European Court of Justice (ECJ) criticised the way the UK courts apply the time-limit for bringing proceedings for breach of procurement law. Under English law a case must be brought "*promptly or in any event within three months*" and time generally runs from when the breach occurs. The ECJ however takes the view that the time for bringing proceedings can only begin to run from the date on which the claimant actually knew, or ought to have known, of that infringement. In the *Uniplex* case, time began to run not when the bidder was informed it was rejected but only at the point when it was given the reasons for its rejection and could take an informed view. The ECJ also added that a national rule that allows courts to dismiss proceedings even when proceedings are commenced within the three-month time limit is inconsistent with the principle of legal certainty. In future, contracting authorities will have an incentive to be open and clear about decisions in order to demonstrate that bidders knew, or at least ought to have known, about any issues over which they have concerns.

The case is likely to somewhat reduce the barrier for bidders seeking redress in the UK and Ireland

### Legal challenge to the Communication on "below threshold" procurement inadmissible

The General Court has dismissed a legal challenge against the European Commission's 2006 Interpretative Communication on the application of EU law to public contract awards that are not covered (or not fully covered) by the public procurement Directive (e.g. contracts below the value thresholds, service concessions and "Part B" contracts). Germany, supported by the European Parliament, the UK and several other Member States, brought proceedings seeking annulment of the Communication on the basis that effectively the Commission was attempting to introduce new laws for the award of public contracts that go beyond the obligations under existing EU law. The General Court dismissed these claims on the basis that the Communication did not attempt to introduce new rules, but rather, sets out the principles already established by the case law of the European Courts and non-binding recommendations on the application of those rules in practice.

The Communication sets out principles established by the case law and non-binding recommendations

## Exercise of planning permission is not subject to the procurement rules

On 25 March 2010, the European Court of Justice gave its ruling in the *Müller* case (C-451/08) clarifying the circumstances in which public authorities may be entering into public works contracts under the procurement rules. The case concerned the disposal of land by a German public body, the Bundesanstalt. The local authority examined the purchaser's development proposals under its urban planning powers and consented to the sale. The parties drew up a building plan for the area, but the purchaser was not subject to any contractual obligations to carry out the development. The central issue before the Court was whether the arrangements amounted to a public works contract which should have been put out to tender under the EU procurement rules. The key points from the ECJ's judgment are as follows:

- a works contract only arises where a public authority is receiving a "direct economic benefit";
- an authority is not receiving a "direct economic benefit" merely when exercises its planning powers to grant planning consent;
- the EU procurement rules are not triggered unless there are legally enforceable obligations on the developer.

*Related item:*

### **Müller case commentary**

To read a longer article on this case and its implications please click [here](#).

## A public sector consortium may bid for contracts

The term "economic operator" under the public procurement rules can be interpreted as including a consortium comprised of non-profit making entities such as universities and state bodies, according to the European Court of Justice in a recent ruling (*CoNISMa* C-305/08). The issue arose in relation to a tender in Italy for the acquisition of geophysical data and marine samples. CoNISMa, a group of 24 universities and three ministries, principally funded by the Ministry of Universities and Research, bid for the contract but was excluded. The ECJ confirmed that an economic operator does not require any particular form and cannot be precluded solely because it is comprised of public bodies, is primarily state funded, or proposes to sub-contract certain aspects of the contract.

An economic operator does not require any particular form, nor can it be excluded because it is primarily state funded, nor because it proposes to sub-contract parts of the contract

## ECJ rules on significant changes to a service concession

The European Court of Justice has given judgment in a case indicating that a change in the identity of a sub-contractor could give rise to a "new" contract which would re-trigger the procurement rules. The case, *Wall* C-91/08, concerned a service concession for the operation and maintenance of public restrooms for the City of Frankfurt. The contract was awarded to a public-private joint venture company, FES, and Wall AG was designated as a sub-contractor. Subsequently, Wall AG was replaced as the sub-contractor and brought proceedings claiming that this represented a substantial change to the contract which amounted to a breach of the general principles of EU law. The ECJ

Material amendments to a service concession can breach EU rules on transparency and may require a contract to be re-tendered

confirmed that material amendments to a concession contract can give rise to an obligation to ensure transparency, and that this could extend to a requirement to re-tender the contract. The ECJ left it to the national court to determine how best to compensate the appellant.

### Inclusion of additional works breach procurement rules

On 22 April 2010, the European Court of Justice ruled that the inclusion of additional works to a works concession that had not been included in the contract notice or tender specifications was a breach of the procurement rules. The case, *Commission v Spain C-423/07*, concerned the award of a public works concession for the construction and maintenance of several sections of a toll motorway in Spain. The ECJ concluded that the additional works awarded to the winning bidder exceeded the threshold for the application of the procurement rules and were not included in any of the tender documents which were originally advertised or those which were subsequently amended and publicised. The Court rejected Spain's reliance on the 'exemption' which applies to the award of unforeseen additional works that cannot be technically or economically separated from the original contract.

ECJ rules that exemption from advertising for additional works arising through 'unforeseen circumstances' did not apply

### ECJ ruling on a challenge to the award of a "mixed contract"

The European Court of Justice has ruled on the application of the procurement rules to the partial-privatisation of a casino. The case, *Club Hotel Loutraki*, concerned a challenge to a tender for an arrangement involving three parts: (i) the sale of 49 per cent of the shares in a public casino to a private company; (ii) an agreement under which the private shareholder would take over management of the casino in return for payment; and (iii) the refurbishment of the casino and adjoining hotels by the private shareholder. One of the issues before the ECJ was whether the arrangement as a whole, or elements of the arrangements, fell within the scope of the procurement rules. The ECJ ruled that the arrangement constituted a single "mixed contract" the main object of which was the acquisition of the 49 per cent shareholding and that the supply of services and works were incidental to that object. The arrangement was therefore outside the scope of the procurement rules, though it was subject to basic EU rules on freedom of establishment and free movement of capital.

The supply of services and works were incidental to the acquisition of shares so the arrangement was not caught by the procurement rules

## EUROPEAN COMMISSION INFRINGEMENT CASES

### City of York infringement case is closed

The European Commission has decided to close its case against the United Kingdom concerning the award of a contract by the City of York for the Osbaldwick development scheme. The announcement on 5 May 2010 follows the commitment by the UK Government that it will ensure that a series of published competitive tenders will take place for each of the four construction phases of the development. The Commission also acknowledged the guidance published by the UK's Office of Government Commerce on the application of public procurement rules to contracts and concessions for land developments.

*Related item:*

#### **Commission closes infringement procedure over land contract in York**

For a copy of the Commission's Press Release announcing its decision to close the infringement proceeding click [here](#).

### Infringement case launched over land development project in the Netherlands

The Commission is taking the Netherlands to the European Court of Justice over the direct award of a public works concession in relation to a land development project in Eindhoven. In 2007, the Municipality of Eindhoven agreed to allow a developer to build and operate a community centre on land which the Municipality owned but had agreed to sell to the developer. The Dutch Government considered that the arrangement was essentially a land transaction and outside the scope of the public procurement rules since the developer realises the project at his own risk and is not receiving any direct payment. The Commission however, takes the view that the main objective of the contract was not the sale of land but the execution of public works. According to the Commission, the municipality imposed obligations on the developer to realise specific building requirements and provided it with a 'tailor-made' building licence to construct and exploit the work.

### Use of social criteria such as "fair trade" labels

The extent and manner to which contracting authorities can promote social and environmental goals during a tender process is hotly debated both in the EU and at the national level. A case in point is the Commission's action before the European Court of Justice against the Netherlands (commenced on 5 May 2010) over a tender for the supply and management of coffee machines to the Province of Noord-Holland. The authority required tenderers to supply tea and coffee with specific labels indicating organic and ethical (i.e. "Fair Trade") products. The Commission's view is that to ensure the equal treatment of bidders, a contracting authority should define the relevant sustainable criteria a product must meet. Such criteria must relate to the characteristics and performance of the goods in question (e.g. glass made from recycled material) or production processes (e.g. organically grown). An authority may not simply refer to a specific "Fair Trade" label. In this instance, the authority had stated it would accept comparable labels or products that met the same or comparable criteria but did not indicate what the substantive standards for comparison were.

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