



INTRODUCTION

There has been a large number of recent legal judgements on public procurement law over the past few months. This Bulletin gives you a snapshot of the most significant of these judgements.

ARE ARRANGEMENTS BETWEEN PUBLIC AUTHORITIES – OUTSIDE OF PUBLIC PROCUREMENT RULES?

On 9 June 2009, the European Court of Justice (ECJ) handed down a judgement on the application of public procurement rules to agreements to co-operate between public authorities. The ECJ held that the arrangement between the City of Hamburg and other public authorities for the treatment of waste by Hamburg on behalf of other public authorities was not governed by public procurement rules on the basis that :-

1. The treatment of waste by the public authorities was solely in the public interest.
2. The City of Hamburg was using its own resources in co-operation with other public authorities to perform its waste treatment function.
3. No commercial contractual relationship existed, it was more an agreement among the public authorities to co-operate.

For more details see: *Commission v. Federal Republic of Germany*, ECJ, 9 June 2009

26 MINUTE LATE TENDER REJECTED – LEADBITTER CASE

On the 1 June 2009, the High Court of England dismissed a challenge to a local authority's decision to reject an electronic tender. In this case the tenderer, Leadbitter forgot to upload certain documents when it made its electronic submission. On realising this, Leadbitter subsequently tried to upload these documents. However, Leadbitter was not permitted to upload these additional documents to the tender submission. Leadbitter then emailed these documents to the local authority 26 minutes after the deadline for receipt of tenders. The local authority rejected Leadbitter's tender on the basis that the tender was incomplete and was submitted late.

The Courts held that the local authority had the discretion to adopt a strict approach to applying the Instruction to Tenderers rules so as to ensure equal treatment and fairness in the procurement process. The Courts noted that the local authority has the discretion to accept a late submission where the fault is on the part of the procuring authority. This was not the case in Leadbitter's situation.

In light of this judgment (which is of persuasive authority in Ireland), tenderers ought to pay particular attention to detail otherwise even the most minor errors could result in a legitimate rejection of their tender submission. From a procuring authority's perspective, this judgement brings comfort to the procuring authority when strictly applying its Instructions to Tenderers.

For more details see: *Leadbitter v. Devon County Council*, [2009] EWHC 930 (Ch)

GUIDANCE ON TIME-LIMIT FOR BRINGING PROCEEDINGS AGAINST PROCURING AUTHORITIES

Amaryllis case

On 8 May 2009, the High Court of England rejected an application by Office of Government Commerce (“OGC”) the procuring authority to strike out an action for damages in relation to an alleged breach of public procurement rules, on the basis that the aggrieved tenderer’s (Amaryllis) proceedings were brought out of time. Under public procurement law in England and Ireland the time limit for bringing proceedings to challenge a decision of a procuring authority must be brought promptly and in any event within 3 months from the date when the grounds for bringing proceedings first arose.

In this case, the Court held that the clock for bringing proceedings starts running when “*an irrevocable decision was taken to exclude the claimant from the list of successful tenderers.*” In this case the relevant date was when the OGC wrote to inform the claimant (Amaryllis) that its tender was unsuccessful, namely 17 March. Amaryllis brought proceedings within the 3 months, namely 4 June. The Courts considered whether the proceedings were brought “promptly”. The Court was of the view that Amaryllis action was prompt enough in light of the fact that it had to make enquiries as to the reasons for their exclusion. The Court also took into account the fact that the procuring authority was anything but prompt in answering Amaryllis enquiries. The judge felt that OGC’s conduct during the 3 month period was likely to have been the main cause of delay.

This case provides clarity to procuring authorities and tenderers alike in respect of when the grounds for bringing proceedings arise and is of persuasive authority in an Irish public procurement context.

For more details see: *Amaryllis Ltd v. HM Treasury (OGC Buying Solutions)* [2009] EWHC 962

SELECTION AND AWARD CRITERIA – EXERCISE CAUTION

Commission v. Ireland

On 15 May 2009 the European Commission referred Ireland to the European Court of Justice (ECJ) over the award procedure by the Department of Agriculture, Fisheries and Food for a public supply contract for animal identification tags. The Commission considers that the arrangement entered into by the Department qualifies as a public supply contract. Furthermore, the Commission is of the view that the procedure for awarding the contract failed to respect the obligations under the Public Procurement Directive (2004/18/EC) as well as the principles of equal treatment and transparency as interpreted by the European Court of Justice, on the basis that the Department applied criteria relating to the tenderers’ ability to perform the contract as award criteria instead of selection criteria. The Commission is also critical of the Department for introducing weightings in the evaluation phase which modified the emphasis among the published award criteria. The Court of Justice have yet to make a decision on whether the Department has committed an infringement of public procurement rules.

WATCH THE SPACE

For more details see:

http://ec.europa.eu/internal_market/publicprocurement/news_en.htm.

Lianakis Case

This European Court of Justice (ECJ) case emphasises the importance of distinguishing between “selection” and “award” criteria and cautions against using selection criteria concerning technical and professional ability in the award process. The ECJ states that “experience” should only be used as selection criteria and not at award stage. This case indicates that procuring authorities should avoid

using experience as award criteria in the public procurement process.

For more details see: *Case C-532/06 Iliankis & Others v. Alexandroupolis*, ECJ 24 January 2008

ECJ RULES ON FAILURE TO PROVIDE PROMPT INFORMATION ON REJECTION

On 4 June 2009 the European Court of Justice (ECJ) ruled on the failure by a procuring authority to provide a bidder with timely feedback on the rejection of its tender. The procuring authority, a Greek electricity company, Dimosia Epikhirisi Ilektrismou AE (DEI) failed to provide a rejected bidder with full reasons for that rejection for over two months. On foot of a complaint by that bidder to the European Commission, the Commission took infringement proceedings against Greece before the ECJ. The ECJ held that Greece was in breach of the former Utilities Contracts Directive (93/38/EEC) because it had not provided a prompt response to its request for information about why its bid had been rejected.

For more details see : *C- 250/07 Commission v. Greece*, ECJ, 4 June 2009

SETTING ASIDE CONTRACTS – NEW DEVELOPMENTS

Status of New EC Remedies Directive in Ireland?

Ireland must implement the EU Remedies Directive (2007/66/EC) by the 20 December 2009. This is likely to facilitate more challenges to the procurement process. The key provisions of the Directive are as follows:

- Strengthening rights of bidders to challenge contracts
- Unsuccessful bidders will have a new remedy of ‘ineffectiveness’. This will mean that a contract can be terminated

when the Courts make an order to this effect.

For more details of its transposition into Irish Law see: Draft EC (Revised Remedies Directive) Regulation 2009 at www.etenders.gov.ie

Recent English/Northern Ireland Cases – on Standstill Period

Under the Irish Regulations, there is a 14-day period between the decision to award a public contract and the actual conclusion of the contract. The aim of the standstill period is to give unsuccessful tenderers an opportunity to challenge the decision before the contract is entered into.

In *DR Plumbing & Heating Services v Aberdeen City Council* the procuring authority entered a contract during the ten-day standstill period. DR plumbing, an aggrieved tenderer challenged this decision. In June 2009, the English courts issued an interim order to suspend the decision and set aside the concluded contract. From a procuring authority’s perspective this case emphasises the importance of adhering to the standstill period.

On 19 February 2009 the Northern Irish courts considered whether the standstill period rule must be adhered to in respect of Part B service contracts. The Courts held that although the Regulations do not explicitly provide for this, under public procurement principles such a duty could arise in “exceptional circumstances” where the value of the contract is significant.

For more details see: *DR Plumbing & Heating Services v Aberdeen City Council* (Unreported, Court of Sessions, February 2009)

Federal Security Services Ltd v Chief Constable for the Police Service of Northern Ireland and Resources Group Ltd (2009) NICh 3.

RDJ PROCUREMENT SERVICES

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- Advising on the procurement process, the appropriate procedures, conduct of the evaluation of tenders and contract award issues
- Managing compliance through the structuring of procurement transactions
- Interpretation of EU and Irish procurement law
- Advising on EU developments such as communications from the Commission and European Court of Justice (ECJ) decisions
- Pursuing remedies for breach of procurement rules

FINOLA MCCARTHY **Partner**



Finola McCarthy specialises in construction, public procurement and environmental law. She advises on all types of construction and engineering projects both public and private sector, from tendering procedures, through to contract documents and dispute resolution.

AOIFE SHIELDS **Solicitor**



Aoife Shields practises in the areas of Construction and Environmental and Public Procurement. She advises businesses across a range of industry sectors; statutory bodies and private clients on all aspects of environmental, construction and public procurement law.

For further information, to receive a copy of our legal updates or to discuss any aspect of public procurement law please contact:

Finola McCarthy

Email: Finola.McCarthy@rdj.ie

Aoife Shields

Email: Aoife.Shields@rdj.ie

Cork Office: Ronan Daly Jermyn, 12 South Mall, Cork. 021 4802700