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# UK Public Procurement Law Digest: The Dangers of Prison Food, Electronic Auctions, and Moving Goalposts in Public Procurement

***The UK High Court has rejected a public authority's attempt to strike out a claim by an aggrieved food distributor, emphasising the importance of sticking to the basic principles in conducting and challenging public procurements.***

**By Alistair Maughan and Masayuki Negishi**

In recent procurement law cases, courts have tended to side with public authorities (rather than bidders) when considering whether a claim raises a serious issue to be tried. In this case, at least on three counts, the Court refused to rule out a procurement complaint based on allegations of irregularity in the award process. The judge indicated his willingness to let the aggrieved bidder have its day in court. The one ground on which the Court agreed with the government – that the time limits for bringing claims should be closely adhered to – is consistent with previous cases.

## WHAT IS THE CASE?

The case is ***Harry Yearsley Limited v The Secretary of State for Justice*** **[2011] EWHC 1160 (TCC)**, a decision made by the English High Court in an application made by the UK government to strike out and seek summary judgment in respect of parts of a claim brought by a disgruntled food supplier which lost out in a tender to supply the UK's prisons with frozen food.

## WHY IS THIS CASE IMPORTANT?

While this case may not create any new legal rules, it does contain several reminders of important established principles that relate to public procurement law challenges. These include the importance of aggrieved bidders acting promptly within the limitation period as soon as they become aware of a potential breach of public procurement law, and the fundamental obligation imposed on contracting authorities in respect of the transparent and non-discriminatory application of evaluation criteria. This case also demonstrates the pragmatic approach to application of the "*pressetext*"[1] principles that the Courts in England might well take in determining procurement challenges that are based on allegations that a public contract was amended materially after the award.

[1] In Case C-454/06 ("***pressetext***"), the leading case law on amendments to existing contract, the European Court of Justice stated that amendments to an existing contract constitute an award of a new public contract for the purposes of EU public procurement law if the amended contract is *"materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to re-negotiate the essential terms of that contract*", and went on to describe what would constitute a 'material difference'. For an overview and analysis of *pressetext*; see our January 2009 update: Amending an Existing Contract.

With the UK economy being slow to recover from recession and with the implementation of the Coalition Government's plan to significantly cut public spending progresses, both bidders and contracting authorities are well-advised to go back to basics and ensure that public procurement projects (including any on-going or planned re-negotiation of an existing contract) are undertaken clearly in accordance with the various judgments that have become well-established principles in the field of public procurement.

## WHAT HAPPENED IN THIS CASE?

In December 2008, the UK's Ministry of Justice ("**MOJ**") initiated a procurement process on behalf of Her Majesty's Prison Service for a contract to supply the UK's prisons with frozen food. Following the submission and assessment of pre-qualification questionnaires, an invitation to tender ("**ITT**") was sent out to potential suppliers and the MOJ received tenders from five bidders, including Harry Yearsley Limited ("**HYL**"), a major frozen food distributor and the then-incumbent supplier.

Within the ITT, the MOJ described the procurement as a two-stage assessment. The first stage involved selection based on certain quality criteria and the second stage involved an electronic auction. The quality criteria were set on a threshold basis, and essentially any bidder who passed the required threshold was allowed to proceed to the electronic auction.

As part of the quality criteria, the ITT stipulated that compliance with certain requirements were mandatory, and this included compliance with the 'Halal Standard'[2] , which stipulated, amongst other things, that animals had to be slaughtered in accordance with Islamic law so as to render the meat fit for consumption by Muslims. One specific requirement of the Halal Standard was that the animals had to be slaughtered by hand.

Furthermore, the ITT, as well as the rules governing the electronic auction provided by the MOJ, pointed out that the electronic auction was a "*price only*" assessment. This was contrary to the MOJ's stipulation that the contract was to be awarded to the "*most economically advantageous tender*".

HYL passed the first stage of the selection process, but it was unsuccessful in the electronic auction and the contract was ultimately awarded to "**3663**" (a major wholesale food distributor) on or around 2 June 2009. HYL was provided with a written debrief on or around 5 June 2009. Unsatisfied with the outcome of the procurement, HYL began making various enquiries.

By early October 2009, HYL had taken legal advice and was of the view that the procurement process was flawed; its position was made very clear in a letter sent to the MOJ. Yet, it was not until April 2010 that HYL issued its claim form and, even then, the April 2010 claim form was not served on the MOJ, and was not followed up by particulars of claim.

Further communications between HYL and the MOJ led HYL to conclude that there were other flaws in the procurement process and, specifically, that:

- 3663 was allowed to participate in the electronic auction despite its inability to comply with the Halal Standard; and

[2] As to the official stance of the UK's Food Standard Agency ("**FSA**") on Halal meat, see Annex 5A to "*Food Law – Practice Guidance (England)*", issued in May 2011 by the FSA. The Islamic law requirements quoted in Annex 5A state that for a meat to be Halal, amongst other things, "*the slaughter man must be a Muslim who has been properly trained and licensed*".

- following the award, various amendments to the contract were made. In particular, it was amended to allow 3663 to supply machine-slaughtered beef (instead of beef manually slaughtered in accordance with the rituals and formalities required by Islamic law), contrary to the requirements of the Halal Standard.

Thus, on 27 July 2010, HYL issued a fresh claim form, which was accompanied by short particulars of claim and was served on the MOJ. In seeking damages from the MOJ, HYL levied five specific allegations of breaches of the Public Contracts Regulations 2006 ("**PCR**") against the MOJ, alleging that MOJ had:

- adopted evaluation criteria and weightings which differed from those that were set out in the ITT;
- allowed 3663, the successful bidder, to derogate from the Halal Standard;
- made material changes to the contract after it was awarded to 3663;
- made a flawed use of the electronic auction as part of the procurement process; and
- in its debrief to HYL, displayed a lack of transparency and fairness, provided inadequate information and acted in a discriminatory manner.

In response to these claims, the MOJ made an application under the Civil Procedure Rules ("**CPR**") to strike out these specific claims or, in the alternative, to obtain summary judgment in respect of these specific claims[3]. It argued, amongst other things, that:

- the proceedings were brought out of time;
- HYL did not suffer, nor did it risk suffering, any loss or damage as a result of the alleged breaches; and
- HYL has no real prospect of succeeding on the merits of its claims.

## TIME LIMITS FOR CLAIMS

Because the original procurement was initiated before the implementation of the new remedies regime introduced by Directive 2007/66/EC and the amendments made to the PCR, the Court proceeded to apply the PCR as it stood prior to the amendments taking effect on 20 December 2009[4].

The implication of this approach was that the requirement under the new remedies regime that the claim had to be "*served*" in order to stop the clock for the purposes of limitation period did not apply. Therefore, in deciding when the proceedings were "*brought*" (generally speaking, procurement challenges have to be brought within 3-month of the aggrieved bidder becoming aware of the breach), the Court had to consider only the CPR, which provides that "*Proceedings are started when the court issues a claim form at the request of the claimant*"[5]. Thus, the clock stopped running for HYL on 20 April 2010 when the first claim form was issued.

[3] Under Rule 3.4 of the CPR, the court can strike out a statement of case on the ground, amongst others, "*that the statement of case discloses no reasonable grounds for bringing or defending the claim*". Similarly, under Rule 24, the court can potentially give summary judgment against either party to a dispute if: *"(a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial*.".

[4] For an overview of the new remedies regime, see our January 2010 update: New Remedies Regime New Public Procurement Remedies in the UK.

[5] See Rule 7.2 of the CPR.

As a result, arguably the strongest of HYL's various claims fell away because it was brought out of the 3-month limitation period that generally applied to procurement challenges. This ruling undermined HYL's allegation that the use of an electronic auction as a pure assessment of pricing – coupled with the use of quality criteria as a threshold condition – was flawed. In the Court's view, the timing issues were fatal to this particular claim because "*by early October 2009 HYL had the knowledge of the facts upon which it now relies for its contention that the electronic auction procedure did not comply with the regulations*", yet proceedings were not brought until April 2010.

However, the Court did refuse to strike out the remainder of HYL's claims because the Court agreed with HYL that it was not in a position to know all of the facts that underpinned those other claims until much later, when additional matters came to light through its various exchanges with the MOJ.

## EVALUATION CRITERIA AND WEIGHTINGS

HYL's claims with respect to evaluation criteria and weightings were two-fold. Firstly, HYL claimed that the MOJ had changed the evaluation criteria and weightings from those originally notified to bidders, and secondly, HYL claimed that the MOJ allowed 3663 to participate in the electronic auction despite knowing that 3663 was unable to comply with the Halal Standard, thereby effectively lifting what was supposed to be a mandatory requirement. In support of the latter allegation of non-compliance of 3663's tender with the Halal Standard, HYL produced evidence by way of witness statements and various exhibits.

With respect to HYL's claim regarding the change to evaluation criteria and weightings, the MOJ conceded that it did use the wrong weightings but it still argued that, because the first stage evaluation against quality criteria was only an assessment against threshold criteria and HYL had passed the first stage evaluation, the use of wrong weightings did not prejudice HYL at all. The MOJ made similar arguments with respect to HYL's claim regarding the alleged derogation from the Halal Standard, *i.e.*, since HYL was successful in the first stage evaluation, any differential treatment given to 3663 or any other bidder in the first stage evaluation made no difference to HYL.

It is on this same basis that the MOJ argued that HYL did not suffer, nor did it risk suffering, any loss or damage as a result of any alleged breach of the PCR committed by the MOJ with respect to the evaluation against the quality criteria. The Court disagreed. It noted that whilst HYL backed its claim regarding the alleged derogation from the Halal Standard with substantive evidence, the MOJ refuted this allegation only on general terms and failed to rebut it with any specific supporting evidence, leading the judge to conclude that "*The MoJ has come nowhere near satisfying me that the allegations in relation to the breach of the Halal Standard have no prospect of success*."

The Court also made it clear that, although the argument advanced by the MOJ had force, such argument was not necessarily correct, noting that whilst the onus was on HYL to prove its loss as a matter of probability at the full trial, as HYL submitted, "*the dynamics of the electronic auction would have been quite different [and] HYL would or might have won it*", had other tenders been properly disqualified at the first stage evaluation for non-compliance with the Halal Standard, which was said to be a mandatory requirement.

## AMENDMENTS TO THE CONTRACT AWARDED TO 3663

As regards the contract awarded to 3663, HYL accused the MOJ of making material amendments to the contract and pleaded four specific examples:

- "*change in weight of muffins*";

- "*provision of a substitute fish for Pollock*";
- "*increase in the price of frozen chops… on an annual basis by some £47,000 odd in the context of a contract with a value of some £22 million*"; and
- the concession to allow 3663 to supply machine slaughtered beef, contrary to the requirements of the Halal Standard.

With respect to the first three of these alleged examples of amendments, the Court took the view that they were "*relatively minor*" and clearly was of the view that they were not material enough to pass the test set out in *pressetext*[6].

In fact, the Court went as far as to indicate that, were it not for the fact that the allegation of post-award amendment to the contract was pleaded only by way of example and the entirety of the scope of the amendment was not clear, the Court was prepared to strike out the first three pleaded examples of alleged amendment to the contract. The Court also ordered HYL to specify "all the facts upon which it relies" if HYL wished to pursue the claim based on the alleged post-award amendment to the contract.

Whether or not any of the alleged changes made to the contract awarded to 3663 will actually be caught by the rules set out in *pressetext* remains to be seen until the case proceeds to a full trial, but this case could potentially result in the Court issuing guidance (possibly for the first time) on how the test set out in *pressetext* will be applied in practice under English law.

## CONCLUSION

This is a judgment in respect of a preliminary application made by the MOJ, and the core issues of the case remain to be resolved at a full trial. Whether or not it will proceed to a full trial at all, and how the matter will be resolved, if it does, remains to be seen. However, even at this preliminary stage, the case is full of salutary lessons in public procurement as to what should be done or not done by both the contracting authorities and bidders:

- The requirement under the new remedies regime that a claim must be "*served*" on the contracting authority in order to stop the clock ticking for the purposes of the limitation period does not apply to a procurement which was commenced under the old regime before 20 December 2009, for which purpose the clock stops simply when a claim form is issued. In pursuing or defending procurement challenges, both contracting authorities and bidders will need to carefully examine the timeline of events and actions taken by the parties, depending on when the procurement in question was initiated.
- For the purposes of the limitation period, the clock starts to run from the time when the bidder knew or ought to have known that a potential breach of the PCR had taken place, and bidders who hold back on issuing proceedings (under the old remedies regime) or hold back on issuing and serving the claim on the contracting authority (under the new remedies regime) may run the risk of being time-barred to plead what is potentially a very good argument. Bidders should therefore consider bringing formal challenges as soon as they suspect any potential infringement at any point during the procurement process without waiting until it has the complete picture[7].
- When bringing a procurement challenge, there is no need for actual loss to be proven, and an aggrieved bidder only needs to prove loss as a matter of probability (*i.e.*, risk). An argument that a particular flaw in a procurement process

[6] See our January 2009 update: Amending an Existing Contract.

[7] As to the importance of acting sooner rather than later, see the judgment of the High Court in *SITA UK Limited v Greater Manchester Waste Disposal Authority* [2010] EWHC 680 (Ch) (as subsequently upheld by the Court of Appeal in *SITA UK Limited v Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156; for a summary and analysis of the High Court's judgment, see our April 2010 update: Limitation Period for Challenges – when does the clock start to tick?)

would not have made any difference to a given bidder because the outcome of the process would not have been any different for that bidder (and, therefore, the bidder has not suffered any loss or was unlikely to have risked suffering any loss), is unlikely to be sufficient to enable a contracting authority to make a successful application for a strike-out[8].

- Evaluation criteria must be disclosed and applied properly. One of the earlier judgements to emerge from the Courts following the coming into force of the PCR clearly states that a contracting authority cannot unilaterally apply evaluation criteria/weightings which differ from what was communicated to the bidders, nor can it apply them in a manner that differs from what was communicated to the bidders. Furthermore, evaluation criteria must be applied uniformly and consistently. An inconsistent application of evaluation criteria (*e.g.*, lifting a mandatory requirement with respect to one particular bidder in the course of evaluation, as the contracting authority was alleged to have done in this case) is likely to infringe one of the most fundamental principles derived from EU law that all bidders must be treated equally and in a non-discriminatory manner[9].

- Where a contracting authority runs a procurement by selecting the "*most economically advantageous tender*" as the overall criteria for awarding a contract, it must be careful in designing its selection process and setting its evaluation criteria, and refrain from adopting a process or criteria which results in assessment of only quantitative factors, or only qualitative factors. In such situations, contracting authorities must ensure that the overall evaluation properly takes into account both quantitative as well as qualitative aspects of the tenders[10].

- When bringing a procurement challenge based on post-award amendments made to a public contract, bidders should carefully consider how their case is put forward, bearing in mind that not all amendments to an existing contract will automatically trigger scrutiny by the Court. Amendments to an existing contract must surpass a threshold of materiality before reliance can be placed on *pressetext*. Likewise, contracting authorities and incumbent suppliers will need to tread carefully when re-negotiating their existing contract by considering whether or not the provisions which they seek to amend are likely to surpass the materiality threshold in accordance with *pressetext*.

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[8] For another example of the Court's careful approach in determining an application to strike out procurement challenges, see the judgment of the High Court *in Montpellier Estates Limited v Leeds City Council* [2010] EWHC 1543 (QB) (for a summary and analysis of this judgment, see our July 2010 update: Risk of Abandoning Procurements)

[9] As to the importance of transparency and the mandatory nature of the disclosure of evaluation criteria and weighting, see the judgment of the High Court in *Letting International Limited v London Borough of Newham* [2008] EWHC 1583 (for a summary and analysis of this judgment, see our December 2008 update: Evaluation Criteria and Weighting – Disclosure and transparency are mandatory, not discretionary).

[10] Compare this case (where the 'qualitative' element of the evaluation was merely treated as a threshold condition and therefore the electronic auction rendered the overall evaluation a 'quantitative' evaluation) against *Henry Bros (Magherafelt) Ltd and others v Department of Education for Northern Ireland* (No. 2) [2008] NIQB 105, where the Northern Irish High Court held that while price is not a mandatory element of the "most economically advantageous tender", and while it is open to a contracting authority to adopt a series of predominantly non-economic evaluation criteria, price or cost must be a part of the evaluation in some form (for a summary and analysis of this judgment, see our February 2009 update: Framework Agreements: Evaluation and Claim Period.

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