

Developments in Public Procurement Law Challenging Contract Award Decisions

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The pre-2007 Directives

- Directive 2004/18/EC (“Public Procurement Directive”; for public contracts) and Directive 2004/17/EC (“Utilities Directive”)
- “Old” Remedies Directives: Directive 89/665/EC (public sector); and Directive 92/13/EEC (utilities sector)

2007 Remedies Directive

- Directive 2007/66/EC (“Remedies Directive”)
 - Article 1: Public Contracts
 - Article 2: Utilities

Defence

- EU: Directive 2009/81/EC of the European Parliament and Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts in the field of defence and security (OJ No L 216, 20.8.2009, p.76).
- UK: the Defence and Security Public Contracts Regulations 2011

The Main UK Regs

- Public Contracts Regulations 2006
- Utilities Contracts Regulations 2006
- The Public Contracts (Amendment) Regulations 2009 (SI 2009/2992)
- The Utilities Contracts (Amendment) Regulations 2009 (2009/3100)

Further Amendments to UK Regulations

- The Public Procurement (Miscellaneous Amendments) Regulations 2011 (SI 2011 No. 2053) – in force 01.10.11
- Limitation after *Uniplex*
- Suspension on issue not service

Award Notification

Regulation 32

- Reasons
- Timing
- Standstill

“Invitation to sue?”

“Automatic” Suspension

Regulation 47G:

- CA must refrain from entering into the contract
- Power shift to the disappointed tenderer
- Issuing Claim Form: “spanner in the works”

Regulation 47H

- If Regulation 47G were *not* applicable, would it be appropriate to make an interim order requiring the CA from entering into the contract?
- If *not* appropriate, the Court may lift the suspension

Regulation 47H

What principles apply?

- *American Cyanamid*
- 'Reverse burden'
- Cross-undertakings?

American Cyanamid

- (1) Serious issue to be tried?
- (2) Damages an adequate remedy?
- (3) Balance of convenience.

The Suspension Regime

- “Reactive” rather than “proactive”
- Contracting authority rather than tenderer applies
- Claimant beware: costs!

First Case

- *Indigo Services (UK) Ltd v Colchester Institute Corp.* [2010] EWHC 3237

Suspension lifted

'Predecessor' case

Alstom v Eurostar [2010] EWHC 2747 (Ch)

Subsequent and recent cases – suspensions lifted

- *Exel Europe v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC)
- *Halo Trust v Secretary of State for the Home Department* [2011] EWHC 87 (TCC)
- *Metropolitan Resources NW v Home Secretary* [2011] EWHC 1186 (Ch)

...and in Scotland

- *Elekta v Common Services Agency* [2011]
CSOH 107 (Scotland, Outer House)

...and in Northern Ireland

- *Rutledge Recruitment and Training v Department for Employment and Learning and aor* [2011] NIQB 61

...except:

- *First4Skills Ltd v Department for Employment and Learning* [2011] NIQB 59 –

(but note ‘exceptional’ circumstances)

Is UK remedy effective?

- *Cyanamid* test
- Court's duty under Article 4(3) TEU (ex Article 10 EC) to ensure the effective application
- Interim relief and Case C-432/05 *Unibet* [2007] ECR I-2271

The Future

- European Commission proposal of 20 December 2011 to reform the public procurement directives
- Next stop: Council of Ministers and European Parliament in 2012

Concluding remarks

The End

Thank you

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The logo for Monckton Chambers is displayed within a dark red rectangular background. It features a large, white, stylized letter 'M' on the left. To the right of the 'M', the word 'MONCKTON' is written in a white, uppercase, sans-serif font. A thin white horizontal line is positioned below 'MONCKTON'. Underneath this line, the word 'CHAMBERS' is written in a smaller, white, uppercase, sans-serif font, with wide letter spacing.

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