

WEBINAR SERIES: PROCUREMENT BITES**A, B, C OF PROCUREMENT****Michael Rainey**

Hello and good morning everyone and welcome to the first in our new series of procurement webinars where we're going to boil down the alphabet soup of procurement law into a series of 30-minute bite-sized chunks. I'm Michael Rainey and I'm joined today by Charlotte Parkinson, Louise Dobson and Jonathan Davey.

Naturally enough we're starting at the beginning of the alphabet with A, B & C or in this case Abandonment, Bills Bills Bills and Covid 19. Please do raise any questions as we go using the question or chat function on the system and we will feed those into the speakers to respond. Just to let you know this session is being recorded.

I'm now going to pass on to Charlotte who's going to tell you all about a recent area of procurement case law focus. The rules about abandoning procurement process.

Charlotte Parkinson

Thank you Michael. So firstly what is abandonment? Generally you'd expect your procurement to run from invitation to tenders, get your bids in, evaluate them and then notification of who has been determined as the winning bidder and then award the contract to that bidder. However, at any point in that process before entering into the contract the authority can effectively cancel its procurement and no longer proceed as you might expect so generally a contracting authority has a broad discretion to abandon providing that it complies with the EU principles, particularly those of equal treatment, transparency and proportionality. So in the spirit of A, B, C firstly some actions.

There are some things for bidders and authorities to check when facing an abandonment decision so for example has the authority reserved its rights not to proceed to award or not to award one or more of the lots in the tender documents and has it also included a clause on no liability for bid costs. Second, in reaching its decision the authority has to have been genuine, rationale and proportionate and thirdly if it does reach that decision to abandon the authority needs to communicate that decision to all bidders and candidates as soon as possible together with the reasons for abandoning so be timely. All parties should consider the timing of an abandonment decision and importantly authorities shouldn't just assume that abandoning is the answer to extinguish any litigation or challenges that have already been brought. If the authority did abandon possibly because a challenge had been brought, the court would look at whether the breaches complained of by that challenger had already happened and potentially caused loss to the challenger by the date that the decision was made to abandon so the cause of action in those circumstances could be considered to have accrued before the abandonment decision and unless the authority can prove it would have abandoned in any event, irrespective of that challenge or the litigation, the courts have recently taken an approach to allowing claims that have crystallised before abandonment to continue irrespective and that could be quite a sizeable damages claim by a disgruntled bidder.

So generally you find that the further into the procurement process you are, particularly around the award decision, the more likely it is that an abandonment will be challenged and a final point on timing. If you are the authority and the best option for you in all of the circumstances is an abandonment, make sure you've considered your next steps so have you got time to do a brand new procurement, can you

lawfully extend existing contracts or can you actually forego the services that you were contracting for altogether or at least until you have that time to run a new procurement. If we're acting for an authority and there are challenges to the procedure if those challenges have merit and the authority does want to abandon, we would be advising that they enter into a settlement agreement with the challenger on terms of we'll abandon if you withdraw your claim or your potential claim. So considering all of that if there is an abandonment you should be aware that there is an option for challenging that decision so if you don't have those settlement terms that I've already talked about it's possible that the disgruntled challenger might want to challenge the abandonment decision or even the successful bidder if you've got as far as having notice of who that was. So all abandonment decisions have to be open to review and the courts can annul them if they find that they were made unfairly or unlawfully so there's also that risk of a judicial review challenge to the decision but that's for another webinar.

As I mentioned, the courts have recently considered this in a case of *Amey Highways Limited v West Sussex County Council* and as I said, while they did allow that original claim to continue, the court did actually conclude that the abandonment decision itself was lawful even though the council had made it because of the legal decision and they decided this because of that broad discretion that authorities have and also because the decision that the council made to abandon, even though the cost of the legal challenge was rationale and proportionate in all of the circumstances.

So to conclude on A for Abandonment if you're the authority is there an alternative? If you realise you've made a mistake in your ramping of the bidders can you reverse the decision and award it to the right bidder by way of a rescoring exercise for example? Or if you abandon and you negotiate some settlement terms with a challenger consider the breaches that you're alleging and any future losses and whether that cause of action has already accrued before the decision was taken by the authority to abandon because it might be that those original challenges could continue regardless of the abandonment decision.

For unsuccessful bidders, do you have grounds to challenge the abandonment and how strong are those grounds bearing in mind the fact of discretion for authorities and the court's recent decisions and a note for authorities, hopefully you've done some risk management at the outset and in light of any challenges consider your timings and options to avoid the need for abandonment or at the very least have mitigated the risks in so far as possible of taking that abandonment decision.

I will hand back to Michael for any questions.

Michael Rainey

Thank you very much Charlotte so we've had a few questions in from listeners and the first question is "How common in practice are abandonment challenges?"

Charlotte Parkinson

So deciding to abandon is not hugely uncommon but I would say that challenges to that decision are more common so unless an authority has done something very untoward in terms of equal treatment and transparency, given the *Amey Highways* case last year and the authority's broad discretion asking the court to look at an abandonment decision is quite rare, you'll find that there's a deal to be done with an abandonment so to give an example we had a matter recently where a bidder did challenge something in the authority's procedure and they even went so far as issuing a claim with that challenge and once the authority looked at it properly they could see that the procurement that they'd run actually hadn't achieved what they were hoping to achieve and so they decided that they should cut their losses and abandon and they'd re-run the procurement again in a different way, so actually the challenger was happy because it meant they'd got another shot at that contract when the authority put the new procurement out and they were also the incumbent so the challenger actually agreed to withdraw their claim although at that point they had spent money on legal costs and the court fee to issue their claim was over £10,000 so there was also an issue on costs but yeah I would say ultimately abandonment decisions are not uncommon but challenges all the way through the courts are a lot more uncommon.

Michael Rainey

Okay thank you very much Charlotte and in the interests of time I'm just going to move on although thank you for submitting other questions as well.

Now we're going to move onto "B" and in light of the government's recent Bill, Bill, Bill initiative announcement Jonathan is going to have a look at the state of play in real estate development in procurement terms.

Jonathan Davey

Thanks Michael and good morning everyone. I thought in my 10 minutes I would have delivered value if I told you two controversial things, dispel two myths and gave you two ideas to take away so here goes.

Two controversial things. The first is what is so bad about running a procurement? So often in the real estate development context a local authority or other client comes to us having identified somebody with whom they want to work and they want to go ahead without running a procurement process, often it will be said that time constraints are such that running a procurement process isn't feasible. I'm not sure that's generally right, the reality is that the things in a procurement process that take time are things that hopefully any sensible process aimed at securing best value will include. For example, deciding what good looks like, deciding what our criteria are for proceeding. Deciding what the parameters of the contract awarded will be. In actual fact the time limits in the Regulations which can in any event be shortened don't tend to be the key issue in terms of the time taken to deliver a procurement.

So my first controversial thought is what is so bad about running a procurement? Going back to a point I made a moment ago, my second controversial statement is I sometimes think authorities start too far along in the process when they're doing real estate development. What do I mean by that? Well too often it seems it's the developer that brings an idea to a local authority, its often got some rights over key pieces of land, it's a site that the local authority wants to redevelop, it's been a problem site for a period, maybe the developer is offering to deliver things that the local authority wants in terms of community benefit and public realm. I wonder if one of the issues that it gives rise to is "oh well we've been talking to these people for six months now, it will be very embarrassing to go back on all that and to tell that we have to run a procurement process". One of things I've encouraged local authorities to do is perhaps be more proactive at the front end of that process. Maybe what we should be doing in our town centres is identifying those sites and bringing forward proposals to develop them. Maybe going out with an advert that looks for professional support in developing viable schemes and then run a competition that might involve money and/or land being input by the local authority as part of developing the best scheme rather than simply trying to ensure that we can go with the one developer who has taken the initiative and come forward to us. So they're my two controversial things.

Two myths. There was a case two years ago called *Faraday* and that case overturned a development agreement entered into by West Berkshire District Council and Faraday and the reason for that was that albeit that at the time the contract was awarded the contractor was not obliged to proceed with development. There came a point after certain conditions were satisfied where the developer was then obliged to go ahead and develop. As a result of the *Faraday* case people have been concerned that all development of that type where there hasn't been a procurement process is now problematic. That's not the case and when I come onto my two ideas you will see that there are still ways in which we can deliver real estate development without going through a procurement process in appropriate circumstances.

The other myth I'd like to dispel is the idea that there's something wrong in arranging things in setting up the contracts, the development arrangements in a way that avoids or minimises the effect of the procurement rules. There's plenty of statements in case law from Judges making it clear than an authority isn't doing anything wrong if it so arranges things as to avoid the procurement rules completely or mitigate their effects. In fact, that's what our team spends a lot of its time doing, helping clients design

procurements in a way that yes delivers what they want but also minimises the extent to which, if I can put it like this, the procurement rules get in the way.

So much for my two myths. What about my two ideas? Well going back really to this theme of it still being possible to do real estate development without engaging the procurement rules. One of the leading QC's puts it this way, he says *"If the authority has a strong enough stomach its generally possible to do real estate development without engaging the procurement rules"*. What does he mean by that? Well it's still the case even after *Faraday* that in circumstances where the developer has no obligation to develop the procurement rules aren't engaged. If for example a developer is given a short lease of land and is told that if you build this on it the authority will take a lease on it but if you don't build if you don't conclude the development then the land needs to come back to the authority, there's nothing wrong with that and that doesn't engage the procurement rules, that's the so called Flensburg exception.

The other approach which presents itself to some authorities is to carry out development through a joint venture vehicle with the private sector. It isn't the case that simply because a local authority has an involvement through share ownership or finance or representation on a Board that that entity is necessarily caught by the procurement rules. To put it very simply, if the authority doesn't control or provide most of the finance for the joint venture or if that joint venture has an industrial or commercial character as opposed to being set up to deliver the authority's public sector objectives, then it may well be that the procurement rules aren't engaged.

So I hope I've given you some food for thought there. It's certainly still possible to do real estate development without engaging procurement rules if your stomach is strong enough but in any event I'd be recommending authorities in appropriate circumstances to start earlier on the path and perhaps to secure best value and the best possible scheme by engaging with the market generally rather than with an individual chosen developer. I'll hand you back to Michael at that point.

Michael Rainey

Thank you very much Jonathan. So questions for Jonathan. Jonathan, if you do a development agreement and you remove the obligation on the developer to develop as you want to, as you say, avoid the procurement rules, how is it that an authority can go about protecting its interests in that instance where its entered into a deal where its go no way of actually enforcing what it wants to happen?

Jonathan Davey

Yeah, the answer to that is quite fact specific. So for example if the authority wants new council offices, wants a new swimming pool whatever, it may not be in a position where it can simply shrug its shoulders and say "well if they build they build, if they don't then they don't" but in other circumstances the authority might be prepared, perhaps for a short period, to accept that it's in the hands of the developer and whether the developer develops or not is down to them. I mentioned the Flensburg exception, that gives the authority some degree of control because of course even if the developer doesn't have a contractual obligation to the authority to develop, if they're spending money, if they're going on site, if they're progressing plans and planning process, then the reality is that commercially there may be a high degree of comfort for the authority that the developer wont readily pull out of that and I've just mentioned the planning process and of course the planning process will also be part of the comfort to the authority that it knows what's going to happen, what's going to be built and there may also be section 106 agreements that achieve some of that. So very fact specific but there is plenty of comfort we can gather around a development to assure the authority that something will happen or that if not it can take back control.

Michael Rainey

Thanks Jonathan and just a quick question on the JV structure we've been asked if there's a bit more detail you can give around that, you've only got a minute left so..

Jonathan Davey

Okay, I'll only use half of that. So the rules, if you're looking at whether a JV is caught by the rules or not the rules ask whether the entity is mainly financed or controlled by the public sector and even if it is, whether that entity is established as the rules put it from the purpose of meeting the needs and the general interest not having an industrial or commercial character. What does that mean? Well it means that for example if a local authority were to put surplus land into a JV which it jointly controls with the private sector, would be JV be operating solely on the basis of commercial principles in deciding whether and what to develop, that is likely to be capable of being achieved without the procurement rules being engaged every time the JV awards the contract.

Michael Rainey

Super, thank you very much Jonathan. So having done A and B we're now going to finish off on "C" this morning Louise is going to talk us through one of the, well the, great issue of the day, Covid 19 so Louise.

Louise Dobson

Thanks Michael. So I've continued with our A, B, C theme here and I'm going to talk to you about the three "C's" which are Considerate Contracting, Challenge and also potential Change. So looking first at the first point about Considerate Contracting I have changed that slightly from the responsible contracting that you'll be familiar with recent PPNs from the Cabinet Office and the guidance to authorities and also to suppliers about how they can manage their relationships including things like KPI's, pricing and supply chains during the economic fallout from the Covid crisis. The Cabinet Office guidance is really to encourage that responsible behaviour from contracting parties due to a concern over supply chains and payments but also to give allowances for an urgent purchasing that might be needed. We have seen this guidance referred to in correspondence already actually but it's very clear that it won't override any contractual terms that are already in play so does it really have the teeth that it might have had otherwise but it's part of a wider trend I think that we're seeing firms doing the right thing within contracts and in supplier relationships like with passing payment terms downstream to ensure everyone gets paid within 30 days.

We know that at the moment, coming to the second point about Challenge, we know that lots of contracts have gone through urgently during the Covid crisis and perhaps without the same level of scrutiny there would have been otherwise and it remains to be seen whether there will be an element of buying in haste and repenting at leisure. We know that there are some challenges ongoing already for urgent awards that took place during the Covid Crisis from the start of lockdown and I thought that perhaps there might be a reluctance to challenge where anything is related to Covid 19 but, like with many things in procurement, often there's a watershed moment where it happens once and then it happens again. I suppose as well as Challenge for the second "C" you could also add Competition into that mix because with the urgent purchasing and awards that have taken place there is a concern generally about the longer term impact of that. If lots of contracts have been procured in lockdown whether they offer that value for money on a long term basis that the most recent PPN guidance talks about because there is obviously that potential there to distort the market if urgent awards are going through that are going to continue long after the recovery phase starts.

Moving to the final point about Change. We know that change might be afoot generally in procurement in the longer term but that might actually be accelerated I think by Covid like in lots of areas there's a thinking about the acceleration of trends that were already in place due to the Covid Crisis, but that actually might assist contracting authorities to push for more flexibility in purchasing, particularly in the health sector for example, but it remains to be seen whether the Covid Crisis will lead to any longer term changes and we'll have to see how things play out as the recovery phase starts in earnest.

I'll hand you back now through to Michael for some concluding remarks and also any questions.

Michael Rainey

Thanks Louise. A couple of questions we've had on this. In the first one you've mentioned that Cabinet Office guidance on considerate responsible contracting has been referred to in correspondence in litigation and that sort of thing but have you actually seen it used or applied by the parties together in any kind of material way in practice so far?

Louise Dobson

I think so far I've seen it used by kind of bidders or suppliers who are asking for changes for example to KPI's or timescales and really calling for a sensible approach from authorities to apply the contract terms in a way where it's not designed to cause any undue hardship when the economic fallout of the crisis is ongoing so I've seen it referred to by economic operators and suppliers but not really from contracting authorities so it's really, I think because of the way the guidance is structured, it's more a kind of call for reasonableness when needed as opposed to a joint working between authorities and their suppliers to find out what might be needed in the Covid Crisis. So a bit one way at the moment and I think given that it doesn't override the contract terms it's more a tool in the armoury to try and encourage a sensible approach rather than anything that you can yield as a weapon.

Michael Rainey

Okeydokey. Then last lastly, just in terms of the new normal in procurement terms and change, I mean you said it remains to be seen whether anything will really change, I mean do you think there's any genuine prospect of you know procurement buying practices whatever actually changing in the short term as a result of this?

Louise Dobson

I think that there will probably be a hope that it will do but I think given political and I suppose in the health sector, clinical pressures I can't see it being so high on the agenda of priorities that it would be able to push through any real change but I suppose it's one that it may have an effect in the longer term but I think in the shorter and medium term, there's other fires to fight at the moment isn't there that may impact on whether the pace of that changed and if it does come.

Michael Rainey

Okay thank you Louise. Thank you to everybody who has joined today, thank you very much for joining and for taking the time out of your day for the first in this series of sessions. Just to remind everybody that was A, B and C, we have a follow up session on D, E and F which we'll be hosting at 11.30 am on the 20th August so please do join us then for that session and invitations will follow by email shortly. So once again, thank you very much for joining and we hope to see you again next time. Bye bye.