ADDLESHAW GODDARD

TRANSCRIPTION

WEBINAR SERIES: PROCUREMENT BITES

G, H, I OF PROCUREMENT

Ryan Geldart

Good morning everyone, we'll just give it another 30 seconds or so for anyone else to join and then we'll kick off.

Okay. Good morning everyone, thank you for joining us today. My name's Ryan Geldart and I'm a member of the Procurement Group here at Addleshaw Goddard and I'd like to welcome you along to the third of our A, B, C of procurement sessions which aim to give a short but informative look at some of the key procurement law practice topics following the alphabet. Today we will be recording the session, that's just to let you know that's happening. The session will be available on-line later. If you have any questions you can use the question functionality to send those through and we'll aim to answer those either as go along or perhaps at the end of the next sweep up, towards the end. Our speakers today are Jonathan Davey who will be talking to you above the Government Procurement Agreement. Second we will have Dr Jan-Oliver Schrotz who is based in our Hamburg office which is helpful when we get to H in the alphabet and also given we're talking about the Hamburg exception and then last but not least we'll have Clare Dwyer who will be talking to us about the issue of ineffectiveness in Public Procurement Contracts so I'll hand over now to Jonathan.

Jonathan Davey

Thanks Ryan.

Good morning everybody or good afternoon, no, it is a good morning.

Three basic questions I want to pose about the GPA. What is it, why do we need to be concerned about it and how different is it from the EU regime?

Well just to do a little bit of history. There's been a Government Procurement Agreement since 1979 although it was revised in 2014. It doesn't cover all WTO members, just those who've signed up but at the time of speaking there are 20 parties to the GPA and that covers 48 states. For example, the EU is one of those parties but behind it all the EU member states have been joined up. There are 36 observers and 12 of them are in the process of acceding to the GPA and it covers countries are diverse as Canada, Australia, Russia, Singapore so it really is a very broad application. What is it? Well if I say that's a framework to ensure fair, open and transparent conditions of competition in public sector procurement that might ring some bells and of course there's a lot of overlap here between what the GPA is covering and what we're used to from the EU directives and the UK domestic rules implementing them.

Why do we need to be concerned about the GPA? Well the WTO trumpets the fact that it's responsible for trade under the auspices of the GPA, is responsible for 1.7 trillion dollars of trade annually so it's a very significant instrument in the context of international trade. Having left the EU we are as the UK now a party to the WTO in our own right and also parties to the GPA so whatever we might choose to do in the reform process which is to kick off shortly in the UK, we won't be going back below the backstop set by the GPA. We're bound by the GPA so whatever we do we can't simply scrap procurement law altogether, we will at the very least end up with something that complies with our obligations under the GPA and the GPA is also the legal basis for the UK's relationship with EU and after states after the end of the transition period so if a UK business is looking to take part in a procedure in Poland or Greece

the basis for that participation and for the grant of rights to UK businesses participating in those competitions will spring from the GPA. How different is it from the EU regime? Well, there are a lot of similarities and we tend to say in the procurement team at AG that most of the issues we get asked about spring from the requirement to treat bidders fairly, to run an open and transparent process and so forth so all of that is familiar and all of that is part of the GPA but it's important to note that the GPA doesn't cover all contracts for all signatories, instead each signatory has what are called coverage schedules which dictate which things are in and which are out and so it may be that particular aspects of a country's economy for domestic reasons are carved out of that party's commitments under the GPA. A real example of that for the UK going forward is hard defence equipment. That's been an area where there've been developments at EU level but our coverage schedules will carve out hard defence also some utility activities, possibly concessions although there's some uncertainty there and there's a very good document that Sue Arrowsmith wrote for the EU which gives you more detail on those differences if that's of interest to you. Another difference is remedies. Obviously we've become used over recent years to the declaration of an effectiveness auto-suspension, the plethora of remedies we now have at EU level and UK domestic level. Those will remain until we alter the PRC or repeal it and replace it with something else but as far as the GPA's concerned there are much less far reaching remedies, no DOI, no auto-suspension etc. We could choose to have those remedies but there's nothing as regards our GPA obligations that requires us to do so. Some threshold contracts aren't covered at all by the GPA whereas we obviously have some case law based stipulations on that at UK level and another interesting example which may be part of the proposals that come forward from cabinet office for reform of UK procurement law is a free use of negotiation so there's no having to prove that your contract is of the type that requires negotiation with bidders. There's the ability to use it freely. There are also no rules on contract change so that's a bit of a question mark looking forward. So that's a brief summary of what the GPA says, why it's important to us. I'm sure we'll be hearing a lot more about the GPA and its interaction with the UK rules going forward. I hope that's given you a brief overview. Happy to take any questions or to pick those up when we wrap up at the end. Thank you and I'll hand over now, if there aren't any questions, to Jan-Oliver.

Jan-Oliver Schrotz

Yes, thank you very much Jonathan.

Yeah let's … good morning everybody. So let's turn to the topic of horizontal co-operation in the public sector or as it is labelled The Hamburg Exceptions, of course, some may argue that it is somewhat unfair that public procurement circles associate the beautiful city of Hamburg with such a, let's say, bone dry topic as a horizontal public co-operation but the label, of course, relates to an ECJ Judgment of the year 2009 and in the Judgment the ECJ has held that co-operation agreements among public authorities and the certain conditions fall outside the scope of public procurement law even if the one public authority does not control the other one and therefore the so called in-house privilege does not apply. The Hamburg Judgment has been widely criticised as being vague and ambiguous yet in the years after the Judgment the Hamburg Exception has regained some contours basically due to some case law on the domestic as well as on the [♦] [00:10:31] level and in particular, of course, the qualification in the European Public Procurement Directives. According to that, contracts solely between contracting authorities are not covered by public procurement law if three basic conditions are met. First, the contract establishes or implements a co-operation solely than between contracting authorities with the aim of ensuring that public services they have to perform are provided. Second, the implementation of the co-operation is governed solely by considerations relating to the public interest and thirdly, market activity of the participating authorities must not exceed a certain level. In the years after the Hamburg Judgment and, of course, in particular after the qualification of the Hamburg Exception and European Directives, the Hamburg Exception has indeed gained some popularity actually as a tool to combine efforts in particular in order to pursue common neutral public service skills yet not really surprisingly some players have sort of over-estimated their possibilities under the Exceptions under the Hamburg Exception and this has led to some litigation and prompted the courts once in a while to clarify the limits of the Hamburg Exception and the limits of horizontal public co-operation under them and in this respect

I would like to go into two more recent ECJ Judgments. The first one has been issued end of May of this year. It relates to co-operation agreement between the cities of Cologne and Berlin and the court, and that's the point I would like to focus on, has highlighted that a co-operation privileged under public procurement law must not lead to private company being placed in a better position than its competitors. In other words, if the co-operation between contracting authorities would result in a scenario within which one private company enjoys a competitor's advantage then as a rule the co-operation is not excluded from public and procurement law which is, of course, quite critical since this aspect is not explicitly mentioned in the respective articles and the public procurement directives. A couple of weeks later, interestingly again relating to a German case, the court then also has stressed that the Hamburg Exception requires what the court called a genuine co-operation well what is a genuine co-operation and the court shared some of its thoughts on these topics with us. So a joint corporation requires that the participation of all the parties is essential to ensure that the public services there to perform are provided. This is quite an important aspect, it's not the case if the contribution of one participant does not go further than a simple reimbursement of costs. Moreover, the co-operation must be the result of a neutral initiative. The co-operation must be based on a common strategy and requires the partners to combine the efforts in order to pursue a certain public service bill. Just to draw a brief conclusion, the court has in its most recent Judgment has opposed a too broad interpretation, some might say excessive interpretation in the application of the Hamburg directive. Nevertheless, the Hamburg Exception remains a useful tool just to combine assets in order to pursue common goals and in particular to ban the resources, to [honour] capacities so it will probably remain and relevant in general and so give some opportunities to contracting authorities. The court has made clear that it is not possible to reward an ordinary public contract under the guise of co-operation in order to avoid public procurement regulation. Of course, the future relevance and application of the Hamburg Exception in the UK after Brexit remains to be seen. That's it from my side. If you have any questions I'd be, of course, happy to answer them. If there aren't I'd love to move on to Clare Dwyer.

Clare Dwyer

Thank you very much Jan-Oliver and welcome everyone to "I" for Ineffectiveness. You'll recall that there are three grounds in Ineffectiveness. Today I'm going to talk to you about the one which had led to the most case law, the first ground. Ineffectiveness is available when a contract has been awarded without prior publication of the contract notice when one is required. Now that sounds fairly simple. If you're carrying out a public procurement you need a notice and if you don't do it declaration of ineffectiveness is available so why is it tricky? Well there are two main scenarios where it can be hard to decide. The first one is post award or post process variations. The procurement process is carried out, the happy bidder is informed, a champagne cork's popped but in the meantime things had changed. The authority needs more, it needs something different, it needs less and if those changes are not within the safe harbour of Regulation 72 Permitted Modifications then the authority should procure and if it doesn't do so or someone thinks it should have done so then you'll get a challenge in the claim for a declaration of Ineffectiveness. The second scenario is where is one on the fringes of public procurement and it is not certain whether a public procurement process is required, typically land development deals. So pretty quickly the courts had to look at Ineffectiveness in the context of variations. There are two main cases I've listed but I'm going to do is to take you through the second one, it's more recent and we acted on it. Now this is a case in which Basingstoke and Deane Borough Council wanted to redevelop Basingstoke Leisure Park. They started a procurement process in 2019 under the negotiated procedure. It came down to one bidder which was New River, however, the scheme needed some revision. It needed much bigger leisure facilities and therefore more retail to support that commercially in a form of what was known as the designer outlet centre so there were some variations. PW having their own shopping centre in Basingstoke said no this should have been re-procured, it can't simply go through as a variation and it brought proceedings in 2018. It came to trial last year and what did the court do? Well the court applied the Alstom test as to whether Ineffectiveness should be granted. Alstom says that all you need to do to decide whether Ineffectiveness is appropriate it to ask these questions. First, was there an ineffective notice capable of relating to the procedure and the contract ultimately awarded i.e. the varied

contract. The second, did that notice actually spark the competition which ultimately led to that particular contract and thirdly is there a mechanistic link between the notice and the procedure and the contract ultimately awarded? Now in this case Sir Robert Akenhead, out from retirement, to decide this case said that there was a proper mechanistic link so not declaration of Ineffectiveness was required and ultimately no permission to appeal was given by the Court of Appeal either. So far, so good, a nice clear test.

The second scenario I'm looking at is the other one where you're on the fringes of public procurement. As is the Faraday case, it is even trickier. In this case West Berkshire District Council wanted to regenerate some old industrial land owned by the council and they entered into a Development Agreement with St Modwen Developments Limited. Airing on the safe side they issued what they call a Voluntary Ante Transparency Notice, a VEATS Notice, and they are notices which declare that you're outside the regime and say why. It's not a public works contract, not a public services contract and it was in effect just a land deal. The effect of these notices is to bring the limitation period down from six months to claim a declaration is Ineffectiveness to one month. So what was the land deal? Well St Modwen were obliged to try and get planning permission and so on. Once they'd go that they could then decide that they had no obligation to develop and acquire the land and if they decided to do so the council then had to contract with them. Faraday brought a challenge and they lost at firs instance so they took it to appeal and the Court of Appeal said this: well, this is a contract to enter into a public works contract in the future so if St Modwen decide they do want to develop the land having got permission you get a public works contract and that enables the authority to circumvent the public procurement regime thus the use of a VEAT Notice was misleading, it wasn't an except land transaction. So the court awarded Ineffectiveness and because when you have Ineffectiveness you must have a penalty but in this case the council had tried genuinely to do its best. The penalty was only £1.00. So there you go, that's where the case law gets us on a first strand. What can we learn from this? Well the first one, the I've instruction is to be very careful of modifications even minor, do check out the regulations, make sure you fall within the safe harbour. If you don't you may need to re-procure because if you don't do that you may well end up with a challenge and a claim for a Declaration of Ineffectiveness.

Second for instruction is the Notices. Do draft extremely carefully. Think whether you should be procuring or not and don't take the risks.

I shall now hand back to Ryan to deal with any questions for any of us arising out of any of these discussions.

Thank you everyone.

Ryan Geldart

Thank you Clare.

We do have a few minutes just to take a few questions that we have. The first one for Jan-Oliver and it's can activities which are not directly part of the public services to be performed but which serve to provide those services so, for example, IT or transport services. Can they be the subject of a privileged co-operation?

Jan-Oliver Schrotz

There's actually quite an interesting point which has been quite astute at least within German public procurement doctrine. The ECJ has actually dealt with this question in its end of May Judgment within this year and the court has explicitly held that so called auxiliary actions such as an IT platform, an IT framework, transport, what you mention and indeed be covered by public co-operation if and of course there's, this aspect you should also bear in mind, if the auxiliary services are connected to the major public services and to be confirmed by the co-operation or to be covered by the co-operation so basically yes.

Ryan Geldart

We've got one for Jonathan as well. Going forward Jonathan as regards EU member states will the GPA or the relevant domestic directive based system of procurement law apply?

Jonathan Davey

A bit of each really so if you're an English business looking to bid for a contract in Poland clearly that contract, the award of that contract will be governed by Polish procurement law which will be based on the EU directives but as I said in my presentation your right as a none EU company to participate in that procurement will result from our GPA member status and the Polish rules as is the case with the English rules should say somewhere within it that anybody who's from a GPA signatory state gets the same rights as a Polish business would to bid for that contract.

Ryan Geldart

Thank you, and finally Clare in relation to Ineffectiveness, do you think that the court's decisions in the recent case law shows a general reluctance on the part of the court to find contracts to be Ineffective particularly given the impact that can have on the authority but also the other contracting party?

Clare Dwyer

I certainly thing that in the sphere of variations there is a reluctance by the court. The court likes the simple mechanistic test and I think what the court has done there is to set out a simple test so that it's only the very major variations which would result in a declaration in Ineffectiveness so there's a discouragement there of minor infringements being brought resulting in a declaration of Ineffectiveness. However, I think where you're on the fringes of procurement there's a slightly different move there where you do have the Court of Appeal say Ineffectiveness should be available if, to quote their words, there's been a misleading VEAT Notice so if you're on the edges courts do want you to procure so I that's the one where you treat it with even more caution.

Ryan Geldart

Yeah, you're on safer ground if you have issued a Notice then than if you haven't?

Clare Dwyer

Exactly and if you do do it, get it drafted really carefully because in Faraday there was a Notice so it's, you know, you need to get it absolutely right.

Ryan Geldart

Thank you very much. I don't think we have any more questions for now so we'll wrap up and I'd just like to thank everyone for joining us today. We will be continuing this series of short webinars. The next one will go on to J, K and L in the alphabet so please do look out for in bites and more details on that to follow, the date being the 26th November.

Thank you again for joining.