ADDLESHAW GODDARD

TRANSCRIPTION

WEBINAR SERIES: PROCUREMENT BITES

G, H, I OF PROCUREMENT

Louise Dobson

Morning everyone and thank you very much for joining us on our fourth procurement bite session. We're now on J, K and L and we'll be looking today at J for January, K for Knowledge and L for the Light Touch Regime. Some of you can ask questions as we go along and we'll try and get through as many as we can.

So turning to J and January I'd like to introduce Michael Rainey who is a partner in our Procurement Team who'll be talking you through what January might bring and hopefully it's not another lockdown.

Michael Rainey

Yes thanks Louise, no lockdown being talked about here thankfully. So it will have escaped nobody's attention that we are leaving the EU and Brexit is going to happen at the end of this year and it's going to be a real Brexit this time so the EU will no longer be a feature of life certainly in legal terms in the UK.

Now as Jonathan discussed on our previous session there aren't any fundamental legal changes happening immediately because of that shift away from EU law because of the UK's obligations under the World Trade Organisation, however, there is one very noticeable practical change coming up and that's what I'm going to talk to you about first of all today and that's the change in terms of publication requirements so the old fashioned notices that we've all got used to publishing in the official journal of the EU or OJEU are now going to become a thing of the past and OJEU publication will no longer be required for new procurement processes. Instead all notices will be published on a new UK notification platform that's going to be called Find a Tender and that will go live at 11:00 pm on the 31 December which is when the transition period ends so for any procurement process that happens after that time you must advertise on Find a Tender and not on OJEU and only Find a Tender adverts will be lawful at that stage. I'm very much hoping that someone will be publishing a notice at one minute past eleven on New Year's Eve but we'll watch this space.

In terms of knowing where you have to publish what matters is when your procurement process has actually started so if your procurement process has already started before 11:00 pm on 31 December you continue to publish notices in OJEU until that competition concludes so under a standard procurement process for example if you've published your Contract Notice in September and your procurement process is still running when you come to publishing your Contract Award Notice that will still be published in the OJEU so you'll have two concurrent parallel regimes running side by side for a certain period until all of those old OJEU procurements expire.

For your non-standard procurement processes and more variable complex arrangements like dynamic purchasing systems and qualification systems those publication requirements for OJEU will continue well into the future for as long as that system is in place so it could be a number of years because every contract that you award under that original advert will have to be advertised sorry the Contract Award Notice will then have to be published in OJEU too so you'll have this twin running for quite for a long time so practically speaking it's probably going to be quite useful to re-visit any of those systems you've got in place to see if you can move it all on to a UK footing to try and minimise that level of parallel running that you have to go through.

In terms of working out whether your procurement process has started, it's all about whether your advert has actually been published. We're used to thinking about timings and starting procurement processes under the rules as when it's sent to OJEU and there's that three to five days' delay that we always talk about before things get published but that doesn't count against you in timing terms. The idea under the new UK systems is that notices will be published pretty much immediately so you won't have that lag but as we change over there's going to be a slight difficulty in that if you have sent a Notice to OJEU before the end of December but it hasn't yet been published as at 11:00 pm on the 31st that will not count as valid advertising so even though you've sent it and it may get published in the OJEU on the 1st or 2nd January you'll have to cancel that Notice and re-publish in the UK to make sure that you've got a compliant procurement notice.

The UK is encouraging people to publish notices in both the OJEU and Find a Tender if you have to publish in OJEU continually under contract law but you should also publish it in Find a Tender but the rules on national restrictions continue to apply even though we've left the EU. If you're required to publish in OJEU, you must publish in OJEU first and you can only publish the UK after that OJEU Notice has been published.

In terms of top tips for how to deal with the confusion that's going on around this potentially, a great thing to do now is to continue talking to your suppliers about this particularly if you're a buyer and you have suppliers based outside of the UK. They may not have seen your communication surrounding this switch and will be used to looking at OJEU for your contract opportunities so geeing them up for this change is going to be an important part of making sure that this all goes smoothly from January.

The next thing I want to talk about briefly is another change that's taking place on the 1st January 2021 and this is a change to the way that social value is procured through government procurement in the UK. This is entirely unrelated to Brexit, we could have done it while we were part of the EU but for messaging and presentation purposes it's probably good to link it to the UK's freedom from the EU regime. This social value model relates to central government procurement and to procurement by central government related bodies for the time being but it's designed as a model that's going to be standardised and rolled out as much as possible across those procurements that are currently in scope so there's clearly a plan to expand that guidance as widely across all contracting authorities in due course.

The latest UK guidance on this model came out earlier this week and I'm just going to talk you through some of the aspects of that to be aware of.

The real punch line from this is that 10% of your marks for any tender process must be allocated to social value aspects and that's part of the overall rating so it's not 10% of quality it's 10% of the whole waiting of the decision that you're making on what the most economical advantageous tender is. The government has produced a model for these social valuation criteria and then a listed a menu of criteria that you can choose from and sub-criteria and the idea is that those are lift and shifted into ITTs with minimal amendment or adaptation required to try and generate this standardisation.

There was criteria based around some principle themes for social value including Covid recovery, economic and equality citing climate change, equal opportunity and well-being so fairly standard social value requirements but there are particularly legal requirements you still have to think about when including these things on your procurement. The first is that any criteria you include must be related to the subject matter of your contract as with any other award criteria. Secondly you must ensure equal treatment, non-discrimination and proportionality and that means on a continuing basis you can't discriminate against people who are not UK based so despite the fact we left the EU and we'll look at this in a bit more detail in the light touch regime section later, you still have to treat providers from overseas in the same as you treat the UK providers.

You've also got to make sure that when you're testing social value through this new model at the bid stage that what you're testing is also reinforced through the contract later. So the promises that bidders

make as part of the social value commitments are then contracted and you have KPIs and measures to make sure they are actually delivering them.

The last thing which is slightly odd and probably unnecessary here is that if the contract you are procuring is its essence social value that's what you're buying so if you're buying for example educational services for disadvantaged people or if you're buying renewable power that obviously is intrinsically socially valuable and has social value in it but if you want to comply with this model you have to find another thing that's not core to delivery of the contract to allocate your 10% of the marks in order to be compliant with the requirements.

Aside from that slight oddity this new social value model actually looks very good and very workable and so as well as the fact that it may well expand to sub-central authorities in due course it's worth everyone being aware of both the contracting authorities and utilities and bidders because it's something that's probably going to take root in the short term and the meeting term.

The last thing to mention under January is reform of the procurement rules more widely. As I've mentioned earlier there's no fundamental change to procurement law in the UK because of Brexit but there is a feeling that there is wider freedom and reforms are in the wind at the moment so we know that the government is working on the Green Paper and the consultation on changes to the procurement rules that are proposed to be particularly radical and we're looking forward to that being published very shortly and we think it's probably going to be out before the end of this year, if not very shortly after that so watch this space for that.

So I'll now hand back to Louise to see if there's any questions on that that have come in.

Louise Dobson

Thanks Michael. That's really interesting and I think that social value changes are a real game changer in terms of going forward with the valuation of 10%.

We have had an interesting question just I thought we might shed some light on which is a real good factual point which is do I still have to publish notices on a contract finder?

Michael Rainey

So yes is the short answer to that question if you're based in England. So at the moment as people will know, once you've published your OJEU Notice you have to then publish a contracts finder notice if you're an English contracting authority and a contracts finder is also required for other publication as well beyond OJEU Notices but even ones who shift the publication obligation from the EU to the UK you're still going to be obliged to publish a contracts finder notice as well so the obligations are to contracts finder are unchanged in that they are two different systems, they don't really talk to each other, Find a Tender and contracts finder as far as we understand it.

Louise Dobson

Okay. That's a really helpful practical insight there.

So turning now to our next letter which is K, I'd like to introduce Ryan Geldart, who is a Legal Director in our Commercial Disputes Practice, to talk you through the tricky area.

Ryan Geldart

Thanks very much Louise and good morning everyone.

As Louise said in this case is for Knowledge in relation to the limitation rules under the Procurement Regulations and it is a tricky area that we have to interpret on a regular basis so firstly a bit of background to the test. The Regulations say that the limitation period for bringing a claim other than for Ineffectiveness begins, the proceedings must be started within 30 days beginning with the date when the [♦] [00:11:27] first knew or ought to have known of grounds for starting the proceedings had arisen and it is obviously that 30 day period is an extremely short period in the context of limitation periods generally which, for instance, under a standard contract or tort claim would be a 6 year period and the

reason for that is a good one, it reflects the underlying public policy goal that challenges to public procurement process are brought swiftly and decided quickly so as to avoid disruption to procedure contracts by challenges being brought a significant time after the contract has been let so the question then becomes what does knew or ought to have known in fact mean. Well the Court of Appeal case of *Sita UK Limited and Manchester Waste Disposal Authority* back in 2011 is the main case which describes an alternative way of framing this and that case said that the knowledge that we needed was knowledge of the facts which apparently clearly indicate that they do not need to absolutely prove an infringement of the Regulations. Now that still means that it's a tricky issue as it indicates that the benchmark is lower than a test which would require a claimant to know everything they would put in a formal claim document such as Particulars of Claim though it doesn't really say exactly what is needed to file that knowledge level. An important point to take into account here is that this is a test which is objectively assessed on the facts of the case so the claimant's individual actual knowledge or lack or knowledge more particularly will not mean that time hadn't started to run if based on the facts objectively assessed that claimant should or ought to have known the grounds for bringing a claim existed.

I just want to chat through a couple of other interesting points that have come out of recent cases and we're seeing more commonly in practice now and the first two points their concealment and misplaced belief or suspicion come from a case from this summer called *Community R4C against Gloucestershire County Council*. The first point relates to a situation, concealment of information by an authority of facts which indicate a potential breach of the Regulations and in this case the council strongly resisted the disclosure of relevant information and only disclosed very redacted versions of amended contracts which may indicate amendment to the contract beyond the prescriptions of the rules and so the question then becomes if an authority seeks to conceal facts which might give rise to a claim can a claimant use that conduct to establish that the limitation period either hadn't started or that it didn't have the requisite knowledge to bring the claim. Well the court said no and this goes back to the objectivity way in which these tests are applied. If the information is available in the public domain it doesn't matter whether the authority has attempted to conceal something or not, the test is does the bidder have the necessary knowledge or not and if that particular bidder claimant does have the knowledge and a test is met then the authority won't be punished by only drip feeding information out into the public domain for instance. That said it is a risky way to behave for authorities and in this case the council later tried to argue that the bidder should have been able to work out from unredacted information the detail of other figures that were redacted in the earlier versions of the document by applying certain assumptions and putting together different numbers that were available in the public domain but the judge seems to have taken the council's witnesses to task on that issue quite heavily and pointing out that if an authority has gone to the trouble to redact certain figures in a document then the council must have intended that those figures couldn't have been calculable or discernible from the other information that was made available and so were very reluctant to find that the claimant in this case was thereby found to have sufficient information by being able to piece together other bits of information and so in this case the limitation period hadn't started.

The other interesting point in the case was whether a misplaced belief or suspicion of a claim can found a limitation period running particularly in this case there was information which indicated there may have been a breach based on that claimant's understanding of the information but the court find that in fact the claimant was just wrong about that, it had misunderstood the information and consequently as the Sita knowledge test that we're applying is an objective one the court found that there must be knowledge of actual facts in the sense of real facts and not just fake news available to the claimant which indicates a valid claim under the Regulations simply because you think you've got a claim but you in fact don't, that can't start a limitation period running for a valid claim that's only discernible by later facts that you then find out.

The other point on the slide that I just want to touch on is something that we're seeing more and more in practice in challenges to public procurement processes and that's the use of standstill agreements. The Procurement Regulations are very clear as in the time limit is 30 days to bring a claim but the court does have an ability under the Regulations to extend that time limit where the court considers there is

good reason for doing so and historically it's been very difficult to prove the good reason for doing so and that extension the court can apply is limited to 3 months from when the Claimant first knew or ought to have known grounds for bring a claim. In the case of *Amey Highways and West Sussex County Council* back in 2018 considered various different time periods and whether there was a good reason for extending time and in that case the parties had agreed a standstill agreement and by that I mean an agreement whereby the council had agreed that it wouldn't rely on any limitation Defence for time running between two particular dates so we often see the date of the agreement to a date perhaps 2 or 3 weeks' time. Now in that case the council didn't renege on that deal, it didn't try to say that the standstill agreement wasn't effective so the court didn't necessarily have to decide the point but Mr Justice Stuart-Smith as he then was did comment in his Judgment to say that it would have been wrong for the council to try and go behind that agreement and the court would have found that the agreement to spend time under the standstill agreement would have been a good reason to extend time so it may be that parties can actually agree an extension to the 30 day period but until this receives more detailed consideration by the court we'd suggest that Claimants will be rather hesitant and treat such agreements with caution in most cases so to sum up then it is still a very tricky area, it's completely fact based and it's based on an objective assessment of what is available in the public domain and to a potential Claimant so it does take close scrutiny and often prudence is the best course of action for the Claimant.

Louise that's the end of my talk. I don't know if there's any questions come in during that?

Louise Dobson

Thanks Ryan, that's been a really helpful summary of what is quite a tricky area.

We do have one question that's just come through which is about whether you always take standstill as day 1 of the 30 day period. Could you shed some light on that because I know a lot of people will track that 30 days from when they get the standstill letter but you know it's helpful to give a view on whether that's always the case.

Ryan Geldart

Yeah so receipt of a standstill letter is obviously often a key point in time for limitation decisions and if the challenge that's being looked at is genuinely a challenge about application of evaluation methodology to the bids and the scoring then often it is the case that the first the bidder has any real knowledge of that process and application of the scoring is the standstill letter and it's safest to use that date but actually there are other types of claims where you need to be very careful particularly if actually the challenge isn't really about the application of the evaluation methodology but about the methodology itself. If that's the case then it can often be that that's evident either from the ITT and the procurement document itself or subsequently following clarification responses that are published by the authority so you need to be very careful as to if you as a challenger have an issue with the way that the authority is going to do something you probably know about that before your standstill letter is sent.

Louise Dobson

Yeah. It's always a very difficult area isn't it and like you say it needs careful scrutiny at any early stage to make sure you're approving the right date as your starting date.

Ryan Geldart

Yeah.

Louise Dobson

Thanks very much.

Not turning to L and the Light Touch Regime Michael is now going to talk us through some of the key points and practical tips. What you need to know when you're dealing with that process.

Michael Rainey

Thanks Louise.

I'm actually going to start by answering a question that came in on my earlier section that we missed when where going through the questions section so someone's asked a question about the social value model and whether that is also a requirement for utilities under the ECR and the answer to that question is no or, well probably more accurately, not yet so the current guidance doesn't apply to utilities but I wouldn't be surprised if something looking like that found its way into proposed reforms to the utilities rules in due course, social value being quite an important component of this country's drive for procurement reform.

Okay so lastly for today's session we're going to look at the Light Touch Regime, just very briefly and also look at some of the changes that may occur to that in the future and under interpreted provisions post the EU so just a reminder to everybody that this is a regime applicable to particular services, health and social services primarily but also other defining services around administration, education, training that sort of thing and they're listed in the Regulations, in all three main Regulations, concessions, public contracts and utilities all have a concept of the Light Touch Regime.

Now the regime is intended for services that don't have a huge cross border market so it's intended to be a lighter more dynamic regime than the mainstream procurement rules and that starts with the thresholds above which we will apply so those thresholds, except for concessions, are generally higher for the Light Touch Regime to apply than they are for the usual procurement regimes to apply. Even once you're above that threshold the procedure that you're going to follow by the rules in procuring light touch services is intended to be significantly more flexible and has limited procedural constraints so you don't have to comply with something like the open procedure, the competitive procedure with negotiation and restricted procedure, all of those detailed procedural rules don't apply to Light Touch Procurements but actually there's not a huge amount more flexibility there. You still have to publish an advert which typically will be a contract notice but can also be a pin. You still have your standstill period at the end of the competition and you still have to provide a standstill letter. There was originally some debate about whether that applied to light touch services but that debates now substantially disappeared and it's accepted that standstill applies and you also have to public a contract award notice at the end of the process so it's only in the middle period when you do have more flexibility and you can run a procedure or your own choosing provided that it's transparent and ensures equal treatment.

Now the idea of this procedure was that it was light and it was going to be dynamic and allow things to be done differently but actually in practice it hasn't really caught on either in the UK or the EU. People are following the Light Touch Regime as they are bound to do but in terms of flexible new dynamic procedures we haven't seen very many of those and it's actually very difficult to construct a procedure that complies with equal treatment and transparency and that you can be confident it does that but it doesn't look a lot like one of the procedures that's already in the rules.

We've seen a few exceptions like one stage open procedure style procurements with negotiations which you wouldn't be permitted to do outside of the Light Touch Regime but generally people have tended to follow this standard procurement rules in applying Light Touch Regime which has taken away some of the flexibility that was there.

It's going to be even more difficult for people to design procedures under this regime after Brexit because it relies on these concepts of transparency and equal treatment which are so inherently EU concepts they've never ever ever been considered by the courts in this country outside of the EU regime and obviously as I've said as of 11:00 pm on 31st December EU law will no longer apply in the UK and so people are trying to understand what transparency and equal treatment means. We'll be left with a sort of slightly hybrid domestic interpretation of those things and it's going to take some time to become clear and that is where a EU withdrawal act comes in and this is a general act applying to UK law as people will know and there's an incredibly ambitious piece of legislation that effectively brings in most of EU law into UK law and sort of petrifies it as the end of December and holds that in UK law as it was at that date so that any future changes in the EU will not apply in the UK but anything that applied as at 31st December continues to apply until the UK decides to get rid of it.

Case law is a very good example of this so any case that's decided towards the end of December in the EU will apply in the UK going forwards and will have the status of a Supreme Court Judgment across all jurisdictions in the UK, however, any case that's decided on the 1st or 2nd January will have no binding effect whatsoever in UK law although courts will be able to have regard to it they won't be bound by it.

So in terms of understanding what we mean by transparency and equal treatment is going to be quite easy on the 1st January but as we diverge from the EU law we're going to have to create our own UK body of law, probably case law, that interprets these concepts and that's going to be really something to keep an eye on because things are going to get very different very quickly.

I just wanted to conclude going back to the Light Touch Regime itself that it's a particularly likely candidate for reform as part of the UK's reform package that is coming up as I've said. This is particularly because the flexibility that it was intended to offer hasn't really been delivered but also the sort of services that we're talking about under light touch, health and social services they aren't caught by the UK's international procurement obligations under the WTO's Government Procurement Agreement so there is the scope there to be far more flexible with how these things are procured and potentially take them out of procurement regulation entirely and if the decision isn't taken to take them out of regulation entirely it might be simpler just to lump them in with the mainstream rules because flexibility can result in confusion and uncertainty and actually standardisation of procedures is something that may help bidders generally.

So that's, with one minute to spare, what we wanted to cover on J, K and L so I'll just hand back to Louise to wrap up.

Louise Dobson

Thanks very much. I totally agree though that the Light Touch Regime has never quite lived up to expectations as to what is was really meant to do from when it started.

One very quick question as we're running out of time on the Light Touch Regime is where a procurement is below the threshold do you still have to worry about cross border interest?

Michael Rainey

So this probably applies generally as well actually to all thresholds in the procurement rules so currently if a procurement is below the threshold you have to consider whether there's interest from elsewhere in the EU and the EU treaty principles kick in and require a procurement. The general view is that after we've left the EU that's no longer relevant, sorry, the procurement rules apply if domestic law is over the thresholds below but other thresholds you don't have to worry about EU treat principles any more because they just don't exist at very large on their own in UK law.

Louise Dobson

Thanks. That's very helpful. So we'll finish on time. Thank you very much everyone for joining us and we'll see you at our next Procurement Bite session hopefully in the near future.

Thanks very much.