HOW TO CHALLENGE AN AWARD OF A CONTRACT ACCORDING TO THE EU DIRECTIVES IN TEN DIFFERENT EUROPEAN COUNTRIES

AN ENGLISH PERSPECTIVE

1. English law respects the fundamental/basic principles set out in the Treaty **viz** Article 12 (no discrimination on basis of nationality), Article 28 (no restrictions on movement of goods) and Article 49 (freedom to provide services in other member states) and the principles derived therefrom applicable to procurement **viz** all tenderers to be treated equally and the requirement for the procuring body to act in a transparent manner.

2. Directive 2004/18/EC of 31st March 2004 (Public Contracts) has been implemented by the Public Contract Regulations 2006 (SI 2006/5) which came into force on 31st January 2006. Those Regulations apply to procedures commenced on or after 31st January 2006.

> [The consolidated/updated Directive relating to utilities i.e. Directive 2004/17/EC of 31st March 2004 has been implemented by the Utilities Contracts Regulations 2006 (SI 2006/6) which also came into force on, and which applied to procedures commenced on or after 31st January 2006].

3. The Public Contracts Regulations 2006 detail the various different procedures which a contracting authority (listed in Regulation 3) may follow – open, restricted, negotiated, competitive dialogue. Regulation 4(3) requires contracting authorities to treat economic operators equally and non discriminatorily and to act in a transparent way.

> [Certain types of contract are excluded from the regulatory regime (see Reg 6) whilst others are made subject to only some parts of the Regulations – a lesser regime (see Regs 5, 35-37). But, in all cases contracting authorities are required to comply with the fundamental rules set out in the Treaty and Regulation 4(3) applies to lesser regime contracts.]

4. Contracts awarded after an open, restricted or negotiated procedure may be awarded either on the basis of "lowest price" or on the basis of the offer which is "most economically advantageous from the point of view of the contracting authority" (this being the only basis if competitive dialogue is the method chosen). The contracting authority is free to select which basis it will use but, it must state in advance the basis it has chosen.

5. Regulation 30(2) deals with the criteria which may be used to decide which tender is the "most economically advantageous". The criteria must be objective and be linked to the subject matter of the contract. The contracting authority may have regard to price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost effectiveness, after sales service, technical assistance, and date for completion. That list is not exhaustive. The criteria which will be used and the weighting to be given to each of them must be clearly stated in the documents sent out by the contracting authority (Regulation 30(3)). However, that obligation is qualified by the following sub-paragraphs. Regulation 30(4) allows the contracting authority to specify minimum and maximum figures for the weightings if it considers that appropriate in view of the subject-matter of the proposed contract. Regulation 30(5) allows a contracting authority which considers that it is not possible to provide objectively devised weightings for the criteria, simply to state the criteria in descending order of importance.

6. A contracting authority is not obliged to award a contract at the end of the procedure. A contracting authority can discontinue/abandon the procedure (a decision which is itself subject to requirements of non-discrimination and transparency). On the other hand, if a decision is made to award a contract, the unsuccessful tenderers must be notified as soon as

possible after that decision was made (regulation 32(1)) and there is then a minimum 10 day "standstill period" between the dispatch of the notification and the award of the contract (Regulation 32(3)). The "standstill period" is there to enable unsuccessful tenderers to object to the decision to award the contract before any contract is concluded. An unsuccessful tenderer can obtain information on the characteristics/relative advantages of the successful tender if a request is submitted before midnight on the second working day from the Regulation 32(1) notice (Regulation 32(4)). That request must be answered three working days before the expiry of the standstill period (Regulation 32(5)).

7. When considering tenders and applying the criteria and deciding which tender is the "most economically advantageous" the contracting authority has a wide discretion but, it must ensure it does not discriminate (the principle of equal treatment) and that the process is transparent. Particular care needs to be taken in communicating with individual tenderers during the tendering period and/or in any post-tender discussions (discussion on "fundamental aspects" are ruled out; however, non-discriminatory clarifying or supplementing are permissible).

8. Remedies open to an aggrieved tenderer for breaches of EU procurement law include making complaints to the Commission, which may decide to bring Article 226 proceedings against the relevant member state. Consideration of that option does not form part of this paper.

9. Regulation 47(1) provides that a contracting authority's obligation to comply with the requirements set out in the Regulations is a duty owed to an economic operator (a tenderer or potential tenderer). Any breach of the Regulations is actionable in the High Court.

Proceedings may be brought by an aggrieved economic operator who has suffered or risks suffering loss or damage.

10. Before commencing proceedings in the High Court an intending Claimant must send a "letter before action" giving notice of the breach and of its intention to bring proceedings (Regulation 47(7)). The proceedings must be brought "promptly" and in any event within 3 months from the date when the grounds for brining the proceedings first arose, unless the Court considers there is good reason for extending the period within which proceedings may be brought (Regulation 47(7)).

> [The grounds for bringing an action arise when the Claimant loses the chance to win the contract – at that time the Claimant may be unaware that grounds for bringing an action have arisen – when considering whether to extend the time within which proceedings may be brought the Court will obviously consider whether the Claimant has acted promptly after it became aware of the grounds.]

11. The High Court can make interim orders as well as making a final decision (Regulation 47(8)). On an interim basis the Court may order the suspension of the procedure leading to the award of the contract or it may prohibit the implementation of the contracting authority's decision to award the contract pending the decision in the case. The test(s) to be applied when deciding whether to grant interim relief is (are) not set out in the Regulations. Remedies Directive 89/665 indicates that the Courts in member states may be given a wide discretion – and this is fully in line with the general approach of the English courts, the test in the **American Cyanamid** case [1975] AC 396.

12. The Court has power to award damages to an economical operator which establishes that it has suffered loss or damage as a result of the breach or breaches of the Regulations (Regulation 47(8)(b)). Once a contract has been awarded the only remedy that the Court can

order is damages (Regulation 47(9)).

13. The Regulations do not specify any particular types of damages which may be awarded to a successful Claimant. Generally applicable principles of English law fall to be applied in the particular context. A Claimant may seek to recover "wasted costs" or "loss of profit" or both. Such claims were considered by the High Court in **Harmon CFEM Facades (UK) Limited v. Corporate Officer of the House of Commons** (1999) 67 Con. LR 1. The legal propositions which can be drawn from that case are thought to be correctly summarised by the learned editors of **Keating on Construction Contracts** (8th Edition) as follows –

> (1) If it is proved that the dissatisfied tenderer should have been awarded the contract if it were not for the breach, that dissatisfied tenderer will recover the costs it incurred in tendering.
>
> (2) The dissatisfied tenderer can also recover damages for the profit or margin which it can prove it would have recovered from the contract if it had not been for the breach. This would not include sums already recovered as tender costs.
>
> (3) If the dissatisfied tenderer cannot recover its profit or margin, it may be able to recover damages for its loss of a chance of making a profit on the contract it was not awarded. That chance must reflect the likelihood of its being awarded the contract and the likelihood of making its claimed profit or margin.

14. A claim for a judicial review in the Administrative Court (a division of the High Court) is unlikely to be appropriate in most cases because aggrieved tenderers are able to claim damages under the Regulations. In one case it has been said there was "no room" for such a claim but, it is thought that rather over-states the position.

15. There are two particular English common law remedies which may also come into play when procurement cases are litigated. They are:

(1) An implied contract which arises once responses to an Invitation to Tender have been received – what is implied is a contract that that the prospective employer will

consider all tenders fairly.

(2) The tort of misfeasance in public office. This happens when there is a deliberate or reckless abuse of the powers given to a public officer.

Neither of these alternatives would allow the recovery of any greater/different damages than would be recoverable for proven breaches of the 2006 Regulations but, (2) in particular, has a potential embarrassment factor which an astute litigator may well think it desirable to exploit.

16. **Amaryllis Ltd v. H M Treasury (sued as OGCBuyingSolutions.com)** [2009] EWHC 962 and 1666 (TCC), Judgments 8th May 2009 and 13th July 2009 is a recent decision of the High Court which will be summarised at the conference.

17. The English Answers to the four case studies follow fairly obviously from the principles outlined above and will be given at the conference.

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