

# Procurement Brief

## November 2009



“As always with procurement, the sands are constantly shifting and there is a need to keep up to date.”

## In this issue

The New Remedies Directive and “Ineffectiveness” by Kris Kelliher	2
Office of Fair Trading Fines Construction Industry for Cover Pricing - What now for Public Sector Procurers? by Kris Kelliher	5
Continuous Improvement and Risks in Procurement by Bob Wren	6
Time Limits for Procurement Claims - From Jobsin to Brent by Rob Williams	8
Europe Threatens to Overrule the Brent Approach by Mark London	10
The Enforcement of Time Limits for the Receipt of Tenders: J B Leadbitter & Co Limited v Devon County Council [2009] EWHC 930 (Ch) by Elisa Holmes	11
Responding to Aggrieved Bidders - Avoiding Culpability by Mark London	14

## Welcome

Welcome to the Autumn Edition of the Procurement Brief. We have a real mix of articles in this issue. Kris Kelliher takes another look at the remedies directive as we continue to wonder when it will come into force, and to what extent it will be watered down. Needless to say, once there is some certainty on the contents of the remedies directive the Procurement Team will run a series of seminars on what it means for us all. I am also delighted to welcome three guest authors to this edition. First up we have Rob Williams and Elisa Holmes, both highly regarded Barristers at Monckton Chambers with whom we have worked closely on a number of important cases. Rob and Elisa tackle the always interesting area of time

limits. I am also pleased to welcome on board Bob Wren, a specialist procurement consultant who continues to work with a number of our clients. Bob's article reminds us of the need to keep reviewing procurement processes in light of recent case law. As always with procurement, the sands are constantly shifting and there is a need to keep up to date. If there is anything further you would like to discuss with the Procurement Team then you need only pick up the telephone. We will be hosting a Procurement Seminar in early December for which invitations will be sent out shortly.

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## The New Remedies Directive and "Ineffectiveness"

### Introduction

The EU Remedies Directive 2007 must be implemented into English law by no later than 20 December 2009. This will substantially amend the existing remedies regime (contained in the Public Contracts Regulations 2006 (the "Regulations")) which governs the remedies available to bidders in the event of a breach of the Regulations by a contracting authority.

The new Remedies Directive reflects the purposive approach currently being taken by the European Court of Justice (ECJ) to EU procurement

compliance. The new Remedies Directive seeks to harmonise the standstill arrangements following contract award, but more significantly introduces "ineffectiveness" as a remedy for serious breaches of the Regulations, including illegal direct awards. It is this aspect of the Remedies Directive that this article focuses on.

### The Remedy of Ineffectiveness

Broadly speaking, under the existing Regulations the remedies available to a bidder for breach are as follows:

- An injunction to prevent the award of the

contract; and/or

- Damages to compensate the bidder for loss of profit and/or its wasted tender costs

These remedies will continue to be available once the new Remedies Directive has been implemented.

Note that under the existing Regulations, a contract cannot be set aside for breach of the Regulations once it has been entered into – the bidder's only remedy in this situation is damages (Regulation 47(9)).

prospective cancellation of contractual obligations that have yet to be performed. It would not seek to “undo” what had already been done prior to the declaration of ineffectiveness.

The Court will have discretion not to apply ineffectiveness if there are exceptional, overriding reasons relating to the general interest for maintaining the contract. However, economic reasons may only be considered as overriding reasons if a declaration of ineffectiveness would lead to “disproportionate” consequences.

“The Remedies Directive introduces a new remedy of “ineffectiveness” to act as a deterrent to and a remedy for illegal direct awards.”

The Remedies Directive introduces a new remedy of “ineffectiveness” to act as a deterrent to and a remedy for illegal direct awards. Contracts can be declared to be ineffective by the Court on application by a claimant where there has been:

- A failure to publish an OJEU notice for a contract subject to the Regulations; or
- A failure to comply with the standstill period where:
  - The failure has deprived the claimant of the opportunity to pursue pre-contractual remedies; and
  - The failure is combined with a substantive breach of the Regulations

A declaration of ineffectiveness will result in the

### **Financial Penalties**

If the Court makes a declaration of ineffectiveness it must also impose a financial penalty on the contracting authority. The level of penalties are left to the discretion of the Court provided they are “effective, proportionate and dissuasive”.

### **Time Limits**

Where the contracting authority has publicised the award of the contract (either via notifying bidders of the award or via the publishing of a contract award notice in OJEU), the claimant must bring its claim for ineffectiveness within 30 days from date of notification / publication. Where there has been no notification / publication of the award by the contracting authority the claim must be brought within 6 months of the date of contract.

All claims other than for ineffectiveness (e.g. pre-contract remedies) must be brought promptly and in any event within 3 months from when the cause of action arises.

### **Voluntary Transparency Notices**

It is not always entirely clear whether a particular contract is subject to the Regulations – for example some “development agreements” involving land transfer and “in house” awards may or may not be subject to the Regulations.

If a contracting authority considers that a contract is not subject to the Regulations but is concerned

they “begin” for the above purposes is likely to the date the contracting authority contacts contractors to seek expressions of interest

### **Conclusion**

In practice, on most high value contracts, an OJEU process will have been followed and a standstill period implemented prior to contract award. In such circumstances, the ineffectiveness remedy will not be available and aggrieved unsuccessful bidders will need to pursue a pre-contract remedy or seek damages after contract signature.

The real impact of the new ineffectiveness remedy

that it may be open to an ineffectiveness claim if it enters into the contract directly without competitively tendering, it will be able to protect itself from an ineffectiveness action by publishing a voluntary transparency notice in OJEU. The transparency notice must state the contracting authority's intention to award the contract and there must be a period of at least 10 days between issue of the transparency notice and entry into the contract.

### **Existing Procurements**

The current proposal is that the new ineffectiveness provisions will only apply to procurement processes which begin after 20 December 2009. In the case of procurements which are not advertised to the market, the date

will be in cases where the contracting authority has not followed an OJEU process to procure a contract when it should have done. The new remedy will act as a major deterrent to any contracting authorities who negotiate contracts with favoured contractors suppliers without advertising the opportunity.

At present, it is unclear how a declaration of ineffectiveness will work in practice. For example, how will the contractor be compensated for the work carried out up to the date of the declaration? What about funders that have made considerable investment in equipment/infrastructure at the beginning of the contract? The result is that contractors and funders are likely want to protections built into the contract in the event of a declaration of ineffectiveness.

# Office of Fair Trading Fines Construction Industry for Cover Pricing – What now for Public Sector Procurers?

## Introduction

On 22 September 2009 the Office of Fair Trading (“OFT”) announced its Decision that 103 construction companies have infringed competition law through their involvement in bid rigging activities, in particular cover pricing. Cover pricing occurs where contractors enter a bid but submit a price they know is too high and consequently they are very unlikely to win the contract. The effect of cover pricing can be to restrict the number of genuine tenders and therefore to reduce competition.

The OFT has imposed fines totalling £129.5 million on the companies involved.

Procurement Regulations. There has been concern within the construction industry that public sector procurers would use the OFT’s Decision as a ground for excluding the companies concerned from future tenders.

In response to this and, possibly, in view of the potentially disastrous effect it could have on the construction industry as a whole, the OFT in conjunction with the Office of Government Commerce (“OGC”), has issued an Information Note for public sector procurers. The OFT’s and OGC’s clear recommendation is that the companies concerned should not be excluded automatically

“Cover pricing occurs where contractors enter a bid but submit a price they know is too high and consequently they are very unlikely to win the contract.”

5

It is important to note that although the findings in the OFT’s Decision relate to the conduct of the 103 named companies, its investigation suggests that cover pricing was a widespread and endemic practice in the construction industry. The OFT uncovered evidence of cover pricing in over 4000 tenders (in both the public and private sector) involving over 1000 companies but had to focus its investigation on instances where the available evidence was strongest. Therefore, it cannot be assumed that the 103 named companies are the only companies that may have engaged in cover pricing.

## Implications for public sector procurers

A large number of the tenders investigated by the OFT were public sector tenders subject to the EU

from future tenders on the grounds that they are named in the Decision, nor should they be the subject of similar adverse measures making it more difficult for them to qualify for such tenders.

The OGC’s / OFT’s main reasons for this stance are that the contractors have already been fined for their behaviour and so should not be subjected to further penalties, and it would be wrong to assume that companies not named in the Decision have not also been involved in bid rigging.

Notwithstanding this general stance, the Information Note states that it is ultimately a matter for individual procurers to decide what action, if any, they should take in their own particular circumstances, having taken appropriate legal advice as necessary.

# Continuous Improvement and Risks in Procurement

The world of public procurement is a detailed and complex one. The majority of people engaged in public procurement and the operation of the **Public Contracts Regulations (2006)** no doubt like to think they are pretty familiar with the Regulations and how to meet the requirements of a lawful public procurement process.

Unfortunately for those involved in public procurement a number of factors (the decision in **Lettings International** being one) have made procurement a potential minefield such that planning a procurement process requires

wish to take the opportunity to review their current practices in relation to the provision of Major Works Programmes through to Term Contracts.

Whilst the actual structure of the reviews or audits can vary slightly, generally the review should cover the following main elements:

- Procurement strategies and processes for the formulation of the procurement including resources and the use and selection of Consultants;
- Timetables and programmes covering

a detailed consideration in the planning and charting of the routes needed to reach the required destination of a concluded contract.

The current competitive environment has led to a situation where bidders are increasingly more knowledgeable about recent decisions in this jurisdiction and in the European Court of Justice. Given recent authorities such as **Lettings International** along with pronouncements by the European Commission, a sophisticated bidder has a better opportunity than ever before to cast aspersions on the lawfulness of a procurement process.

Those Contracting Authorities who recognised the danger - and there can be no doubt that the danger of challenge has increased - might

the complete procurement processes;

- Preparation and evaluation processes for the Pre-Qualification Questionnaire;
- Evaluation of submissions, interviews and site or organisation visits;
- Debriefing and action to be taken before appointment of a successful bidder;
- How the Contracting Authority deals with a challenge;
- Feedback and lessons learnt from previous procurement exercises.

Having carried out a number of reviews the sorts of issues that invariably require further

consideration and action to correct or improve the procedure are:

- More detailed consideration of the structure, timetable and resources for the procurement in question including selection of Consultants and advisers;
- Training on awareness and understanding for all those involved in the procurement;
- PQQs and ITTs not being given full consideration in their preparation especially in selection and publishing

time, cost and reputation.

Obviously the review process should aim to make improvements to future procurement processes and to provide for regular feedback and review sessions along the way. The procurement landscape has changed and it will continue to evolve at a fairly rapid rate of knots. Staying on top of these changes and ensuring procurement practices are regularly reviewed is the first step to avoiding the quicksand, and cost of a procurement challenge.

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of objective criteria and scoring mechanisms;

- The continued use with slight reviews of old documentation for PQQs and ITTs;
- Lack of knowledge of the requirements in the Public Contracts Regulations especially in relation to evaluation and debriefing procedures;
- The operation of transparency at all times together with openness and fairness to all bidders;
- No feedback or lessons learnt kept from previous procurement exercises;
- The awareness and understanding of the risk of challenges with its effect on

# Time Limits for Procurement Claims - From **Jobsin** to **Brent**

Any lawyer familiar with public procurement law will tell you that if you are making or defending a claim for breach of the regulations, time limits are important. However, it is surprising how much debate there has been over how the applicable time limits actually work.

The UK has chosen to apply short limits to public procurement law claims - the claim must be brought promptly and in any event within three months of the grounds for bringing the claim first arising. Claims which are commenced outside the time limit can only be made if the court decides to grant an extension of time.

Department was looking for, not when **Jobsin** was subsequently excluded from the shortlist.

However, subsequent cases have arguably been more generous to claimants. For example, in **Risk Management Partners v Brent LBC** a tender process was commenced, but Brent decided whilst that process was ongoing to award a contract outside it. Stanley Burnton LJ found that time ran from the point at which Brent actually awarded a contract in breach of the regulations, and not from an earlier point when the Council had resolved to contract outside the regulations. The judge observed that until a contract was actually

The main point of controversy has been as to when the grounds for bringing a claim first arise. In particular, does unlawfulness in a process give rise to a claim as soon as it happens (for example when a PQQ or ITT is published), or are there only grounds for bringing a claim when a decision is made in respect of a particular bidder?

Until fairly recently it was widely understood that a bidder wishing to complain about unlawfulness in a procurement process could not “sit on his rights” until he found out the outcome of the process: see **Jobsin v Department of Health**. In **Jobsin**, the Claimant said that the authority had wrongly classified the procurement as relating to Part B services rather than Part A services. The Court of Appeal found that the grounds for bringing that claim arose when a briefing document was published setting out the services which the

awarded, Brent could have awarded a contract lawfully under the ongoing process.

Brent was subsequently applied in the recent case of **Amaryllis Limited v OGC**, in which OGC sought to strike out the claim for delay. The Claimant's case was that its bid had not been evaluated in accordance with the PQQ and that there had been a lack of transparency in evaluation. Relying on **Brent**, Coulson J held that the grounds for bringing a claim will arise when a specific and irrevocable act occurs. In **Amaryllis**, the act was the improper and unfair evaluation of the Claimant's bid, not the publication of the PQQ. Coulson J also considered it important that the Claimant did not know all the relevant facts until after it had been excluded from the process and noted that the Claimant had not received full and prompt answers to questions it had raised of OGC.

**Amaryllis** is only a “strike out” decision, and so is not firm legal authority. However, it adopts a very different approach from cases like **Jobsin**. In particular, the idea that time will not run until there has been an “irrevocable act” shifts the focus from the aspect of the process which is said to be unlawful to the application of the process to the claimant’s bid. That approach comes close to allowing the Claimant to “sit on his rights”.

The difficulty with **Amaryllis** is that Stanley Burnton LJ’s comments on the ongoing procurement process were treated as a rule of law rather than common sense observations on the facts. Overall, one can see why Brent should not be

**Amaryllis** is not good authority. He said: “Where there has been a failure to comply with the proper procedure the later award of the contract does not constitute a separate breach of duty; it is merely the final step in what has already become a flawed process.”

Another important point, which differs from **Amaryllis**, is that it was accepted on both sides that whether the claimant knows of the breach was not material to when the grounds first arose. Thus Brent confirms that the time limits work objectively and not subjectively, although the grant of an extension of time will inevitably depend on the claimant’s subjective knowledge of a breach.

“The decision in Brent appears to have restored clarity as to how the time limits in procurement cases should be applied.”

treated as having jumped one way or another until it contracted outside the ongoing process; it was only at that point that it crossed the line from “likely breach” to actual breach”. However, it does not follow that the legal test should be “irrevocable act”. Indeed, very few decisions in procurement are truly irrevocable.

**Brent** has now been considered by the Court of Appeal, which upheld Stanley Burnton LJ’s decision but gave further useful guidance. Like Stanley Burnton LJ, Pill LJ found that Brent had not “committed itself” to a contract outside the regulations until the later date; Moore Bick LJ also found that Brent had not “finally decided” to contract until then.

However, Moore Bick LJ also gave guidance which tends to suggest that the reasoning in

The decision in **Brent** appears to have restored clarity as to how the time limits in procurement cases should be applied. Nevertheless, contracting authorities should have in mind that the courts are reluctant to see meritorious claims shut out for delay. That is particularly so where a Claimant receives information about the process only in fits and starts.

For this reason, the most important debate may not be about when the grounds for the claim first arose, but rather about whether the Claimant has made a good case for an extension of time. Therefore, whilst time limits remain very important in procurement claims, the bottom line is - unsurprisingly - that the court will always do what is fair on the facts.

# Europe Threatens to Overrule the Brent Approach

The Court of Appeal's ruling in Brent looks unlikely to remain good law if the European Court of Justice follows the recent Opinion of Attorney General Kokott's in C-406/08 Uniplex v UK.

The case involves a relatively straightforward procurement dispute. Uniplex failed to win a tender for the provision of haemostats to the NHS Business Services Authority. Uniplex entered discussions with the NHS on the failure to win the tender and subsequently commenced proceedings for breach of procurement laws outside the three month period as interpreted to

law requires that national limitation periods for actions under regulation 47(7) of the Public Contracts Regulations 2006 "may not start to run until the time when the applicant knew or ought to have known of the alleged breach of procurement law". This flies in the face of Brent, which confirmed that the three month period begins to run from the date of the relevant breach of the procurement laws. Under the Brent approach, knowledge of the breach is not necessary.

A-G Kokott goes on to suggest that the requirement of effectiveness demands that

commence upon the date of the actual breach.

The High Court referred questions to the ECJ on the application of European law. The main question before the ECJ is whether the limitation period runs from the date of the alleged breach or the date when the failed bidder knew or ought to have known of the breach.

The ECJ is also asked to advise on whether proceedings could be dismissed on the basis that they had not been brought promptly, regardless of whether brought within three months (however calculated), and as to how the discretion to extend the limitation period should be exercised.

In his Opinion, A-G Kokott considers that the principle of effectiveness enshrined in European

applications within the three month period cannot be dismissed for lack of promptness. In effect, regulation 47(7)(b) does not impose a two part test. The requirement for promptness becomes relevant only in consideration of the discretion to extend limitation under the discretionary power afforded to the Court.

The ECJ is not bound to follow the Opinion, and indeed it appears the Court will need to undertake a stringent analysis of the principles of equivalence and effectiveness before a Judgment can be entered on the basis of the arguments presented in the Opinion. Either way, the decision in Brent looks uncertain at this time.

# The Enforcement of Time Limits for the Receipt of Tenders: J B Leadbitter & Co Limited v Devon County Council [2009] EWHC 930 (Ch)

Contracting authorities surprisingly regularly face the dilemma of what to do when they receive tenders past the stipulated deadline, whether it be one minute past, a few hours past, or a number of days later. Similar decisions arise where a tender is incomplete or not strictly compliant.

Generally the decision as to whether or not to accept tenders received days after the deadline is relatively straightforward. But what about situations in which tenders are received a few hours, or, more difficult still, a few

Devon took the decision not to accept Leadbitter's tender. Leadbitter challenged that decision primarily on the ground that it was disproportionate. The application of the principle of proportionality to the implementation of the terms of a procurement process was, before this decision, uncertain. Mr Justice David Richards, however, found that the principle of proportionality did apply in these circumstances. That principle, however, must be applied bearing in mind that a court should interfere only with "manifest errors". In

“The enforcement of time limits and rules for compliance is generally accepted to be important for the very purpose of ensuring equality and fairness between tenderers.”

11

minutes after the deadline? And what about tenders submitted before the deadline but which are (mistakenly) incomplete?

In J B Leadbitter v Devon County Council, Leadbitter submitted an incomplete tender, having omitted one (crucial) section of its tender response from the documents which it uploaded onto the Council's e-procurement website by the stated deadline. It telephoned the Council's procurement helpdesk shortly before the deadline, having realised its error. Having been reminded by the Council that the instructions were clear that tenderers had only one opportunity to upload the complete set of documents, Leadbitter then emailed the missing section 26 minutes after the deadline.

other words, a court “must respect this area for judgment and will not intervene unless the decision is unjustifiable”.

The enforcement of time limits and rules for compliance is generally accepted to be important for the very purpose of ensuring equality and fairness between tenderers. Indeed, that is the basis for the regulation of procurement processes generally. Any decision to relax these requirements risks a conclusion that a tenderer who benefits from such a decision is treated more favourably than other tenderers.

For these reasons, Mr Justice Richards decided that the Council was entitled to reject

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Leadbitter's tender, despite the fact that it was established that it had completed the missing section of its tender in good time before the deadline, the failure to include the relevant section was unintended and was a "technical error", and the rest of the tender was submitted in time.

It should, however, be noted that the principle of proportionality might, in extreme circumstances, require the acceptance of a late submission of the whole or part of a tender. This is most obviously the case, as Mr

had been affected by a power failure which meant that it was unable to submit its tender electronically before the initial deadline. In these circumstances, the Council decided to extend the deadline for all tenderers by three hours. It notified all tenderers of this decision by email, 47 minutes before the initial deadline.

This particular decision was not challenged, except on the basis that Leadbitter was discriminated against since time was extended for this tenderer but not for Leadbitter. Mr Justice Richards rejected the discrimination

Justice Richards acknowledged, where the late submission was due to a fault on the part of a procuring authority.

Further, the decision in Leadbitter did not exclude the possibility of the existence of a discretion on the part of a contracting authority to accept late tenders. In taking such decisions, however, contracting authorities should be mindful of the fact that late or non-compliant tenderers should not be provided with an unfair advantage over other tenderers.

Indeed, to make matters more interesting in the Leadbitter case, the deadline had already been extended earlier the same day at the request of another tenderer whose premises

argument on the basis that the circumstances were very different. In particular, that tenderer was affected by circumstances beyond its control and further, the deadline was able to be extended for all tenderers and many tenderers, including Leadbitter, had taken advantage of that extension to review their own tenders before submitting them.

This suggests that contracting authorities facing requests from tenderers before the deadline for an extension and / or where tenderers cannot comply with the deadline due to matters beyond their control, are entitled to extend the deadline, at least where such an extension can be provided to all tenderers.

A final note: in the Leadbitter case, tenderers were given ample and clear warning in several places in the Invitation to Tender and accompanying documents of the applicable deadline and in particular, that tenderers had only one opportunity to upload all of their documents onto the e-tendering system. It is not clear from the judgment whether the Council could or should have accepted Leadbitter's tender if the missing section was emailed (but not uploaded according to the instructions) before the deadline. In these

“It is not clear from the judgment whether the Council could or should have accepted Leadbitter's tender if the missing section was emailed (but not uploaded according to the instructions) before the deadline.”

cases, as with all others, contracting authorities should, in taking the decision whether or not to accept such tenders, bear in mind the overriding requirement to ensure all tenders are treated fairly and equally.



# Responding to Aggrieved Bidders – Avoiding Culpability

## The Law

Under the Public Contracts Regulations 2006 (PCR), a contracting authority owes a duty to bidders for public contracts to comply with the provisions of the PCR. However, under Regulation 47(7), a bidder cannot bring an action against the Contracting Authority unless:

- The bidder has informed the contracting authority “of the breach or apprehended breach of the duty owed... and of its intention to bring proceedings under this regulation in respect of it”; (Regulation 47(7)(a)) and

## Background

OGC Buying Solutions ('OGC') issued a contract notice in the OJEU of November 2007, intending to create a framework agreement for the supply, delivery and installation of furniture to UK public sector bodies. Bidders were invited to tender for six lots, of which Lot 1 was the most valuable.

Amaryllis was informed on 17 March 2008 that it had been successful in obtaining lots 2 – 5, but not 1 or 6. In post-tender discussions between the parties, it became

- The bidder institutes legal proceedings “promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is a good reason for extending the period within which proceedings may be brought” (Regulation 47(7)(b)).

This wording offers significant scope for problems and peculiarities of application.

In May 2009, the High Court had an opportunity to apply these provisions in the case of *Amaryllis Limited v HM Treasury (sued as OGC Buying Solutions)* [2009] EWCH 962 (TCC) ('Amaryllis').

clear to Amaryllis that OGC was not able to provide adequate reasons for the failure to also award Amaryllis Lot 1 and, after requesting substantive responses and reconsideration, Amaryllis withdrew from Lots 2 – 5 and wrote to OGC on 4 June 2008 informing them that it would issue proceedings under Regulation 47.

Amaryllis were good to their word and issued proceedings for damages in excess of £11,000,000. OGC sought to strike out the proceedings on the basis of a breach the restrictions laid down in Regulation 47(7).

### Had Regulation 47(7) been complied with?

The Court had to consider whether notice had been given sufficient to satisfy the first limb of

Regulation 47(7)(a). The letter of 4 June 2008 clearly identified the Regulations in question, described the actual breach complained of and informed OGC of an intention to bring proceedings. This fell within the three month maximum specified in the regulation, but did not automatically mean that the matter was brought 'promptly'.

OCG argued that Amaryllis intentionally failed to bring proceedings promptly on the basis of commercial reasons. The High Court gave short shrift of this argument, making it clear

Contracting Authority in providing responses and dealing with procedural complaints in the procurement process at an early stage. Failure to do so adequately could result in unsuccessful bidders commencing proceedings that, though outside the three month time period, will be upheld by the court as falling within Regulation 47(7).

## PART II

### Disclosure

Amaryllis continued to a further hearing, in which the court was asked to consider the Contracting

“In deciding what documents must be disclosed, a court will consider matters such as proportionality to the litigation at hand and whether or not documents should be withheld as a matter of public interest.”

that Amaryllis was well within its rights to go through a period of information gathering prior to issuing proceedings. It was in fact held that OGC had failed to respond adequately to requests for information at an early stage and in doing so had brought about the delay itself.

Though not necessary for the instant case, the High Court took the opportunity to make clear that there would have been grounds for an extension to the three month period if so required by Amaryllis. The Court attributed the delay to the inaction of OGC in providing information, and, in any case, came to the conclusion that such delay could not be said to have caused any prejudice to OGC.

Amaryllis underlines the importance for a

Authority's disclosure of documents.

In deciding what documents must be disclosed, a court will consider matters such as proportionality to the litigation at hand and whether or not documents should be withheld as a matter of public interest.

While each case will turn on its own facts, **Amaryllis** does serve to give some guidance as to what may or may not be deemed disclosable in the event of a dispute with an aggrieved bidder.

Disclosable:

- Marked version of pre-qualification questionnaire (PQQ);
- Notes prepared regarding PQQ;

- PQQ evaluation report and scoresheet;
- Relevant extracts of minutes to pre-tender Supply Meetings;
- PQQs of other bidders;
- Pre-Qualification Report;
- Evaluation Report attachments;
- Documents specifically referred to in correspondence with the bidder;
- Detailed Procurement Strategy specifically referred to in internal correspondence.

After initially refusing to do so, the contracting authority also agreed to disclose:

- Pre-Qualification Development;
- Initial Business Case;
- Contract Notice development;
- Questions and answers on the Bravo Portal (Q&A portal for prospective bidders).

Notably, documents relating to the contracting authority's decision-making process were open to disclosure, despite the claimed public interest immunity. Documents provided by third

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Not Disclosable:

- Stakeholder correspondence;
- Notes prepared regarding other bidders' PQQs;
- Further communication with other bidders' prior to PQQ;
- Documents relating to decision-making process;
- Documents relating to other bidders;
- Documents relevant to policy decisions;
- Documents relating to Reconsideration of Weighting;
- Individual Marking for PQQ, Composite Marking and Calibration (already covered above);
- Additional PQQ Marking Scheme versions.

party bidders were also open to disclosure, with certain redactions and substitutions only where absolutely necessary to protect confidential information.

This level of disclosure may well appear disquieting to contracting authorities who are well-advised to take note of the wide-ranging documents that may be obtained via an order for disclosure. Any reference to a document made in external, or indeed some internal correspondence, may open that document up to disclosure. For contractors providing documents during the bidding process, it is a salutary reminder that any confidential information disclosed to a contracting authority at tender must be clearly marked as such to prevent later disclosure to aggrieved bidders.