



Procurement News January 2019

Welcome Andrea,

This newsletter is for all colleagues within the Department of Health and Social Care and its ALBs who have an interest in procurement and commercial activities. You may forward to colleagues within the health family who have an interest in commercial issues.

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If you have anything to contribute, feedback or suggestions for future stories please [get in touch](#).



Rick Webb
Procurement Policy Manager
Department of Health and Social Care

CCS Crown Customer Service customer update

The latest issue (published 14th January 2019) is available [here](#). This month there is news on:

- What can you do to tackle modern slavery
- CCS helping customers review their energy portfolio generates £1.2 savings
- 9 education customers save £161,500 on IT hardware
- Could you make savings on your postal services?
- South Downs National Park Authority saves on new planning solution
- New software framework coming soon
- Share your views on purchasing strategy for print and print related items
- Unlock energy generation opportunities through the HELGA (heat networks and electricity generation assets) agreement
- Transport technology infrastructure customer workshop
- Government ICT conference - [22nd January](#) at QEII Centre, Westminster
- Government Property 2019 - [14th February](#) at QEII Centre, Westminster
- Webinars:
 - [Technology](#)

- [Travel](#)
 - Buildings
 - Framework extensions
 - General Legal Advice Services ([RM3786](#)) has been extended until 27th February 2021
 - New frameworks
 - Heat Networks and Electricity generation Assets - HELGA ([RM3824](#))
 - Technology Expense Management ([RM3802](#))
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Procurement Policy Notes (PPNs)

All Procurement Policy Notes (PPNs) are published on the CCS website [here](#).

No new PPNs have been published since the last edition.

NHS Long Term Plan

NHS England has launched the NHS Long Term Plan. Part of this plan includes potential impacts on procurement in the NHS. There are 7 chapters covering:

1. a new service model for the 21st century
2. more NHS action on prevention and health inequalities
3. further progress on care quality and outcomes
4. NHS staff will get the backing they need
5. digitally-enabled care will go mainstream across the NHS
6. taxpayers' investment will be used to maximum effect
7. next steps

The plan sets out how the NHS can face challenges by:

- doing things differently
- preventing illness and tackling health inequalities
- backing our workforce
- making better use of data and digital technology
- getting the most out of taxpayers' investment in the NHS

The Long Term Plan can be accessed [here](#) in either PDF or digital formats.

Electronic invoicing in Public Procurement

In November CCS released a [PPN 03/18](#). This PPN requested feedback on a proposal to implement EU Directive 2014/55/EU on electronic invoicing in public procurement.

From **18th April 2019** central contracting authorities must accept and process electronic invoices complying with the standard.

Sub Central authorities have the option to defer implementation until 18th April 2020.

Suppliers are not required to comply and adopt the standard meaning that they are not obliged to implement electronic invoicing.



Commercial and Single Use Plastics

The objective of banning single use plastics on government estates by 2020 is drawing nearer. The ban will have an impact on catering and other facilities management contracts.

Actions for commercial staff and wider organisations to take have been proposed:

- Engage your current suppliers to find alternatives to single use plastics
- Work with your clients remove single use plastics using specifications e.g. catering contracts
- Communicate the single use plastic changes to the rest of your organisation.

The results of the recent [DEFRA consultation](#) on single use plastics will be made available over the coming months. Keep an eye out for updates from DEFRA and CCS.

Construction Framework Conference

The December conference in Sheffield facilitated a range of discussions including:

- cost vs quality

- innovation
- collaboration
- scale
- supply chain
- social Value
- EU Exit

A keynote speech from the Civil Engineering Contractors Association discussed a recent report that was published building on previous work looking at the industry's procurement challenges.

Both documents have looked at the positives and negatives of construction framework agreements. Benefits include delivering health and safety improvements and giving suppliers information on the potential volumes of work that they may be awarded over a set time period.

While both of these are positive aspects of construction frameworks, negatives were raised around suppliers feeling locked into framework agreements if there is an ability to carry out work changes. This is in addition to the high costs of bidding to be included on a framework agreement where there is no guarantee of work.

A full review of the conference can be accessed on the Built Environment Network [website](#).

Faraday Development Ltd v West Berkshire DC [2018] EWCA Civ 2532

Provided by Phoebe Baxter, GLD

This Court of Appeal case resulted in the first declaration of ineffectiveness in English public procurement since the remedy was introduced in 2009. The case also revisited the key features of a public contract and provided guidance on drafting VEAT notices.

Facts

West Berkshire DC ('the Council') ran a tender process, outside the procurement regime, to award a development agreement (DA) to redevelop an industrial estate. The appellant Faraday /Development was part of an unsuccessful consortium bid; St Modwen Developments Limited ('St Modwen'), an interested party in the appeal, was successful. The Council did not believe that the DA was subject to the public procurement regime but had been aware of the issue so published a Voluntary Ex Ante Transparency (VEAT) notice relating to the DA.

Under the DA, St Modwen had an option to draw down land for development and if they did so, the DA stated that they were "obliged to carry out the development of the plot in question". If they did not take the option, they were not required to carry out the development works.

Faraday Development challenged the Council's decision to award the DA to St Modwen on the basis that the option in the DA created an enforceable obligation on St Modwen to carry out the development works, and therefore that the DA as a whole constituted a public contract within the meaning of Directive 2014/24/EU and the Public Contracts Regulations 2015 ('PCR 2015'). As such it was argued that the Council had acted inconsistently with its obligations under public procurement legislation.[1]

Key issues considered by the Court of Appeal

1. Was the DA a 'public works contract' or did the Council unlawfully commit itself to entering into a 'public works contract' without a public procurement procedure?

The Court turned to Article 1 (2) of Directive 2004/18/EU to identify the four main constituents of a public contract:

- a) for pecuniary interest
- b) in writing
- c) entered into by an economic operator and a contracting authority
- d) having as its object the execution of works or the supply of products or the provision of services.

Although the DA ostensibly satisfied those requirements, the Court noted that case law had developed an additional requirement that the contractor must assume an obligation or obligations in order for the agreement to constitute a public contract. The case law was not clear on whether that obligation must be immediately enforceable, however, so the Court approached this question by looking at the substance of the transaction, not merely its form, to establish the true nature of the DA.

The Court held that the DA was not a public works contract when concluded because although the main purpose of the DA in substance was the execution of development works on the land, this was contingent on St Modwen exercising its option to draw down the land, and contingent obligations were not sufficient to satisfy the case law requirements for a public contract.

However, even though the DA was not a public works contract when it was concluded, the Council had committed itself under the DA to enter into a public works contract without following the procedure for public procurement as soon as St Modwen exercised its option to draw down the land. At that point it would be too late for the Council to run a procurement process so a public works contract crystallised without a lawful procurement procedure.

By entering into the agreement, the Council "effectively agreed to act unlawfully in the future" – breaching the legislative regime for procurement. That was "unlawful – whether as an actual or anticipatory breach of requirements for a lawful procurement... or simply as public law illegality, or both".[2]

2. If the DA was not a 'public works contract,' was this because the public procurement regime was deliberately and unlawfully avoided?

There was no evidence to suggest this. Seeking to achieve a lawful contractual relationship outside the procurement regime is not inherently unlawful and there was no evidence of bad faith, even if ultimately the arrangement was unlawful as it should have been subject to the procurement regime.

3. If the DA was not a ‘public works contract,’ was it a ‘public services contract’?

In answering this point, the Court considered whether the contract in question was “an indivisible whole” and, if so, what was its main object? The Court found that the contract was an “indivisible whole” because the design and planning services could not sensibly be separated from the obligations to carry out the actual development of the land. The DA’s main object was the development work, and it was therefore not a public services contract.

4. Was the claim for a declaration of ineffectiveness precluded by the Council’s VEAT notice?

The Court held that the VEAT notice did not comply with the requirements in Regulation 47K(4)(a)(ii) and (iii) PCR 2006 – it did not provide a clear description of the contract sufficient to allow those who read it in the OJEU to understand the object of the contract. It omitted any reference to St Modwen’s obligations, including relating to the option, and oversimplified, to the extent of being misleading, the DA which was described as an ‘exempt land transaction’.

The notice was therefore not a valid VEAT notice and so could not preclude the remedy of a declaration of ineffectiveness, if such a remedy was justified (which it was in this case).

Additional points

The Court also considered a limitation point relating to the application of Reg 47 PCR 2006.

The Court made a declaration of ineffectiveness and ordered the payment of a financial civil penalty of £1. The Council was refused permission to appeal to the Supreme Court.

Commentary

The case provides clarification on a number of points, but perhaps most importantly, guidance as to when projects will be considered ‘public works contracts’ and therefore subject to the procurement regime. Contracting authorities should consider options agreements and modifications of contracts as if the options and modifications were immediately enforceable, in order to assess whether the contract should be subject to the public procurement regime.

One of the key arguments upheld by the Court was that if contracts were not assessed as a whole, contracting authorities would be “at liberty to construct a sequence of arrangements... whose combined effect [would be] to constitute a “public works contract”, without ever having to follow a public procurement procedure. That would defeat the operation of the legislative regime.”[3] Contracting authorities should be aware of the need to look at contractual arrangements as a whole when assessing whether they fall within the procurement regime.

On a more positive note, the Court acknowledged that where the conclusion is that the contract sits outside the procurement regime, this is not in itself unlawful; neither is it unlawful for a contracting authority to seek to find such an arrangement without intending the arrangement itself to be unlawful. Where the Council erred in this case was to commit to acting unlawfully in the future. Clarity on whether a contract legitimately sits outside the procurement regime is therefore essential to avoid challenges on this point.

Clarity of drafting in VEAT notices is also emphasised in this case: in order to avoid a declaration of ineffectiveness, VEAT notices should:

- be clear and unequivocal on the reasons for awarding the contract without following the procurement procedure; and
- provide a full, objective picture of the relevant facts such that a third party would be able to decide, within the 30 day limitation period, whether to launch a challenge of the decision to award the contract.

The Court's decision to make a declaration of ineffectiveness in this case should also serve to remind contracting authorities that the courts will not shy away from their obligations under the procurement regime to make such a declaration, which has the effect of cancelling any prospective obligations under the contract. A declaration of ineffectiveness would likely be a costly outcome even if, as in this case, the financial penalty imposed by the Court is nominal.

[1] The Council and St Modwen entered into the DA on 4 September 2015 but the contract award procedure started before 26 February 2015 so the relevant applicable legislation was Directive 2004/18/EC and the Public Contract Regulations 2006 ('PCR 2006').

[2] Para. 62 of the CA judgment

[3] Para. 62 of the CA judgment

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