PUBLIC PROCUREMENT UPDATE – 2017 SO FAR

Jorren Knibbe, Guildhall Chambers, 20 June 2017

Contents

Introduction

1. This note describes developments in public procurement case law in the first half of 2017.

2. It will examine three domestic cases in detail:

    a. the decision of the UK Supreme Court in *Nuclear Decommissioning Authority v EnergySolutions* in relation to public procurement damages claims;

    b. *Bombardier v Merseytravel*, in which Coulson J has given two interim judgments on confidentiality issues; and

    c. *Wylde v Waverley Borough Council*, on standing to bring judicial review proceedings in public procurement cases.

3. It will then summarise other significant developments in the domestic and EU case law over the same period, in relation to (among other things) amending procurement documents, clarification of tenders after submission and proof of technical ability.

Nuclear Decommissioning Authority v EnergySolutions [2017] UKSC 34 (11 April 2017) – damages claims in public procurement

4. This case involves a challenge to the outcome of a procurement carried out by the NDA for decommissioning services for nuclear power plants. ES was unsuccessful in that procurement, but allowed the standstill period to lapse (and the contract to be entered into) before bringing proceedings seeking damages.

5. A trial of preliminary issues addressed two principal questions:

    a. whether the claimant bringing a damages action under the Public Contracts Regulations 2006 ("**PCR06**") has to prove that the *Francovich* conditions for Member State liability under EU law are fulfilled; and

    b. whether failing to bring proceedings before the contract had been concluded amounted to a failure by the claimant to take reasonable steps to mitigate its loss, which could reduce or extinguish the claimant's entitlement to damages.

The *Francovich* conditions

6. In a line of cases starting with *Francovich*, the EU Court of Justice ("**CJEU**") has recognised a right to damages for breach of EU law by a Member State, where three conditions are met: the EU rule which has been infringed must be "intended to confer rights on individuals", the breach of that rule must be "sufficiently serious", and there must be a "direct causal link between the breach and the loss or damage sustained by the [claimant]".[1]

7. Directive 89/665/EEC on remedies in public procurement (as amended) ("**the Remedies Directive**") requires that Member States make provision for the award of damages to a claimant which has been harmed by an infringement of the EU procurement rules.[2] The CJEU's 2010 judgment in Case C-568/08 *Spijker* suggested that the claimant's entitlement to damages under the Remedies Directive arises only where the *Francovich* conditions for Member State liability are met.[3]

T**he Court of Appeal's judgment**

8. In its December 2015 judgment in *EnergySolutions v Nuclear Decommissioning Authority* [2015] EWCA Civ 1262*,* the Court of Appeal held that:

    a. the right to damages under the EU procurement Directives *does* only arise where the *Francovich* conditions were satisfied, following the judgment of the CJEU in *Spijker* (above);

    b. however the right to damages granted by the PCR06 was broader, and a claimant did not need to show that the *Francovich* conditions were satisfied in order to establish an entitlement to damages under the domestic legislation; and

    c. failure to sue during the standstill period (or while the contract had not yet been concluded) did not amount to a failure to mitigate the claimant's losses.

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[1] See Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraphs 31 and 51; Case C‑445/06 *Danske Slagterier* [2009] ECR I‑2119, paragraphs 19 and 20

[2] Directive 89/665/EEC, Art 2(1)(c); Directive 2004/18/EC, as replaced by Directive 2014/24/EU.

[3] Case C-568/08 *Spijker* [2010] ECR I-12655 at [92]

Subsequent developments

9. The NDA appealed to the Supreme Court. Before that appeal could be heard, Fraser J determined following trial on liability that the NDA's award decision was vitiated by breaches of the PCR06.[4] In a subsequent judgment given in December 2016, Fraser J also held that those breaches were *sufficiently serious* for the purposes of the second *Francovich* condition.[5]

10. Following the hearing of the appeal before the Supreme Court, the parties reached a settlement of ES's claim (leading to the announcement of a public inquiry).[6] Nonetheless, having heard full argument, the Supreme Court was asked to give judgment in relation to the preliminary issues.

The Supreme Court's judgment

11. Giving the unanimous judgment of the Supreme Court, Lord Mance agreed with the Court of Appeal that, as a result of the CJEU's judgment in *Spijker*, the Remedies Directive gave a right to damages only where the *Francovich* conditions were met.[7]

12. However Lord Mance disagreed with the Court of Appeal's conclusion that the UK legislator, in enacting the PCR06 (as amended), had intended to provide a broader right to damages which did not require that the *Francovich* conditions be satisfied. In fact it was "a natural assumption that the UK legislator will not go further than required by EU law" when implementing a scheme of remedies such as those laid down by the Remedies Directive, and this was reinforced by contemporaneous statements expressing an intention not to "gold plate" the legislation. It followed that the PCR06 "should be read as providing for damages only upon satisfaction of the *Francovich* conditions".[8]

[4] [2016] EWHC 1988 (TCC)
[5] [2016] EWHC 3326 (TCC)
[6] See https://www.gov.uk/government/speeches/nda-settlement-contract-termination-and-inquiry
[7] [2017] UKSC 34 at [25]
[8] At [39]

13. As regards the argument that ES had failed to take reasonable steps to mitigate its losses, Lord Mance considered that

> "an economic operator is entitled, in the face of what it views as (and later proves to have been) a breach of duty by the contracting authority, to leave it to the authority to take the risk of implementing its wrongful award decision. The economic operator cannot be said to be acting unreasonably if it fails to stop the authority from perpetrating a breach of duty which the authority could itself stop perpetrating."[9]

14. Lord Mance added that "it has not been - and could not be - suggested that the NDA entered into the contract only because it thought that it was not exposed to a subsequent claim by [ES]". Lord Mance noted that even if ES had brought its claim before the contract was concluded, the NDA may have sought to lift the automatic suspension imposed by the PCR06, and may therefore have chosen to run the same risk of concluding a contract which could turn out to have been awarded unlawfully.[10]

15. In those circumstances, ES had not unreasonably failed to mitigate its losses by failing to take steps to prevent the NDA from concluding the contract with the winning bidder. Instead, each party had simply had "choices which it was entitled to, and no doubt did, exercise in its own interests."[11]

Consequences

16. The Supreme Court's decision establishes that a claimant seeking damages under the PCR06 must prove that the *Francovich* conditions for Member State liability are satisfied. It follows from Lord Mance's judgment that the same will be true in damages actions under the Public Contracts Regulations 2015 ("**PCR15**"), which have replaced the PCR06. This creates a number of interesting questions.

17. First, it is not clear whether or when an infringement of the procurement rules will be *sufficiently serious* for the purposes of the *Francovich* conditions. In his December 2016 judgment, Fraser J appears to have considered that any breach of procurement law will be *sufficiently serious* if it affected the outcome of the procurement process. Accordingly,

[9] At [56]
[10] At [57]
[11] At [58]

Fraser J held that a failure to award the contract to the tenderer submitting the most economically advantageous bid, and a failure to disqualify a tenderer which should (according to the rules of the procurement) have been disqualified, will be sufficiently serious.[12] Similarly, other breaches of the PCR06 would be sufficiently serious "when, or if, their effect, either individually or cumulatively, upon the scoring is such that the outcome of the competition would be altered".[13]

18. If this is correct, it seems that the application of the *Francovich* conditions to procurement damages actions may add little or nothing. But it also seems very unlikely that Fraser J's judgment will be the last word on the matter. Until there is higher judicial authority on the point, any defendant to a significant damages claim will have an incentive to argue that its breaches (if any) were not *sufficiently serious*.

19. Secondly, it is open to question whether the *Francovich* conditions also apply to damages actions under the EU directives and domestic legislation on utilities procurement.[14] This legislation is worded in substantially similar terms to the EU directives and domestic regulations considered in *Spijker* and in *NDA v EnergySolutions*, but regulates procurement by entities which will not necessarily always be emanations of the State.[15] To apply the *Francovich* conditions for Member State liability to a damages action against a non-State utility would be, at the very least, odd. In fact, if the entitlement to damages under the utilities regime is solely an "expression" of "the principle of State liability", the correct defendant in an action for damages under that legislation may, in some circumstances, not be the utility.[16]

20. Thirdly, in the context of Lord Mance's judgment on mitigation of losses, the observation that the NDA did not conclude the contract in the belief that ES's challenge had been dropped creates an ambiguity: would the position have been different if the NDA *did* believe that ES had given up its challenge? Or if the NDA would have refrained from concluding the contract until the expected challenge was resolved? Lord Mance's judgment does not explain why this should make a difference. But these are plausible

[12] *EnergySolutions v NDA* [2016] EWHC 3326 (TCC) at [65] to [66]
[13] At [67]
[14] See most recently Directive 2014/25/EU on utilities procurement; Directive 92/13/EEC on remedies in utilities procurement (as amended); Utilities Contracts Regulations 2016 (SI 2016/274)
[15] See e.g. Utilities Contracts Regulations 2016, r. 5(1); Case C-282/10 *Dominguez* EU:C:2012:33 at [39]
[16] Cf. *Spijker* (above) at [87]

scenarios, and Supreme Court's decision unfortunately seems to leave room for the point about mitigation to be raised again in the event that these circumstances arise in future cases.

Bombardier v Merseytravel **[2017] EWHC 726 (TCC) (12 April 2017) - confidentiality in public procurement proceedings**

21. These proceedings involve a challenge under the Utilities Contracts Regulations 2006 to a procurement carried out by Merseytravel for rolling stock and related works and services. Merseytravel has concluded the contract with the winning bidder, so that the claim seeks damages only. Coulson J has given two interim judgments, both relating to confidentiality issues.

22. The earlier decision considered whether the Particulars of Claim ought to be made available publicly.[17] Coulson J commended the approach to confidentiality issues set out in the TCC's *Guidance note on public procurement cases*, which (at the time of writing) has been finalised but remains to be formally launched. In short, the *Guidance note* confirms that documents on the court's file (such as pleadings) will, by default, be public, so that a party which wishes to restrict public access to the court's file will need to apply for an order from the court to that effect. Coulson J found nothing in Bombardier's Particulars of Claim to warrant a restriction of public access to that document, leaving the question of access to the annexes to be determined subsequently.

23. By the time of Coulson J's second interim decision, Merseytravel had disclosed the winning bid in the procurement to Bombardier, which now alleged in addition that there had been unequal treatment as between its bid and the winning bid.[18] The winning bid had been disclosed into a confidentiality ring made up of Bombardier's advisors, which had been established by a consent order. Bombardier applied to the court for an order making changes to the confidentiality ring, to enable it to share elements of the confidential information with additional expert advisors and with one member of Bombardier's staff.

[17] [2017] EWHC 575 (TCC) (24 March 2017)
[18] [2017] EWHC 726 (TCC) (12 April 2017)

24. The second interim judgment, given on 12 April 2017, includes a number of interesting points.

25. First, Coulson J rejected an argument that Bombardier's attempt to examine Merseytravel's evaluation of the winning bid was an "unjustified fishing expedition". Coulson J cautioned that this concern should not be "taken too far", since "a claimant in the position of Bombardier is entitled to investigate fully the comparative treatment of the tenders, either to confirm criticisms it has already made, or to found freestanding allegations".[19]

26. Second, Coulson J accepted Bombardier's evidence that it required the help of external experts in order to understand elements of the confidential information. Accordingly he ordered that the confidentiality ring be modified to that extent.[20] However Coulson J would not admit a named Bombardier employee to the confidentiality ring, since he was not persuaded that that individual's assistance was necessary, and noted that, despite her forthcoming retirement, there remained a risk that she might participate in subsequent procurement processes in which Bombardier would be in competition again with the winning bidder.[21]

27. Third, Coulson J rejected an assertion that electronic disclosure of confidential information carried additional risks of inadvertent transmission to third parties. He was therefore prepared to amend the confidentiality ring order to provide for electronic disclosure of certain spreadsheets which, thus far, had only be disclosed in hard copy, in order to enable Bombardier to examine the workings underlying the data.[22]

28. Fourth, having allowed Bombardier's application to vary the consent order in certain respects, Coulson J considered the costs of the application. He noted that Merseytravel was itself neutral in relation to the application, but had attended in order to pass on the objections of the winning bidder (whose confidential information was in issue). The winning bidder had provided evidence in response to the application, but (contrary to its earlier indications) had not attended the hearing.

[19] [2017] EWHC 726 (TCC) at [23] to [24]
[20] At [25]
[21] At [32] to [35]
[22] At [36] to [38]

29. In those circumstances, Coulson J considered that the winning bidder ought to pay the costs of those parts of Bombardier's application to which it had objected unsuccessfully. The court had power to make such an order under section 51(3) of the Senior Courts Act 1981 and CPR 46.2, despite the fact that the winning bidder was not a party to the proceedings and had not attended the hearing. Coulson J gave the winning bidder 14 days to make representations as to its liability for costs, following which he proposed to decide the matter on the papers.[23]

Comment

Disclosure of the winning bid (etc)

30. When a disappointed bidder is considering whether to challenge the outcome of a public procurement process, it will, in the usual course, ask for extensive disclosure of information. It will also, in the usual course, meet a response which declines to disclose all or part of the requested information on the grounds that the request is a "fishing expedition". Coulson J's second interim judgment in *Bombardier v Merseytravel* suggests a lack of sympathy with this response, and goes so far as to say that a claimant should be given information *either* to confirm allegations it has already formulated, or to "found freestanding allegations". This passage might be taken to suggest that the winning bid (for example) will generally fall to be disclosed.

31. The winning bid will, of course, routinely include confidential information, and require appropriate protections. Where proceedings have been commenced, the appropriate measures are likely to involve a confidentiality ring (which can be established by a consent order where the parties agree, as in the *Bombardier* case). Where proceedings have not been commenced, the claimant's legal team might (for example) be asked to provide undertakings not to disclose the information to the claimant, but the contracting authority must bear in mind that it is likely to owe obligations of confidence to the winning bidder, and may need that bidder's consent before disclosing its confidential information even to the claimant's lawyers. If the lawyers' undertakings are breached, it is the winning bidder which will suffer loss, and thus the winning bidder may also ultimately wish to be able to sue on the undertakings.

Winning bidder's liability for costs

[23] At [48] to [53]

32. As the *Bombardier* case illustrates, if the winning bidder objects to disclosure of its bid in procurement proceedings, so that an application to the court becomes necessary to resolve the matter, the winning bidder may be exposed to costs risk even if it is not a party to the proceedings.

33. However the process adopted by Coulson J in this case may require adjustment in order to comply with court rules. CPR46.2(1) requires that, "where the court is considering" whether to make a costs order against a third party, that entity must be made a party to the proceedings for the purposes of costs only, and must "be given a reasonable opportunity to attend a hearing at which the court will consider the matter further". This suggests that the winning bidder is entitled to a *further* court hearing to make representations regarding costs. Coulson J's proposal to resolve the matter on the papers appears to neglect this.

Wylde v Waverley Borough Council [2017] EWHC 466 (Admin) (9 March 2017) – standing to bring judicial review proceedings in a public procurement case

34. In this case, the Council decided to vary an existing development agreement over its land, in order to increase the developer's profit. The claimants (some of whom were local councillors, and some residents) contended that the Council's decision breached the PCR06. The claimants were not economic operators, so could not bring proceedings under the PCR06; instead they sought to challenge the Council's decision in judicial review proceedings.[24]

35. The court ordered a preliminary trial of the question whether the claimants had "sufficient interest" (or, in other words, standing) to bring JR proceedings, for the purposes of s. 31(3) of the Senior Courts Act 1981. Dove J held that the claimants lacked standing, so that the claim could not proceed.

36. Dove J adopted "a conventional approach to [the] assessment of standing", which was "focused upon the purpose and policy of legislation being invoked".[25] In the case of the PCR06, that policy and purpose was "firstly, to provide for an open and transparent system for the competition for public contracts in the interests of securing a fair and efficient market", and "secondly, to provide a bespoke system of remedies for those

[24] See PCR06, r. 47C(1)
[25] [2017] EWHC 466 (Admin) at [39]

parties who are directly involved in competing for such contracts".[26] Dove J therefore agreed with the obiter remarks of the Court of Appeal in *R (Chandler) v Secretary of State* [2009] EWCA Civ 1011:

> "[i]t is in my view entirely consistent with the purpose of the Regulations to confine standing in any judicial review claim brought outside the extensive range of remedies available to economic operators, and by a person who is not an economic operator, to only those who 'can show that performance of the competitive tendering procedure… might have led to a different outcome that would have had a direct impact on him'."[27]

37. Dove J considered that a local resident, member of the local authority, or local ratepayer, could not without more satisfy that test: there was "no direct impact upon them as a consequence of any alleged failure in any procurement requirements.[28] Had the Council complied with the procurement rules in varying its existing development agreement (which would in principle have required new procurement), at most there would have been a new economic operator developing the same scheme; that would not have impacted on the claimants' objectives, which were to halt the scheme.[29] Furthermore a competitive tender process would not have impacted directly on the claimants because they were "not remotely approximate to any economic operator, nor could they begin to demonstrate any interest in the procurement process which might be akin to or a proxy for status as an economic operator".[30]

Comment

38. Dove J's refusal of standing in this case conflicts with the more liberal approach in *R (Gottlieb) v Winchester City Council* [2015] EWHC 231 (Admin), in which Lang J held that a local resident and councillor did have standing to challenge a very similar decision, based on that individual's interest in ensuring that the local authority "complies with the law, spends public funds wisely, and secures through open competition the most appropriate development scheme".[31] Dove J's judgment is more rooted in detailed consideration of the authorities, and is perhaps therefore more powerful. If Dove J's

[26] At [40]
[27] [2017] EWHC 466 (Admin) at [40]
[28] At [41]
[29] At [43]
[30] At [44]
[31] [2015] EWHC 231 (Admin) at [151]

approach is adopted more broadly in the case law, it may offer a reasonably significant degree of comfort to contracting authorities when modifying existing contracts, by significantly curtailing the risk of challenge other than from alternative plausible providers.

39. There are, however, arguably flaws in Dove J's judgment. First, the assumption that re-procurement would have resulted in a different developer implementing the same scheme perhaps betrays a limited understanding of the public procurement regime. If (as seems likely) the amendments to the Council's development agreement amounted to a material change triggering the need for new procurement (in accordance with the CJEU's jurisprudence in *Pressetext*), the Council would in principle have had to determine anew its requirements for the scheme.[32] That may indeed have achieved the claimants' objectives.

40. Second, Dove J's judgment appears to add requirements going beyond the Court of Appeal's judgment in *Chandler*, and it is questionable whether the test for standing suggested by Dove J can ever be satisfied in practice. The PCR15 (which have replaced the PCR06) define an "economic operator" as, in essence, an entity engaged in economic activity; such an entity can sue under the Regulations if, as a result of the alleged breach, it "suffers, or risks suffering, loss or damage".[33] An economic operator which cannot show that it has suffered loss will be precluded from suing under the Regulations, but (if it cannot show loss) seems likely also to struggle to show that "performance of the competitive tendering procedure […] might have led to a different outcome that would have had a direct impact on him". Conversely, an entity which is not engaged in economic activity cannot sue under the Regulations, but (following Dove J's approach) will only be able to bring judicial review proceedings if it has an interest in the procurement which is "akin to or a proxy for status as an economic operator". What (if anything) those words mean is far from clear.

41. There seem to be good arguments of policy to the effect that (for example) a charity which monitors probity in public expenditure, or represents the interest of SMEs, should be able to bring JR proceedings to enforce observance of the public procurement rules. Similarly, a local ratepayer impacted by cuts to particular public services ought perhaps to be able to bring JR proceedings if the Council's decision on a particular contract

[32] See Case C-454/06 *Pressetext* [2008] ECR I-4401 at [34] et seq.
[33] PCR15, rr. 2(1), 88(2), 89(2), 91(1)

brings about, or exacerbates, those cuts. Claimants of that nature might plausibly argue that they would be directly impacted by the outcome of the procurement procedure, and could therefore meet the test proposed by the Court of Appeal in *Chandler*. Yet in neither situation would the claimant appear to have a *status akin to* that of an economic operator. Considerations such as these perhaps suggest that Dove J's judgment is, again, not the final word on the matter; the more liberal approach in *Gottlieb* is perhaps to be preferred.

42. It was also argued in *Wylde* that the remedies provided by the procurement legislation are an exhaustive scheme, which entirely excludes enforcement by way of JR proceedings. Having reached the conclusion that the claimants lacked standing, Dove J found it unnecessarily to reach a conclusion on this point. The Court of Appeal rejected the same argument in *Chandler*, but *obiter*, with the consequence that it remains for determination in a future case. If the argument were to be accepted, the debate regarding standing to enforce the procurement rules in JR would, of course, be academic.

Other decisions of interest

***Alstom Transport v London Underground* [2017] EWHC 1406 (TCC) (15 June 2017) – scheduling of interim applications**

43. This case involves a challenge to a procurement carried out by LUL under the Utilities Contracts Regulations 2006. LUL applied to lift the automatic suspension, and Alstom made an application for specific disclosure.

44. Coulson J's judgment addresses Alstom's request that its disclosure application be heard before the application to lift the suspension. Coulson J noted that, as a matter of policy, applications to lift the suspension should be heard quickly, but held that there was no general rule that the application to lift would be heard before the disclosure application. The correct order for hearing the applications would depend on the facts in each case, and in particular:

    a. the court would not allow the contracting authority to "obtain an unfair advantage by refusing to disclose the documents sought, and then relying on the absence of such documents to argue [on the application to lift the suspension] that there is no serious issue to be tried"; and

b. if the documents sought by the claimant "were or might very well be relevant" to the application to lift the suspension, the court would be astute to avoid the risk that the suspension application has to be adjourned part-heard in order to deal with disclosure issues. As a result "the safest course will sometimes be to fix the specific disclosure application first in any event".[34]

45. On the facts, Coulson J held that some of the documents sought were relevant to LUL's arguments that there was no serious issue to be tried.[35] LUL offered to argue its case on the application to lift the suspension on a more limited basis, but Coulson J thought that it would be "wrong" to limit LUL in this way: "it might produce an artificial result and would be impossible to police in any event".[36] It followed that the application for disclosure would be heard first. This involved a delay to the application to lift the suspension, but LUL had delayed its responses to Alstom's letters fairly significantly (by three weeks on two separate occasions), so that a further week's delay would not cause it prejudice.

Case C-296/15 *Medisanus v Splošna Bolnišnica Murska Sobota* EU:C:2017:431 (8 June 2017) – discriminatory technical specifications

46. In this case a Slovenian hospital ran a procurement to purchase blood products which had, pursuant to national medicinal regulations, to be obtained from blood plasma donated voluntarily in Slovenia.

47. The CJEU was asked to rule on whether that requirement was lawful. The case raised issues under EU medicinal laws, as well as Directive 2004/18 on public procurement and Article 34 TFEU (which guarantees the free movement of goods).

48. The CJEU held that the national origin requirement was "inherently discriminatory", in that it prevented economic operators with products from other Member States from participating in the procurement.[37] It was therefore contrary to Article 2 of Directive 2004/18, which required contracting authorities to "treat economic operators equally and non-discriminatorily".[38] Moreover the national origin requirement was a technical

[34] [2017] EWHC 1406 (TCC) at [13] to [15]
[35] At [21] to [22]
[36] At [23]
[37] Case C‑296/15 *Medisanus* EU:C:2017:431 at [68]
[38] At [73]

specification which was contrary to Articles 23(2) and (8), since it did not specify that equivalent products were acceptable.[39]

49. For the same reasons, the requirement infringed Article 34 TFEU. The CJEU held that that infringement was not justified (pursuant to Article 36 TFEU), since the same public health objectives could be met by products from other Member States.[40]

50. The judgment is perhaps curious, in that the CJEU considers whether the apparent infringement of Article 34 TFEU is capable of justification, but fails to ask the same question in respect of the apparent infringements of Directive 2004/18. This cannot have made a difference to the outcome (the analysis of justification would surely have been the same) but creates an unfortunate impression that the application of the relevant provisions of Directive 2004/18 (which are now reflected in Directive 2014/24) is purely mechanical. In fact it is not clear from the EU procurement Directives how they are intended to operate where a technical specification is discriminatory but *can* be justified. In those circumstances, the result under the Directives and under Article 34 ought to be the same.

C-131/16 *Archus and Gama v Polskie Górnictwo Naftowe i Gazownictwo* EU:C:2017:358 (11 May 2017) – whether an excluded tenderer can challenge the award decision

51. In this case, the CJEU confirmed that a tenderer which had been excluded from a procurement process for failure to comply with a technical requirement was entitled to bring proceedings challenging the award of the contract to another bidder. The relevant authority had adopted its decisions excluding the claimant and awarding the contract at the same time. The claimant argued that the authority ought also to have excluded the winning bidder.

52. The CJEU recalled its previous case law to the effect that tenderers have a legitimate interest in seeking the exclusion of other tenderers, with a view to winning the contract or forcing a re-run of the procurement.[41] The CJEU distinguished its December 2016 judgment in *Bietergemeinschaft*, in which it held that an excluded tenderer could be prevented from challenging the award decision: in that case, the excluded tenderer had

[39] At [74] to [77]
[40] At [97] to [98]
[41] See e.g. Case C‑689/13 *PFE* EU:C:2016:199 at [27]

previously challenged its own exclusion in legal proceedings which had been resolved by a binding judgment. In those circumstances, the Remedies Directive allowed that the excluded tenderer could be treated as "definitively excluded" within the meaning of Article 2a(2) of the Remedies Directive, so that it lost its entitlement to bring further proceedings in relation to the award decision.[42]

53. The *Archus* judgment concerns the EU Directives on utilities procurement, and confirms that the relevant provisions of the Utilities Remedies Directive (Directive 92/13/EEC) are to be interpreted in the same manner as the Remedies Directive for general public procurement.[43]

54. The CJEU in *Archus* also dealt with a further question relating to the clarification of tenders post-submission, which is mentioned further below.

C-387/14 *Esaprojekt* EU:C:2017:338 (4 May 2017) – amending tenders post-submission; relying on the abilities of others; exclusion based on misrepresentation

55. In this case, the contracting authority required bidders for an IT services contract to provide previous work examples meeting certain criteria, in order to prove their relevant experience. The successful bidder provided examples which did not meet the criteria, but was permitted to provide further examples after the deadline for bids. The national court asked whether the authority had acted unlawfully.

56. The CJEU reiterated the principles derived from its previous judgments on post-submission amendments to bids, according to which:

    a. as a general rule, bids cannot be amended after the deadline for submission;

    b. however Directive 2004/18 "does not preclude the correction or amplification of details of a tender, on a limited and specific basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors"; and

[42] Case 131/16 *Archus and Gama* EU:C:2017:358 at [55] to [58]; Case C-355/15 *Bietergemeinschaft* EU:C:2016:988 at [32]-[35]
[43] See Directive 92/13/EEC, Articles 1(3) and 2a(2); Directive 89/665/EEC, Articles 1(3) and 2a(2)

c. if a contracting authority is to permit such *correction or amplification*, it must "ensure […] that the request for clarification does not lead to the submission, by a tenderer, of what would appear in reality to be a new tender", and must "treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed".[44]

57. On the facts, the CJEU indicated that the submission of new work examples, "far from being merely a clarification made on a limited or specific basis or a correction of obvious material errors, [was] in reality a substantive and significant amendment of the initial bid, which is more akin to the submission of a new tender".[45] In accepting the new work examples, the contracting authority had therefore acted in a manner prohibited by Directive 2004/18.

58. The CJEU's judgment on this point is a reminder of the difficulty contracting authorities can face in deciding whether to invite or permit clarifications after the deadline. As noted above, a similar point arose in the later judgment in Case C-131/16 *Archus and Gama*, where the CJEU left the matter to be determined by the referring court on the facts. In *Archus and Gama*, the CJEU referred in addition to the established requirement that any request for clarification "must, as a general rule, be sent in an equivalent manner to all undertakings which are in the same situation and must relate to all sections of the tender which require clarification."[46] This, especially, is likely to be difficult to judge in practice.

59. The successful bidder's further work examples in the *Esaprojekt* case in fact involved contracts carried out by consortia of which the bidder had formed part. The CJEU was asked further questions regarding a bidder's ability to rely, in order to prove its technical ability in accordance with Article 48 of Directive 2004/18, on work carried out by other entities. The CJEU reiterated previous jurisprudence to the effect that a contracting authority can, in exceptional circumstances, require that the bidder itself possess the relevant technical ability.[47] The court also ruled that the bidder could not rely on work

[44] Case C-387/14 *Esaprojekt* EU:C:2017:338 at [37] to [40]; See e.g. Case C-324/14 *Partner Apelski Dariusz* EU:C:2016:214 at [62] to [65]; Case C-336/12 *Manova* EU:C:2013:647 at [31] to [32] and [36] to [37]
[45] Case C-387/14 *Esaprojekt* (above) at [42]
[46] Case 131/16 *Archus and Gama* (above) at [30]; Case C-336/12 *Manova* (above) at [34] to [35]
[47] Case C-387/14 *Esaprojekt* (above) at [46] to [54]

carried out by another entity when the bidder sought to be awarded the new contract on its own.[48]

60. Finally, there was a suggestion that the successful bidder had sought to mislead the contracting authority by its initial submission of work examples. The CJEU was asked whether Article 45(2)(g) of Directive 2004/18, which permits exclusion of a bidder where it is "guilty of serious misrepresentation" in the procurement, required that the contracting authority be able to show wilful misconduct on the part of the bidder. The CJEU ruled that this was not necessary; a bidder could be excluded under Article 45(2)(g) if it could be shown that it "is guilty of some degree of negligence which may have a decisive effect on the decisions to exclude candidates from being selected or awarded [a] public contract".[49]

C-298/15 *Borta* EU:C:2017:266 (5 April 2017) – changes to the procurement documents; prohibiting the use of subcontractors; requiring proof of individual technical ability

61. This case involved challenges to the specifications for a below-threshold works procurement carried out by a Lithuanian port authority.

62. The authority's requirements as to technical ability had been amended during the course of the procurement, and the CJEU was asked whether such amendments were contrary to the EU general principles for below-threshold contracts. The CJEU referred to established case law to the effect that "the contracting authority cannot, in principle, during an award procedure, amend the scope of the essential conditions of the contract, which include the technical specifications and the award criteria, and on which the economic operators concerned have legitimately relied in order to take the decision to prepare the submission of a tender, or to the contrary to decide not to participate in the award procedure for the contract concerned".[50] However the CJEU noted two exceptions to the rule prohibiting amendments during the tender process:

[48] Case C-387/14 *Esaprojekt* (above) at [65]
[49] Case C-387/14 *Esaprojekt* (above) at [70] to [78]
[50] C-298/15 *Borta* EU:C:2017:266 at [70]

a. by analogy with the case law on post-submission clarification of tenders (considered above), the CJEU held that “the contracting authority has the possibility, on an exceptional basis, to correct or amplify the information in the tender specifications which require mere clarification, or to correct obvious material errors, provided that all the tenderers are informed”; and

b. the CJEU held that a contracting authority “must also be authorised to make certain amendments to the tender specifications, in particular as regards the conditions and the scheme for combining professional capacities, provided that the principles of non-discrimination and equal treatment and the obligation of transparency are respected”. The court clarified that this would be the case where three requirements were met:

    i. first, “the amendments concerned, although they may be substantial, must not be so substantial that they have attracted potential tenderers which, in the absence of such changes, would not be in a position to submit a tender. That might be the case, in particular, where the changes make the contract noticeably different in nature from the way it was initially described”;

    ii. second, the changes must be “adequately publicised, so as to enable all those potential tenderers which are reasonably informed and exercising ordinary care to become acquainted with [them] under the same conditions and at the same time”; and

    iii. third, the changes must be " made before the tenderers submit their bids and […] the time limit for the submission of […] tenders [must be] extended where those changes are substantial, the length of the extension depending on the extent of those changes and [being] sufficient to allow the economic operators concerned to adapt their tender as a consequence”.[51]

[51] At [71] to [76]

63. This aspect of the judgment may prove significant. It appears to represent a limited relaxation of the CJEU's jurisprudence on changes to specifications in public procurement, at least as that jurisprudence was explained by Advocate General Sharpston in her Opinion in *Borta*.[52] Furthermore the test put forward by the CJEU is new and distinct from that contained in its *Pressetext* judgment regarding modifications to a concluded public contract.[53] As a practical matter, *Borta* suggests that, where the amendment to the procurement documents is more than a clarification or correction of an "obvious material error", the authority will need to publicise the amendment even if it takes the view that it would not have led other bidders to participate. That publication must reach *potential* tenderers (not merely bidders already involved in the process), suggesting that an additional OJEU notice will be required. There is good reason to suppose that the position under the new EU procurement Directives (which do not expressly regulate changes during the procurement process) will be the same.[54] But it is not clear to what extent the *Borta* jurisprudence will govern changes other than to "the conditions and the scheme for combining professional capacities"; this remains to be seen.

64. In the same case, the CJEU went on to consider a national rule which required the "main" works (as defined by the contracting authority) to be carried out directly by a tenderer rather than by subcontractors. The CJEU held that this amounted to a restriction on the freedom of establishment and freedom to provide services, contrary to Articles 49 and 56 TFEU, since it was "liable to prohibit, impede or render less attractive the participation of economic operators established in other Member States" in the procurement. That restriction could not be justified, since it went beyond that which was necessary to ensure quality in the provision of works.[55]

65. Finally, in the same case, the authority required that a consortium of bidders identify what proportion of the required works each member was to carry out, and prove that each member satisfied the authority's requirements as to technical ability to a corresponding extent. That requirement was included pursuant to national legislation which implemented Article 54(6) of Directive 2004/17 on utilities procurement, and which applied equally to below-threshold contracts. As a result, the CJEU was prepared to rule

[52] See Case C-298/15 *Borta* EU:C:2016:921 at [AG72] to [AG74]
[53] Case C-454/06 *Pressetext* [2008] ECR I-4401 at [34] et seq.
[54] See Directive 2014/24/EU on public procurement and Directive 2014/25 on utilities procurement
[55] At [46] to [57]

on the lawfulness of the authority's approach by reference to the Directive.[56] The CJEU held that a contracting authority could require consortium members to prove their individual capacity to carry out those parts of the works which were to be provided by them, in exceptional circumstances where to do so was "proportionate to the subject matter and objectives of [the] contract".[57] However the authority's approach in this case was not such as to "prevent one of the tenderers concerned from carrying out specific tasks for which it does not in fact have the experience or capacities required", so that it failed that test.[58]

[56] At [33] to [34] and [83] to [84]
[57] At [84] to [89]
[58] At [92] to [94]