

Contract Management – Key issues facing the Housing Sector

27th April 2010

Bridgewater Hall, Manchester



Getting Into The Contract

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Business Law



Getting Into The Contract

- Contracts In English Law
 - Offer
 - Acceptance
 - Consideration
 - Intention to create legal relations
 - Contract by tendering?
 - Heads of Agreement



Getting Into The Contract

- The Battle of the Forms: news from the front line
 - When is the contract created?
 - Whose terms prevail?
- When are formalities needed?
 - Land
 - Intellectual Property
 - Public Contracts Regulations



Getting Into The Contract

- Contract Drafting
 - How much freedom do you have?
 - Cover the Basics:
 - Term
 - Termination
 - Minimum Obligations and KPIs
 - Allocation: liability and profit, savings
 - Change Control
 - Dispute Resolution: just in case
 - Maths



Getting Into The Contract

[] shall pay to [] a sum ("X") calculated as:

$$X = A - (B + C)$$

Where:

A = the Advance

B = The amount in the absence of the Advance that [] would have been obliged to pay to [] ... prior to the Year of termination

C = In respect of the Year of termination such amount as equals

$$C = (D \div 365) \times E$$

Where:

D = The number of days expired in the Year of termination

E = The amount payable by [] to [] in respect of the Year of termination ...



Getting Into The Contract

- Limitations and Exclusions
- Factors to consider
 - UCTA 1977 – absolute or “reasonableness”
 - Direct and Indirect Losses
 - Insurance
 - Bought off?
 - Will it stick?



Getting Into The Contract

- When Does Procurement Apply?
 - Public Body
 - Works or Supply/Services
 - Over the thresholds
 - £101,323 - £313,694 Supply/Services
 - £3,927,260 Works
 - Limited Exemptions
 - Part B



Getting Into The Contract

- Trying to avoid the Regulations
 - Aggregation and Lots
 - “Land” contracts
 - Mixing Works and Services
 - Valuation
 - In practice? *Auroux*



Getting Into The Contract

- Four different Procurement processes
- Common features
- OJEU Notice
- Time Limits
- Selection and Award Stages
 - Different criteria
 - Don't mix them up: *Lianakis*



Getting Into The Contract

- General Principles Apply
 - Even under the thresholds
 - Transparency, proportionality and equal treatment
 - Examples:
 - Advertising smaller contracts: *Telaustria*
 - Local Jobs for Local People? *Nord Pas De Calais*
 - Hidden Criteria and Overscoring: *Lettings International*
 - Lowest price or MEAT? *SIAC Construction*
 - Consistency: *Aquatron Marine*
 - Time and format: *Leadbitter*



Getting Into The Contract

- Changing Existing Contracts
 - Pre-Award
 - *Succhi di Frutta*
 - *Danish Bridge Case*
 - Post-Award
 - Is change allowed in the contract?
 - Can it be done under Procurement rules?
 - Sometimes: *Pressetext*
 - Significant change = new award
 - Objective external factors
 - Changes going against the Contractor



Getting Into The Contract

- Challenges
 - Who can challenge?
 - The standstill period and afterwards
 - Time limits for challenges
 - The Remedies Directive
 - The “automatic injunction”
 - Damages or Ineffectiveness
 - Information/FOI and Confidentiality



Getting Into The Contract

- Know When You're Getting Into A Contract
- Plan Ahead
- Consider Contract Structure
- Change Standard Terms
- Don't Lose The Battle of the Forms
- Watch Out For Exclusions and Limitations



Getting Into The Contract

- Don't Ignore the Public Contracts Regulations
- Don't Confuse Selection and Award Stages
- Follow the General Principles anyway
 - Transparency
 - Equal Treatment
- Take care with Changes
- Watch out for Challenges
- If in doubt? Stop: *Federal Security*



Contracting and Employees

Peter Byrne
Partner and Head of Employment Law



TUPE

- Will apply to the transfer of an undertaking or business in the UK immediately before transfer
- Service provision change included
- Must be a transfer of an economic entity that retains its identity
- Can apply to part of a business



TUPE

- Service Provision change
- Relevant upon:-
 - Award to a contractor
 - Re-let to a new contractor
 - Brought back “in-house”



TUPE

- Service Provision change - 3 conditions
- Immediately before the change there must be an organised grouping of employees in UK whose principal purpose is to carry out the activities concerned on behalf of the client



TUPE

- Immediately before the change, the client must intend that the activities will, after the change, be carried out by the transferee other than in connection with a single specific event of short term duration



TUPE

- The activities must not consist wholly or mainly of the supply of goods for the client's use
- E.g. if contractor supplied sandwiches for client to sell, TUPE does not apply. If contractor runs the canteen as well, may fall outside this exclusion



TUPE

- If TUPE applies:-
- There is an automatic transfer of employees
- There is an automatic transfer of rights and liabilities
- Transfer related changes to terms and conditions may be void
- Dismissals may be automatically unfair



TUPE

What other things transfer?

- Terms and Conditions
- Continuity
- Statutory and civil claims
- Special provisions for public sector re liability for claims following transfer - jointly and severally liable



TUPE

- Varying Terms and Conditions
- General position – transfer on pre-existing terms and conditions
- Now provision to agree contractual variations in the context of a transfer
- Depends on the sole or principal reason for the change
- Will need an ETO reason to be valid



TUPE

- ETO – Economic, technical or organisational entailing changes in the workforce
- Understood that changes etc. means there must be some structural change in the workforce
- Can be change of duties, e.g. manager no longer required to manage, or move a secretary to a sales role



TUPE

- Dismissals
- Reason – transfer – Automatically Unfair
- Connected with transfer but no ETO – Automatically unfair
- Connected with transfer and there is an ETO
- Potentially fair
- Unconnected with transfer – potentially fair



TUPE

- Where transfer involves a substantial change in working conditions to the employee's material detriment, the employee can treat himself as dismissed i.e. constructive unfair dismissal



TUPE

- Liability
- Transfers to the transferee upon transfer
- If employee resigns post transfer, liability rests with transferee for constructive unfair dismissal claim



TUPE

- Note a compromise agreement between the employee and his former employer will not protect the transferee from claims
- Need for indemnities very real between transferor and transferee



TUPE

- Information and consultation obligations pre transfer
- Must inform employees of "measures"
- Failure to do so can lead to claim for Protective Award



TUPE

- Need for Transferor to give employment information re terms and conditions to transferee
- Failure to do so can lead to claim to tribunal not less than £500 per employee



TUPE

- Pension Rights
- Since April 2005, a minimum amount of protection applies to employees
- Membership of a defined benefit scheme upon transfer leads to at least 6% of pensionable pay by way of contribution to employee
- Where member is required to contribute, maximum will be 6%



TUPE

- Pension Rights
- Or transferee matches member contributions to the scheme up to a maximum of 6%
- Where a money purchase scheme exists, where the employer must match the employee's contributions, maximum is 6%



TUPE

- Where a stakeholder scheme exists, match member contributions up to maximum of 6%
- Note Public sector pressure from statutory guidance



Secondments

- Secondments regularly used to avoid uncertainty of TUPE
- Parties all agree that appointment with new contractor is not a TUPE transfer
- Agreement has no effect if TUPE applicable
- Leading Case – *Celtec v Astley*



TUPE

- Recent Decisions
- *Capita Health Solutions v BBC and McLean*
 - M employed by BBC as Occupational Health Nurse
 - BBC outsourced to Capita
 - M did not want to transfer so raised a grievance



TUPE

- Capita Health Solutions v BBC and McLean
 - BBC agreed to second her to Capita while she worked her 6 week notice
 - Held TUPE was applicable
 - Also her grievance was not a valid objection to the transfer
 - Employment therefore transferred to Capita





Riverside

Managing the Contractor in practice.

Sharon Partington
Riverside Group



Riverside

SHARON PARTINGTON

- Gas Administrator
- Riverside Group, within Pennine Division
- Pennine manage 3000 properties
- 100% access for Gas Servicing

R Riverside

Hints and Tips regarding:

- The contract
- The contractor
- Partnership working
- External support
- Best practise

R Riverside

Managing the Contractor in practice

- Does your Housing Organisation ensure the competency of the contractors they employ?
- Are the same competency checks of contractors applied to planned maintenance works?
- Who undertakes the quality checks of the gas paperwork?
- Is your service programme approached on a structured basis.

R Riverside

Managing the Contractor in practice

- Is there a clear procedure for advising tenants in advance
- Are there regular meetings arrangements with contractors
- Is performance on annual servicing at or very close to 100 per cent
- Do contractors make appointments for servicing

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Managing the Contractor in practise

- Are arrangements flexible and tailored to tenants needs
- What use is made of out of hours and evening appointments

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Managing the Contractor in practise

- Is there a clear procedure to gain access to undertake a gas safety check every 12 months
- How many properties have Cp12s older than 12 months and what stages of action are they all at?
- Are front line housing staff and other agencies involved in cases of persistent no access

R Riverside

Managing the Contractor in practise

- Has the housing organisation's gas servicing policy been approved and reported through its structure
- Is there an external independent quality and compliance audit



Riverside

Managing the Contractor in practise

Best Practise

- Notification to tenants
- Internal communication
- External support
- Marketing



Riverside

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Contract Disputes

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Commercial Litigation



Contract Disputes

- Procurement Litigation
- Dispute Resolution



Procurement Litigation

Marked increase in claims going to Court, and procurement exercises being overturned.

Examples

- "Local Government Lawyer" 07.04.10 – "Westminster Council faces new legal challenge to parking Contract Award"
- Rochdale online 19.08.08 "Town Centre regeneration developer selection to be re run"
- Council News 23.03.10 "Veolia launches fresh legal action over Thurrock deal"
- Lancashire Evening Post 9.04.10 "Lancashire Council set to appeal ruling" that it might pay Environmental Waste Control millions of pounds for missing out on a waste contract



Procurement Litigation

1. Common Law Challenges
2. Judicial Review
3. Remedies under Public Contract Regulations



Procurement Litigation

- The tender process has a contractual element
- The rules form a contract with tenderers
- Tenders have a remedy if the contract is breached
- *Blackpool and Fylde Aero Club v Blackpool BC*



Procurement Litigation

Contract Remedies

- Damages, such as loss of profit
- Injunction, but might need to act promptly



Procurement Litigation

Note that RSL's are subject to judicial review

- *R (on the application of Weaver) v. London and Quadrant Housing Trust*
- Remedies are limited
- Claim needs to be issued
 - a) Promptly
 - b) In any event within three months



Procurement Litigation

Regulated exercises

- New remedies under 2009 amendments to regulations
 - Standstill period
 - Award decision notice to all tenderers stating
 - The award criteria
 - The reasons for the decision including the characteristics and relative advantages of the successful tender
 - The scores obtained by the recipient and the operator to be awarded the contract
 - The successful operator's name
 - A precise statement of when the standstill period is expected to end (10days if sent by fax/email, 15 days if sent by post)



Procurement Litigation

Remedies

- Automatic suspension of the process once proceedings are started
- Remains in force until brought to an end or until proceedings disposed of
- The Court can declare a contract "ineffective", so that prospective obligations under the contract are cancelled



Procurement Litigation

Grounds for ineffectiveness

- An Illegal direct award if no OJEU notice
- No standstill suspension period
- Award of call off contracts in excess of the value of public contracts threshold under a framework or dynamic purchasing system



Procurement Litigation

Ineffectiveness

- The remedy is **not** discretionary and the Court must make a declaration of ineffectiveness unless specific derogations apply:
 - NO OJEU Notice – the contracting authority thought the award was permitted and a “Voluntary transparency notice” was published in OJEU, and a standstill period of 10 days after that notice applied



Procurement Litigation

- Non compliant call off – the rules on frameworks and dynamic purchasing systems have been followed, there has been a voluntary standstill
- General interest Derogation: There are “overriding reasons relating to a general interest” that require the contract to be maintained



Procurement Litigation

Ineffectiveness

Consequences

- Contractual obligations still to be performed are not to be performed
- Court can make consequential orders to address implications arising
- Restitution and compensation
- Financial penalties
- Contract shortening



Procurement Litigation

What are the main issues giving rise to Litigation?

- Changes to the process mid way through
- Introducing criteria not advertised
- Incorrect application of scoring
- Incorrect weighting to criteria



Procurement Litigation

Limitation period under Regulations

- Sita UK v Greater Manchester Waste Disposal Authority 29.03.10
- Vividor Laing appointed preferred bidder and contact 8 April 2009
- Proceedings issued 27 August 2009



Procurement Litigation

- Aim of Directive to ensure transparency, non discriminative, and effective and **rapid** remedies

Requires- Interim measures aimed at suspending the process

Requires- Provisions to set aside decisions taken unlawfully



Procurement Litigation

Limitation two stages

1. Service provider gives notice of its interim to bring proceedings
2. Proceedings are brought promptly, and in any event within three months unless the Court thinks there are good reasons to extend the period



Procurement Litigation

Uniplex v NHS Business Services Authority

- a) A limitation period defined by “promptness” is not sufficiently certain to be justified
- b) It is wrong to allow a limitation period to start before the claimant knows of the infringement



Procurement Litigation

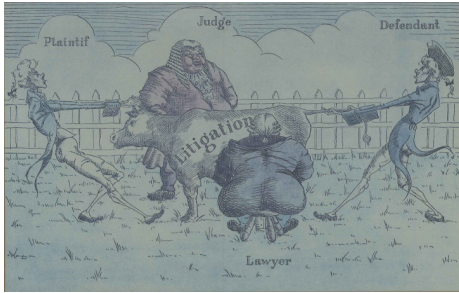
Sita UK v Greater Manchester Waste Disposal

Judge decides

1. The discretion to extend the limitation period means it is effective
2. He will extend it to 3 months from the date Sita knew, or ought to have known, it had a cause of action
3. Sita knew this in April 2009, so the proceedings were out of time



Contract Disputes



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Contract Disputes



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Contract Disputes

- Negotiation
- Mediation
- Adjudication
- Arbitration
- Litigation

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Negotiation

- a) Is it required as part of the procedure



Example

- 1. Dispute Resolution Procedure
 - 1.1 All disputes between the parties arising out of or relating to this Framework Agreement shall be referred by a Framework Manager to the other party's Framework Manager for resolution.
 - 1.2 If any dispute cannot be resolved by the parties' Framework Managers within a maximum of ten (10) Working Days after it has been referred under Clause 25.1, that dispute shall be referred to the parties' respective First Senior Escalation Points for resolution.



Example

- 1.3 If any dispute cannot be resolved by the parties' First Senior Escalation Points within a maximum of ten (10) Working Days after it has been referred under Clause 25.2, that dispute shall be referred to the Contracting Authority's Housing Services Director and the Contractor's Managing Director for resolution.
- 1.4 In the event that the dispute cannot be resolved by the parties' representatives nominated under Clause 25.3 within a maximum of ten (10) Working Days after referral the dispute shall be further referred to mediation in accordance with the provisions of Clause 26.



Negotiation

- b) Is it required by pre action procedure
- c) Timing
- d) Identify the issues and get to “yes”
- e) “Without prejudice”



Mediation

- Independent third party
- To broker an agreement
- Cannot impose a solution
- Consensual process (though may be required by contract)
- Court can penalise refusal to take part
- Results in settlement agreement being signed



Adjudication

- Applies to construction contract
- Gets a quick decision
- Interim, not final, but enforceable immediately
- Not usually challenged
- No appeal



Arbitration

- Private process – outside the Court system
- But there is a legal framework under Arbitration Act 1996. Section 1 (1) “The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense”
- Not in public
- Arbitrator chosen by the parties – may need technical knowledge
- Decision is normally final
- Limited right of appeal



Court Action

- This is “state provided” dispute resolution
- Not consensual
- Pre action protocol
- Pleadings
 - Particulars of Claim
 - Defence
 - Reply
- Case Management
- Detailed Rules
- Right of Appeal



Round up / Others

- Early Neutral Evaluation
- Expert Determination