Prettys

Dispute Resolution

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Prettys

PUBLIC CONTRACTS REGULATIONS 2015 IN FORCE

In our last edition we reported briefly on changes to the public procurement regime. You can read a more detailed article on the changes, which was published in the October 2014 edition of Construct (our Construction and Development Newsletter) here. (If you would like to receive Construct every month, please email your details to construction@prettys.co.uk).

As we reported last time, the Public Contracts Regulations 2015 came largely into force with effect from 26 February 2015. The changes identified in our October 2014 Construct article have all now been implemented.

Some of the changes which will not come into force until later include:

- The requirement to ensure that tender processes are run on a fully electronic basis (from 18 October 2018);
- The introduction of a European Single Procurement Document, to replace individual PQQs. A draft of this document is under discussion by EU Member States but no final date for implementation has yet been agreed. Once implemented, the ESPD will act as a "passport" to being shortlisted on any public contracts within the EU and will avoid the need for organisations to complete lengthy and varying PQQs for each procurement process entered;
- Updated OJEU Notice and contract award notice precedents are not yet available, so Contracting Authorities will need to be wary as to how new processes are advertised and awarded.

One area which does not change in the new Regulations concerns the operation of the "standstill period" between contract award and a contract being entered into; and the means by which unsuccessful bidders can challenge a procurement process. This means that the demanding timescales for launching a challenge remain and early advice will remain critical.

As well as implementing the new EU procurement directives, the 2015 Regulations enshrine into law some of the recommendations contained in Lord Young's Report on Small Firms 2010 – 2015, concerning the accessibility of government procurement processes to SMEs. Part 4 of the Regulations introduce SME-friendly rules which Contracting Authorities must follow when awarding contracts with values that fall below the EU procurement financial thresholds but above £10,000 (for central government) or £25,000 (for sub-central government authorities). The requirements include:

- Publishing information about the contract opportunity on the Contracts Finder website within 24 hours of the opportunity being first advertised in any other way;
- Not including a PQQ stage if procuring a contract with a value below €134,000 (for central government) or €207,000 (for sub-central government);
- Publishing information on contract awards on Contracts Finder within a reasonable time;
- Every public contract must include provisions stipulating that the Contracting Authority will pay a contractor no later than 30 days from an invoice date if the invoice is "valid and undisputed";
- Having regard to Cabinet Office guidance in relation to these new requirements (once published).

MITIGATION PRINCIPLES: A TIMELY REMINDER

In a recent High Court case, *Thai Airways International Public Company Ltd v KI Holdings Co Ltd [2015] EWHC 1250*, Thai Airways (T), the national airline of Thailand, contracted with Koito (K), for the supply of economy class airline seats. As a result of regulatory intervention, K's seats were prohibited from export meaning that K delivered some of the seats late and failed to deliver some of them altogether, with some of the delivered seats also breaching implied terms of quality.

As a result of delay to the completion of T's own aircraft, T had to put it into storage and buy seats from elsewhere. In the meantime, it leased aircraft from a third party. T brought a claim for damages as a result of a breach of contract and sought to recover the costs for the actions it took in order to mitigate the failure of K, even though T profited from the leasing arrangement. T argued that its profits were merely incidental and that it had taken the only mitigating steps available. On the other hand, K argued that the benefits T received should be used to offset the costs of the lease arrangement. The appropriate measure of T's damages was its loss of profits, calculated by comparing its actual profits to the profits it would have made had the relevant aircraft entered T's fleet on time.

There was also the issue of betterment in that T was only able to source light weight seats which over time would result in fuel savings for T.

The High Court emphasised that a Claimant in a breach of contract case is required to take all reasonable steps to mitigate losses resulting from the Defendant's breach. If the Claimant fails to take all reasonable steps, it might not be allowed to recover reasonable losses that it might have avoided or recovered through mitigation.

Legatt J held that T had acted reasonably in mitigating its losses by leasing aircraft. Further, the monetary benefit received by T in taking these steps should be taken into account when assessing damages, even though the steps taken were the only mitigating steps available to T.

The burden of proving that T had received a benefit and the amount of the benefit received was for K to overcome. Legatt J found that K had shown that T's profits resulting from its mitigating steps exceeded the amount it would have received had K fulfilled its contractual obligations. Credit was also given for future fuel savings, but only where it was possible for those fuel savings to be calculated with accuracy.

Businesses must consider taking action to mitigate their losses where possible if they experience late or failed delivery i.e. by identifying an alternative in the open market. However, businesses should note that wherever mitigation leads to monetary benefits or betterment, they should consider giving credit for this when assessing damages.

DEBTOR INSOLVENCY: NOT ALWAYS THE DEATH KNELL OF A CLAIM

A wise adage is that you should not throw good money after bad.

On the face of it, pursuing a claim, however strong it may appear, against someone who has the appearance of being insolvent might not seem to be worthwhile. Often a claimant in such circumstances will wait to see whether the debtor enters into an insolvency process, and, if it does, lodge his claim with the appointed insolvency officeholder, hoping to get a dividend out of the insolvent estate.

This wait and see tactic, however, can be the wrong one.

Certain circumstances might suggest that it is worth investing in pursuing the debtor quickly, and here is why.

There may be a very real prospect of an insurer covering the type of claim that exists. In that event statute provides recourse against the insurers in certain circumstances.

First, there has to be in existence an insurance policy which covers the type of liability that is being claimed.

Liability for and the amount of the claim has to be established.

If the insolvent company has been struck off the Register of Companies, it may have to be reinstated.

There is no point in pursuing a claim if, for example, the insurer is able to say that the particular claim is not covered because it is outside of the scope of risk which it insured, or because the insolvent insured has failed to comply with policy conditions, for example as to notification.

Key initial steps are therefore to set out promptly a quantified claim, to call upon the prospective defendant to confirm that it has notified its insurers of the claim, and identify who those insurers might be.

There is 2004 Court of Appeal authority that if the company against whom the claim is made declines to provide such insurance details, an application to court for relevant insurance documentation to be supplied should succeed.

There is on the statute book, but yet to be brought into legal effect, a new piece of legislation called the Third Parties Act 2010, which should make pursuing claims against an insolvent defendant via its insurer substantially easier. The current hope is that this piece of legislation will come into force in October 2015.

If you have any questions about the subject matter of this article, please contact rsharp@prettys.co.uk.

UPCOMING EVENTS:

Business Academy Seminars: Tuesday 10 November, Wherstead Park, Ipswich & Thursday 12 November, Essex County Cricket Ground, Chelmsford

Developers' Club Seminars: Thursday 8 October, Snape Maltings, near Aldeburgh & Thursday 15 October, Essex County Cricket Ground, Chelmsford

MANDATORY BUSINESS TO CONSUMER DISPUTE RESOLUTION REGULATIONS

On 1 October 2015 all UK businesses selling goods and services to consumers will have to bear in mind the Alternative Dispute Resolution ('ADR') Consumer Disputes Regulations. Some businesses may already be subject to certain of these regulations because of statute or trade association conditions applicable to particular sectors.

A failure to comply with the Regulations could result in action by Trading Standards, a court order compelling compliance with them and in default of such compliance, fines and imprisonment.

Consumers are widely defined as anyone buying goods and services wholly or mainly outside their own trade, business, craft or profession.

So far as businesses are concerned, there is no need to be worried about business to business transactions. There are exemptions, such as where the provider of services is the public sector unless the consumer is paying directly for those services, or contracts for the sale of property or tenancy agreements. Consumer to consumer transactions are not covered by the Regulations.

Complaints that are envisaged to be covered are about delivery, poor service, faulty goods, but not abusive behaviour, discrimination or other conduct issues. The failure of a customer to pay for the goods or services supplied does not fall within the Regulations.

What then do the Regulations require?

If under legislation or via its trade association there is in existence an ADR scheme which is mandatory, then the business must supply consumers with the name and website address of the ADR entity that is to seek to mediate any dispute. These details should be provided on the business's website and in its general terms and conditions of contract.

ADR is widely defined and contemplates the involvement of an independent third party to resolve the dispute, at no cost to the consumer.

It is expected that internal complaints procedures shall be fully carried through first, before the ADR scheme is triggered. It will be for the parties to agree whether the ADR is or is not to be binding.

Under statutory and trade association terms, the ADR is likely to be binding on traders. Subject to mandatory ADR being compelled on the business, it is not, however, compulsory for traders or consumers to use ADR.

From 1 October 2015 the following information has to be supplied to a consumer who has exhausted the business's internal complaints handling procedure:

- that the trader cannot settle the complaint;
- the name and website address of an ADR entity competent to deal with the complaint;
- whether the trader is obliged to submit to the ADR resolution process (i.e. by obligation of law or trade association terms).

Details about the extent to which the parties may or may not agree to the ADR process, time limits under the Regulations, and the effects on normal limitation periods may require consideration.

Note the European Commission has committed to provide an internet platform for online dispute resolution via which consumers will be able to commence the ADR process from January 2016.

Whether this ADR process, without the fact finding and legal analysis more traditionally involved in formal dispute resolution processes, is a good or a bad thing will be a matter for debate, and will doubtless divide opinion.

If you require more detail, please contact Roland Sharp on rsharp@prettys.co.uk or 01473 298234.

CONTACT US

Peter Blake
Partner
01473 298206
pblake@prettys.co.uk

Roland Sharp
Consultant
01473 298234
rsharp@prettys.co.uk

Ian Seeley
Associate
01473 298228
iseeley@prettys.co.uk

Spencer Lewis
Associate
Tel: 01245 295276
slewis@prettys.co.uk

Emma Champion
Associate
Tel: 01245 295272
echampion@prettys.co.uk

Elm House, 25 Elm Street
Ipswich, IP1 2AD
01473 232121

Number One Legg Street
Chelmsford, CM1 1JS
01245 295295

www.prettys.co.uk

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