

NHMF Maintenance Conference and Exhibition

Avoiding EU and Section 20 Challenges – What is needed?

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New opportunities and new challenges in repairs and maintenance

- New ways to improve value and save money
- Increased use of Competitive Dialogue to identify best bidders
- Increased use of joint venture/wholly-owned subsidiary structures to obtain improved controls and cost savings



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New opportunities and new challenges in repairs and maintenance

- Performance-based contracts with clear measures of resident satisfaction
- Innovative pricing models to reduce administration
- Incentives to motivate savings
- Local training and employment commitments



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New ideas and EU/Section 20 compliance

- What impact on Section 20 leaseholder consultation?
- What impact on EU procurement?
- Risks of challenge and how to overcome these in practice



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Leaseholder consultation – the basics

- Qualifying Long-Term Agreements (over 12 months) need for leaseholder consultation for works/goods/ services over £100 for any one tenant in any one year
- Notice of Intention (prior to OJEU), Notice of Landlord's Proposals (prior to entering into contract) and Notice of Qualifying Works (before works commence)



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Concerns of leaseholders

- Essential to work closely with leaseholders and other residents throughout procurement/ implementation of repairs and maintenance contracts
- Concerns of leaseholders that long-term contracts may involve less cost certainty and no guarantee of savings
- Need for procurement/contracting/pricing models that deal with leaseholders concerns



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Price per property/price per void

- One of various new pricing models
- Greater cost certainty/less administration
- Bidders will accept risk dependent on levels of accurate historical repair data
- Need to be clear as to inclusions/exclusions
- Need to be clear as to annual reviews – is indexation the maximum increase?



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Price per property/price per void

- Still scope for open-book profit/overhead and systems to reduce costs of workforce/supplies/subcontracts
- Can be reconciled with joint venture/wholly-owned subsidiary models
- Need to be clear as to incentivisation – what share of savings?



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PPP - Impact on leaseholder consultation?

- Price per property (PPP) not acceptable to leaseholders if no work done to their property in that year
- Need for Schedule of Rates to deal with leaseholder works and other exclusions from PPP
- Use of NHF Schedule of Rates or simpler basket rates?



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PPP - Impact on leaseholder consultation?

- Schedules of Rates can cover wide scope of planned as well as responsive works in order to maximise contract duration
- Schedules of Rates can be starting point (to achieve EU and Section 20 compliance) – with potential for reduced workforce/supplier/subcontractor costs and related incentives
- Incentives can be extension of contract/share of savings



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Conclusions

- New approaches to procurement/contract/pricing should not neglect leaseholder interests
- Do not be put off by Section 20 consultation – price certainty and compliance can be achieved
- Robust performance-driven long-term contracts can use “mixed economy” of price per property/ void and schedule of rates



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Avoiding EU Challenges – What is needed?

- Content - Lessons from recent UK cases:
 - A dollar short: enforcing tender rules
 - A day late: time limits for bringing challenges
 - Listen, do you want to know a secret: confidentiality issues
 - Something is happening, but you don't know what it is: evaluation and award criteria



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Avoiding EU Challenges – What is needed?

Content Cont.../d

- Say what you mean, mean what you say: the evaluation process
- Public Interest 4 – Bidders 0: suspending the award process
- They think its all over: setting aside award decisions
- Conclusion: Black, white or shades of grey?



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Avoiding EU Challenges – Enforcing tender rules

- Why have rules?
- What attitude do the Courts take? Enforceable?
 - Public Interest Lawyers –v- Legal Services Commission (2010)
 - Hereward Foster LLP –v- Legal Services Commission (2010)
 - R (Harrow Solicitors and Advocates) –v– Legal Services Commission (2011)
- Lesson – a well drafted set of tender rules helps to manage the process



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Avoiding EU Challenges – Time limits for bringing challenges

- Public procurement (Misc) Amendments Regulations 2011
- Introduced (after consultation) to address ECJ's concerns in *Uniplex*
- Introduces revised time limits
 - Where date of knowledge of breach occurred before 1 October 2011 – Reg 47(7) to have effect as follows:
 - Time limit 3 months running from date on which claimant knew or ought to have known that grounds for challenge had arisen
 - Court has discretion to extend where “good reason”
 - No requirement to act “promptly”



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Avoiding EU Challenges – Time limits for bringing challenges

- Where date of knowledge of breach occurred after 1 October 2011 – Reg 47(7) to have effect as follows
 - Time limit is 30 days from the date of knowledge (defined as date when claimant first knew or ought to have known of grounds arising)
 - Court has discretion to extend where “good reason” but only up to a maximum of 3 months from date of knowledge
 - Intended to strike balance between interests of claimants and defendants in manner compatible with *Uniplex*



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Avoiding EU Challenges – Confidentiality uses

- Regulation 32 PCR 2006
- Mears Limited –v- Leeds City Council (2011)
 - Model answers used: non disclosed criteria/sub-criteria/weightings?
 - What was necessary for disposing fairly of the issues?
 - Measures to protect content
 - Paras 46-53: in particular para 49:
- Lesson - “Confidentiality” is not the issue: therefore prepare for bidders to request documents/information



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Avoiding EU Challenges – Evaluation and award criteria

- Regulations 30(1)(a)/(b) PCR 2006
- Further refinement for MEAT award: Regulation 30(2) PCR 2006
 - Linkage to the subject matter of the contract
 - Use of weighting
 - Order of importance
- Transparency
- As was: “everything that would make a difference”
Lettings International Limited –v- London Borough of Newham(2008) See paras 37 and 64-65 of Judgment:



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Avoiding EU Challenges – Evaluation and award criteria

- As is: “what would the bidder have done differently” J S Varney & Sons Waste Management Limited –v- Hertfordshire CC (2011)
- Lesson – take advantage of the new time limits to fix bidders with knowledge as soon as possible.



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Avoiding EU Challenges – The evaluation process

- Regulation 30(2) PCR 2006
 - Interviews?
 - Site visits/inspections?
 - Using panels?
 - How do you mark?
- What is/isn't permissible?
 - Permissible:
Lancashire County Council –v- Environmental Waste Controls Limited (2010)



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Avoiding EU Challenges – The evaluation process

- Can model answers (safely) be used?
 - Mears Limited –v- Leeds City Council (2010)
 - “documents provided to those evaluating the tenders to assist them with carrying out the scoring of information provided by the tenderers”
 - Model answers may amount to (undisclosed) award sub criteria
- Lesson: Model answers are likely to be challenged: use carefully and sparingly



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Avoiding EU Challenges – Suspending the award process

- Regulation 47(G) PCR 2006
 - (1) suspensory effect: ... “the starting of proceedings requires the Contracting Authority to refrain from ...”
 - (2) shifting the burden: ... “the requirement continues until ...”
 - NB: Post 1 October 2011 “awareness” of proceedings
- Regulation 47H(1), (2) and (3) PCR 2006
- What approach are the Courts taking?:
 - Alstom Transport –v- Eurostar International (2010)



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Avoiding EU Challenges – Suspending the award process

- Indigo Services (UK) Limited –v- The Colchester Institute Corporation (2010)
- Excel Europe Limited –v- University Hospitals Coventry and Warwickshire NHS Trust (2010)
- The Halo Trust –v- The Secretary of State for International Development (2011)
- When determining the balance of convenience and adequacy of damages as a remedy the public interest is likely to prevail
 - Alstom: para 138(iv)
 - Excel: para 46, 47



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Avoiding EU Challenges – Setting aside award decisions

- A rare occurrence?
- Inter relation with automatic suspension
- Resource (NI) v Northern Ireland Courts & Tribunals Service (2001)
 - Part B Services but Contract Notice published
 - Manifest and serious error in marking by taking into account immaterial considerations i.e. not specified in the tender documents



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Avoiding EU Challenges – Setting aside award decisions

- Conflict in evidence: procurement evaluation panels are “solemn exercises of critical importance to economic operators and the public and must be designed, constructed and transacted in such a manner to ensure that full effect is given to the overarching procurement rules and principles”
- Lesson – conduct panel evaluation exercises scrupulously and ensure the paper trail is robust



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Avoiding EU Challenges – Conclusion

- Black, white..... or shades of grey
- Aggrieved bidders will have to move quickly to challenge
- Courts appear to be taking strict approach
- Extensions of time not granted readily
- Rules are a useful tool



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