# Oil on troubled waters

## *Jack Hayward reflects on a new spirit of compromise*

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When the Remedies Directive came into force back in 2009 I anticipated that there would be a flood of cases around procurement challenges (and anticipated a complementary torrent of fees heading my way) and, while there have been an increasing number of cases, mainly due to our friends in Northern Ireland, the anticipated flood of cases (and the torrent of fees) has not materialised. There are lots of reasons for this but I am firmly of the opinion that the main reason for this is the substantial legal costs that are incurred in mounting a challenge.

I think because of the technical nature of the Public Contract Regulations practitioners have been reluctant to consider any form of alternative dispute resolution as a forum for resolving procurement disputes. That has not been the case with outsourcing where I have been involved in a number of mediations. My experience of these has lead me to be sceptical about ADR and mediation, but I think that is largely because the outsourcing disputes I was involved in were between large public bodies and multinational outsourcers and where the relationship of trust had completely broken down and both sides seem to treat the process as a 'fishing expedition'.

It was refreshing therefore to be involved in mediation recently concerning a contract dispute where I genuinely felt that both parties had come away satisfied with the result. Our mediator – Jon Lang – facilitated, after some 16 hours, a result that would have taken at least another 12 months to achieve had we pursued court proceedings. I am still not convinced that mediation will work where the parties are completely at odds, but certainly where there is the need to heal a dispute in a situation where there is a desire to continue with a contract I would certainly give it very serious consideration.

### The dreaded undertaking

As I referred to in the above paragraph, Northern Ireland is a fertile source of procurement case law. In *Lowry Brothers Ltd and Wilson (t/a A G Wilson) v Northern Ireland Water Ltd* [2012], a case brought under the Utilities Contracts Regulations 2006, the High Court in Northern Ireland refused an application by the defendant contracting utility for the plaintiffs to provide an undertaking in damages.

The defendant had applied for an order to lift the automatic statutory suspension, which prevents the award of the disputed contract. That application had not been heard. The court concluded that it was too early in the proceedings to consider whether it was appropriate to require the plaintiffs to provide an undertaking in damages. In accordance with the relevant provisions of the regulations, this could only be considered at the time when the court decides whether to make the requested order. The court also noted that it did not yet have sufficient evidence to make an informed decision and to engage in a proper exercise of judicial discretion.

Generally, cases surrounding the replacement of injunctions with an automatic suspension have simply concerned the lifting of the suspension. The courts have taken a sympathetic line with public bodies and have looked for any reason to justify that the suspension should be lifted. It is refreshing to see that policy may be changing, but with the caveat that this is a Northern Irish case, and it remains to be seen if judges in the rest of the UK follow suit.

### Freedom to harass

I read somewhere in his biography that Tony Blair came to regret passing

the Freedom of Information Act and viewed it as one of the biggest errors of judgement he made in office. A view I suspect heartily endorsed by most public sector bodies. Therefore, the decision in *Wirral Metropolitan Borough Council v Information Commissioner* [2012] is very welcome although it relates to the Environmental Information Regulations 2004 rather than the FOI regulations.

The First-tier Tribunal decided that draft reports, background papers prepared by political assistants, and related council correspondence relating to a council's procurement exercise, did not have to be disclosed. The Tribunal accepted that the information requested was covered by the 'unfinished documents' and 'internal communications' exceptions and the public interest was in favour of withholding disclosure. This ensured council officers and political assistants were not subjected to excessive public scrutiny before the final decision on a procurement exercise and a decision on whether to proceed with the proposed procurement was taken.

In my experience FOI officers tend to be cautious souls, but I think that they should consider very seriously the wider implications of this case in relation to FOI.

### Definition of a contracting authority

Readers will recall the case of *Cambridge University v the Inland Revenue* (*R v HM Treasury ex parte University of Cambridge* [2000]), which set out the definition of a contracting authority. There has not been much case law on the topic since that decision, however that may be about to change since Advocate General Mengozzi has handed down an opinion on a reference for a preliminary ruling from a German court on whether a professional medical association is a contracting authority for the purposes of Directive 2004/18.

The AG considered that where national law provides for the professional association to be financed by contributions from its members, but does not fix the amount of the contributions or the manner in which they are spent, this is not sufficient to create a 'close dependency' of the professional association on the state such that the association is considered to be 'financed, for the most part, by the state' under Article 1(9) of Directive 2004/18. (*IVD GmbH & Co KG v Ärztekammer Westfalen-Lippe* [2012])

### Disclosure

Bidders always like to know what the other party has bid. Fending off such requests is a real bane. So it is encouraging to see that the General Court has dismissed appeals by an unsuccessful bidder in a procurement procedure conducted by the European Food Standards Agency (EFSA) relating to a shuttle service contract. The General Court found that the EFSA did not breach the principles of equal treatment and transparency in relation to the information provided to the unsuccessful bidder and that there had been no failure to provide reasons.

The court also found that EFSA's decision not to disclose the successful bidder's tenderer bid to the unsuccessful bidder was lawful. A successful tender can fall within the scope of the exception relating to the protection of commercial interests and this restriction is integral to the objectives of EU rules on public procurement, which are based on undistorted competition. (*Cosepuri Soc Coop pA v EFSA* [2013]). ■

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*Cosepuri Soc Coop pA v EFSA* [2013] (Joined Cases T-339/10 and T-532/10

*IVD GmbH & Co KG v Ärztekammer Westfalen-Lippe (Advocate General's opinion)* [2012] EUECJ C-526/11

*Lowry Brothers Ltd and Wilson (t/a A G Wilson) v Northern Ireland Water Ltd* [2012] NIQB 105

*R v HM Treasury ex parte University of Cambridge* [2000] ECR I–8035

*Wirral Metropolitan Borough Council v Information Commissioner* [2012] UKFTT 0117 (GRC)