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New developments affecting construction

- Procurement
- Tax
- Contract Law Update

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March 2019

10 things you should know about procurement litigation

- Agenda for today
 - Bidder vs. public authorities:
 - ❖ Five key points from the *bidders'* perspective
 - ❖ Five key points from the *public authorities'* perspective

Read the small / fine print in the tender documentation

- Double and triple check you have provided all the required information.
- No duty to allow correction of an error once the bid has been submitted.
- May be considered proportionate to allow the correction - *if* it does not affect the merits of the tender.



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Keep an eye on the time....

- Don't wait until the last minute to submit your tender.
- Public authority *may* exercise discretion to accept late tenders - particularly where the delay results from its own actions...



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Be prepared to justify your tender bid price

- Public authorities have the power to require tender parties to explain the proposed price or costs where they appear abnormally low.
- Possibility of bid-rigging...?



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Don't talk to the other bidder

- Only the public authority is allowed to speak to the bidders to clarify or supplement its requirements.
- Even if inconsistencies in the tender documentation, do not be tempted to speak to the other bidders.
- 'Bid rigging' strictly prohibited by competition law and may lead to the exclusion of bidders from future as well as current procurements.



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If in doubt, shout!

- Bidders should flag any suspected breaches of the procurement rules as soon as possible.
- Delaying until the end of the process - in the hope that you might actually win - could lose you the opportunity to challenge any defects in the process...



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Take care in choosing your tender procedure

- Thinking through and documenting requirements carefully at the beginning of the procurement.
- Should not adopt negotiated procedure by default when another process may be more appropriate – avoiding embarrassing and potentially risky backtracking later on.



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Ensure your *Alcatel* letter is precisely worded

- Point of **maximum risk** in any tender process is once the *Alcatel* letter has been issued.
- Relevant time limits for a challenge may not apply if the letter does not contain all the necessary information.



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Ensure future flexibility

- Procurement rules continue to apply after award - any material changes could trigger the need for a fresh procurement process.
- Ensuring that foreseeable changes are clearly provided for in the contract - to the extent permissible - will help reduce this risk.



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Keep an eye on the time (again!)

- Procurement rules prescribe minimum time periods
- Urgency is no excuse when of the public authority's own making.
- Time limits for bringing challenges also vary:
 - usually one month from date of knowledge for a *damages* action; and
 - six months from concluding the contract for a *declaration of ineffectiveness*.
- Use of Contract Award Notice or Voluntary Ex Ante Transparent (VEAT) Notice



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Do not treat a VEAT Notice as a get out of jail free card...

- Publishing a VEAT Notice *can* remove the risk of a public contract being declared subsequently ineffective.
- However, using a VEAT Notice where legal conditions not met could paradoxically expose the parties involved to additional risk of challenge...



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Recap...

- 1) Read the small/fine print in the tender documentation
- 2) Keep an eye on the time...
- 3) Be prepared to justify your tender bid price
- 4) Don't talk to the other bidders
- 5) If in doubt, shout!
- 6) Take care in choosing your tender procedure
- 7) Ensure your *Alcatel* letter is precisely worded
- 8) Ensure future flexibility
- 9) Keep an eye on the time (again!)
- 10) Do not treat a VEAT Notice as a get out of jail free card...

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VAT reverse charge on construction services (and certain goods)

- Change in law will take effect from **1 October 2019**.
- Designed to target "missing trader fraud" and similar – i.e. where suppliers charge VAT to their customers but then fail to account for the VAT to HMRC.
- The reverse charge will shift the responsibility for accounting for VAT to certain customers receiving certain construction services (and certain goods).
- This will have a significant impact on VAT compliance for those affected, requiring new systems and processes to be implemented.
- Start preparing now!

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VAT reverse charge on construction services (and certain goods)

The current position

- VAT is chargeable on the supply of goods or services made in the UK by a "taxable person" in the course or furtherance of their business (except where supplies are zero rated or exempt).
- Standard rate of VAT is 20%.
- The supplier is generally liable to account to HMRC for VAT ("output VAT") due on supplies of goods. The supplier may be entitled to credit for VAT on supplies of goods/services received ("input VAT") where attributable to VAT-able supplies made by the supplier.
- Certain supplies of construction services may be zero rated (e.g. in the course of construction of dwellings, or buildings used solely for a "relevant residential purpose" or a "relevant charitable purpose"; certain supplies to housing associations) or reduced rated at 5% (e.g. certain residential conversions and renovations).

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VAT reverse charge on construction services (and certain goods)

New rules – reverse charge

- For supplies of construction services (and certain goods) meeting the following conditions, supplier will not have to account to HMRC but customer will for supplies made on or after 1 October 2019:
 1. A "taxable person" (i.e. UK VAT registered or liable to be UK VAT registered person) supplies "construction services" (and/or certain goods) that are not "excepted" (see below).
 2. The customer is a "taxable person" at the time the supply of construction services (and/or certain goods) is made and the supply is made in connection with the customer's business. [Therefore, supplies to businesses that are not UK VAT registered (or liable to be registered) or to customers for non-business use are not caught.]
 3. The construction services (and/or certain goods) supplied are subject to UK VAT at the standard or reduced rate of VAT. [Therefore, zero rated supplies are outside the scope of the reverse charge. Accordingly, the supply of most construction services to a main contractor/developer who sells a newly built residential development should not be caught.]

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VAT reverse charge on construction services (and certain goods)

- "Construction services"
- Based on the definition of "construction operations" as used for the purposes of the construction industry scheme ("CIS").
- Broadly captures:
 1. Constructing, altering, repairing, extending, demolishing and dismantling of buildings, structures and works forming (or to form) part of the land such as walls, roads and power-lines.
 2. Installing heating, lighting, air-conditioning, drainage and other systems.
 3. Painting or decorating the outside or inside of a building.
 4. Preparatory work such as cleaning, site clearance, earth-moving excavation, laying foundations and erecting scaffolding (with labour).
- HMRC's CIS guidance will apply.

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VAT reverse charge on construction services (and certain goods)

- Goods supplied with "construction services"
- Goods (materials) supplied with "construction services", which fall to be treated as part of a single supply of services, are also subject to the reverse charge.
- Necessary to consider case law and HMRC guidance on single vs multiple supplies. As a general rule, there is a single supply if one or more elements constitute the principal service, while one or more elements are ancillary; and multiple supplies where the essential features of the transaction confirm that the supply is of several distinct principal services.

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VAT reverse charge on construction services (and certain goods)

- Excluded services
- The following services are excluded from the definition of "construction services" and so do not come within the scope of the reverse charge (subject again to the rules on single vs. multiple supplies):
 1. Oil, gas or mineral extraction.
 2. Manufacture of building, engineering, heating, lighting, air-conditioning or drainage components.
 3. Professional services of architects, surveyors or consultants.
 4. Artistic works.
 5. Signage.
 6. Installation of security systems.

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VAT reverse charge on construction services (and certain goods)

- "Excepted supplies"
- There are 3 categories of supplies that will not be subject to the reverse charge:
 1. **Supplies to contractors not required to report payments under the CIS.** This should also exempt "small" payments (of £1,000 or less).
 2. **End-users** – i.e. "taxable persons" who do not make further supplies of "construction services". Therefore, supplies to most property owners/developers should be outside the scope of the reverse charge on the basis that they make supplies of property interests, rather than further supplies of "construction services". However, awaiting clarity from HMRC to confirm developers won't be regarded as making an onward supply of construction services when delivering a completed building. End-users should provide written confirmation to suppliers of their status to avoid being subject to reverse charge according to HMRC guidance – contract warranties of end-user status?
 3. **Intermediaries** – i.e. recipients who make onward supplies of construction services without material alteration or further processing, PROVIDED THAT:
 - a) intermediary is "connected" with expected end-user (e.g. parent or subsidiary of end-user) – this could exempt supplies between group companies; OR
 - b) supplies are made in relation to land, buildings or civil engineering works in which both the intermediary and the expected end-user of those services have a "relevant interest" (i.e. person or connected person is the landlord, tenant, licensor or licensee) – this is most likely to be relevant between landlords and tenants where the landlord or tenant commission construction services and on-supply those services to the other.

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VAT reverse charge on construction services (and certain goods)

- Practical points
- Suppliers will need to annotate invoices to show that reverse charge applies and that customer is required to account for VAT where applicable.
- Customers within scope of the reverse charge will have to account to HMRC for any VAT. For customers entitled to full VAT recovery, cash tax impact should be nil as input VAT and output VAT will be accounted for in the same VAT return.
- Failure to properly account for VAT under the reverse charge could lead to tax assessments, loss of the right to recover input VAT and penalties and interest.
- If supplier incorrectly charges VAT when the reverse charge should apply, customer still has to account for VAT and supplier has to return any money collected as VAT and amend VAT records – this could entail penalties.
- HMRC has indicated that it will operate a “light touch” approach to penalties for genuine mistakes over a 6 month period.
- Start reviewing now supplies made to and received from other VAT registered supplies to establish if the reverse charge may apply.
- Review VAT language in construction contracts – e.g. where reverse charge applies, make sure only required to pay an amount net of VAT to suppliers; seek end-user warranties where relevant.

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Case Law Update

- “Smash & Grab” Adjudications
 - S.111 HGCRA – if an Employer wishes to pay less than the sum applied for, he must give the required notice within the specified time period. If he does not do this, he must pay the sum claimed by the contractor, even if that sum is greater than the “true value” of the work.
 - Unfair? Advantage from administrative error? Or crucial to keep cash flowing?
 - Previous case law (e.g. *ISG Construction Ltd v Seevic College [2014]*) did not allow a second adjudication to determine the true value of the works.
 - Led to a spate of “smash and grab” adjudications. If successful, hands contractor significant advantage in subsequent negotiations, or makes expensive proceedings more likely.

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Case Law Update

- S&T (UK) Ltd v Grove Developments [2018]
 - Subsequent adjudication can determine the true value of the works.
 - But, only after the “notified sum” is paid.
 - Preserves priority of cash flow over coming to the “right” answer.
 - Potential risk if a contractor is close to insolvency – the Employer might not have the opportunity to get his money back in subsequent adjudicators.
 - The answer? Get your notices in on time!

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Case Law Update

- Adjudication by insolvent companies?
 - *Bresco Electrical Services Ltd (in liquidation) v Michael Lonsdale (Electrical) Ltd [2019]*
 - ❖ Injunction against Bresco from pursuing adjudication proceedings in circumstances where Lonsdale had a cross claim.
 - ❖ On basis of “practical utility” – i.e. there is no point. A decision in Bresco’s favour would not be enforced by Courts because risk that sums awarded could not be repaid if decision overturned. Futile and a waste of money.
 - ❖ But, there could be exceptions....
 - *Cannon Corporate Ltd v Primus Build Ltd [2019]*
 - ❖ No general rule preventing enforcement of adjudication commenced by insolvent party.
 - ❖ Primus placed into a Company Voluntary Arrangement (CVA), in part because of the money owed by Cannon. CVA designed to enable a company to trade its way out of insolvency.
 - ❖ Compare with insolvent liquidation. Primary purpose is to protect creditors, e.g. from incurring fees in futile adjudication proceedings that won’t be enforced.

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Questions



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