



## LEGAL BRIEFING

### *Amaryllis Ltd v HM Treasury*

[2009] EWHC 962, TCC, Mr Justice Coulson

#### **The Facts**

This case concerns a framework agreement governed by the Public Contract Regulations 2006 (“2006 Regulations”). In November 2007 the defendant, OGC Buying Solutions (“OGC”), part of HM Treasury, posted an advertisement in the Official Journal of the European Union for a framework agreement to supply, deliver and install all types of furniture and associated services on a national basis. The notice made it clear that the framework agreement would fall within the 2006 Regulations and that the work would be divided up into six Lots, with Lot 1 being the largest and most valuable.

The claimant, Amaryllis Ltd, downloaded the Pre-Qualification Questionnaire and submitted its completed response by the required date of 9 January 2008. On 17 March 2008 Amaryllis received a letter from OGC stating that they had been successful in pre-qualifying for Lots 2, 3, 4 and 5, however, was unsuccessful on Lots 1 and 6. Very little information had been provided in the letter and Amaryllis was extremely disappointed as they had considerable experience in providing furniture to a number of UK public bodies.

On 15 April 2008 Amaryllis wrote to OGC requesting an explanation of the scoring system and urged OGC to reconsider its decision. OGC did respond to this letter on 21 April 2008, however that letter failed to reply to the questions raised. Amaryllis then began to make enquires of other tenderers so as to work out why it had not succeeded with respect to Lot 1, and on 4 June 2008 informed OGC that they intended to commence proceedings for a breach of the 2006 Regulations. OGC did not respond until over a month later by which time Amaryllis had already launched proceedings seeking substantial damages in excess of £11 million.

In March 2009, OGC applied to the court for the claim to be struck out and/or summary judgment in its favour on the basis that:

- (i) Amaryllis failed to provide a written notice of the breach and its intention to bring proceedings in accordance with Regulation 47(7)(a); and
- (ii) the proceedings were not brought within three months from the date when grounds for bringing the proceedings first arose in accordance with Regulation 47(7)(b).

#### **The Issues**

- (i) Was Amaryllis’ letter of 4 June 2008 a notice under Regulation 47(7)(a) of the 2006 Regulations?
- (ii) When did the grounds for bringing proceedings first arise?
- (iii) Were the proceedings brought promptly and in any event within three months?

#### **The Decision**

With respect to the first issue, Mr Justice Coulson reviewed the relevant authorities which set out that the notice must identify *the actual breach*

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complained of, and held that Amaryllis' letter of 4 June 2008 was an adequate notice under Regulation 47(7)(a). The letter plainly identified the 2006 Regulations, the actual breach complained of and stated the intention to commence proceedings. Furthermore, he stated that *"the adequacy of the notice has to be considered against the backdrop of the information made available to the claimant by the defendant."* As OGC had failed to provide a comprehensive response to Amaryllis' query on the reasons for its failure on Lot 1, Amaryllis was forced to reply on the basis of its suspicions and information it had obtained from the other tenderers.

On the second issue, the Judge found that the date on which the grounds for bringing the proceedings first arose was 17 March 2008 - the date on which OGC wrote to inform Amaryllis that its bid in relation to Lot 1 was unsuccessful. He dismissed the OGC's submission that the ruling in *Jobsin v Department of Health* applied. In that case, the Court of Appeal had held that the right of action first arose when the briefing document was issued to the tenderers. However, the allegation of breach in *Jobsin* was regarding failures in the briefing document, and hence the claimant *"knew all the facts it needed to know in order to start proceedings"* right from the start when the briefing document was issued. Here, Amaryllis could not possibly have known that it had been excluded until it had received the letter from OGC stating its failure to pre-qualify on Lot 1.

Finally, Mr Justice Coulson held that as the grounds for bringing proceedings first arose on 17 March 2008, the maximum three month period required by the 2006 Regulations was complied with and, on the facts, Amaryllis was prompt in commencing proceedings. Furthermore, he concluded that on reviewing OGC's conduct, had it not failed to provide an adequate response to Amaryllis' query in a reasonable time, the proceedings would have commenced earlier.

Accordingly, the defendant's application for summary judgment and to strike out the proceedings was dismissed.

#### **Comment**

When tendering for a project which falls within the ambit of the Public Contract Regulations 2006, be aware of the court's strict approach. If you need to bring an action for breach of the Regulations, it is clear that this must be done promptly and within any event three months from the date the grounds arose. So, how do you know when the grounds arise? Mr. Justice Coulson concluded that:

*"...what matters in each case is when the specific breach of the Regulations (of which complaint is made) actually occurred. Depending on the facts of the case, that will often be when the actual decision is made to exclude the claimant tenderer from the process or wrongly reject his tender."*

Stacy Sinclair  
May 2009

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