SPRING 2014

Construction Law

NEWS AND ADVICE FROM BIRKETT LONG

Public sector procurement changes and SMEs

Each year local authorities in England spend around £230 billion on contracts for goods, works, services, utilities, defence and security so there are plenty of opportunities out there for businesses.

However, for many small and medium sized enterprises (SMEs) their experience of finding work, tendering for it and being awarded the contract is that the procurement process is complex, costly and inconsistent, particularly when more than one local authority is involved. Therefore, many SMEs avoid the whole public sector procurement process altogether and miss out on valuable contracts.

Two very recent changes, which are designed to simplify the process, have been brought in to make public sector procurement more accessible to SMEs.

The first change announced on 7 December 2013 includes:

- cutting process and abolishing the Pre-Qualification Questionnaire (PQQs) for low value contracts. The new UK threshold is £172,514
- the use of a standard PQQ for high value contracts and ensuring small businesses needs are considered in the design of the procurement process
- making contract opportunities accessible on a single online portal
- using prompt payment terms all the way down the procurement supply chain

Additional measures to be introduced will include the requirement for all public bodies to report their procurement spend and prompt payment performance with SMEs. More detail on these measures will be published in due course. On 1 January 2014 the UK thresholds for awarding contracts for public works were revised and have been published in the Official Journal. The UK thresholds are slightly lower than those currently applicable. The EU thresholds have been revised upwards.

If you have any questions about the procurement process please contact Claire Wiles or Peter Allen in our construction team.

Claire Wiles
01245 453811
claire.wiles@birkettlong.co.uk

Are you up to date with TUPE?

The regulations are intended to protect employees whose employer changes hands due to the sale of that business. In addition, employees who are assigned to a particular contract are protected when the provider of that particular work changes (known as a service provision change).

The coalition Government recently consulted on changes to the regulations and have now published updated regulations which came into effect on 31 January 2014. Having suggested in consultation that they wished to reduce the effect of the regulations by removing the "gold plating" of the Acquired Rights Directive, it seems that, in fact, the changes which will be implemented are cosmetic. Some of the most important changes are set out here.

It has been decided that service provision change transfers will not be excluded. A change in location on its own following a transfer will now be a potentially fair reason for dismissal. Consultation on post transfer changes can now be undertaken before the transfer takes place. The information which has to be provided to the new employer must now be provided 28 days before the transfer rather than 14 days before.

These changes have a narrower effect than many expected but they are still important and any businesses involved in contracting and/or the acquisition of other companies need to take advice on how the changes will affect them.

For more information on TUPE please contact our employment team.

Martin Hopkins
01268 244145
martin.hopkins@birkettlong.co.uk

Legal update

Are you aware of your roots?

It has generally been thought that landowners will not be liable for damage caused to neighbouring properties by the roots of their trees unless they are aware of the possibility that such damage is being caused and fail to act.

However, in the recent case of Khan and Khan v Harrow Council and Kane, Mrs Kane was found liable for damage caused to the Khans' property by the roots of her cypress hedge, despite the fact that she cut back the hedge promptly on receipt of a letter from the Khans' solicitor. Whilst accepting that Mrs Kane had not appreciated that her hedge may be causing damage until she received that letter, the court found that a "reasonably prudent landowner" should have foreseen this risk and taken action sooner.

The case poses the question at what point a landowner should identify the risk of their roots causing damage to a neighbouring property and causes much uncertainty. In practice, if the homeowner's insurer has signed up to the ABI's Domestic Tree Root Agreement then they are likely to be exempt from such claims from their neighbours. If not, homeowners should consider seeking expert advice if they have any vegetation on their property that may be a cause for concern. If you have any questions on this subject please contact Keith Songhurst on 01245 453821 or keith.songhurst@birkettlong.co.uk.

No pay? Walking off site ?

Strange as it may seem, the fact that you have not been paid does not mean that you are automatically entitled to stop working.

If an unpaid party to a contract simply leaves site they could be facing serious consequences. They will be in breach of contract and the paying party could sue for damages caused by that breach. This could include costs incurred due to delay on completion of the project as well as the extra costs of completing the works. In turn, this can mean that not only is the unpaid party not paid for the works it has carried out but then it has to pay for the losses it has caused by walking off site.

It is possible to avoid this situation. In construction contracts there is a statutory right to be able to suspend performance of obligations under the contract if you have not been paid. However, this right cannot be exercised without first giving notice of intention to suspend performance. Such notice must be in writing and includes emails; it must also give at least 7 days' notice of the intention to suspend. Those 7 days do not include Bank Holidays.

The right to give notice and to suspend the works arises only in relation to non-payment of monies due, it does not relate to any other breach of contract. Furthermore, the final date for payment must have passed and the paying party must not have served a valid Pay Less Notice indicating that it was going to pay less than the amount that was due. Contractors and subcontractors who have not been paid must follow this procedure of serving the correct notice. If they do not, the consequences could be devastating for them.

Unfortunately, in the heat of the moment people do walk off-site. Our advice however, is to avoid this at all costs and follow the proper process.

Peter Allen
01245 453813
peter.allen@birkettlong.co.uk

Meet the team

Katy Humphreys

Katy trained with Birkett Long and joined the Chelmsford Dispute Resolution team in September 2012, on her qualification. She acts for both private and corporate clients, advising on a wide range of contractual and commercial disputes.

Katy is experienced with contentious construction matters. Katy has advised on adjudications and enforcement of adjudication decisions through the High Court. Katy has recently had her first reported case on the successful enforcement of an adjudicator's decision on behalf of a sub-contractor client in the Technology and Construction Court.

Before joining Birkett Long, Katy spent five years working for Credit Suisse in its legal and compliance department, where she was promoted to Assistant Vice President in 2008. During that time Katy studied for and passed the CISI Diploma in Investment Compliance obtaining a Distinction. She also spent a period of time on secondment in the United Arab Emirates with Credit Suisse Dubai in 2009, advising the business on regulatory and cross-border issues.

Katy Humphreys
01245 453865
katy.humphreys@birkettlong.co.uk

under the spotlight

Sustainable shouldn't make businesses feel green!

While it is now clear that the UK must do more to create its own energy, there is no consensus as to how and where this energy should be produced. Despite news that MS Power Projects Ltd is to build south-Essex's first major solar farm in Laindon, with further proposed farms in Wix, Landermere and Thorpe, Essex as a whole appears unconvinced by 'green' energy. Although there are already around half a dozen schemes planned for the region, more than 600 campaigners signed a petition against a proposed farm in Halstead. The majority of objections stem from an understandable desire to preserve the area's agricultural heritage and protect 'natural beauty'. But sustainable energy's biggest challenge, it seems, is that most people still perceive 'green' as costly, inefficient and unprofitable.

The Laindon project will create jobs and generate enough energy for more than 2,300 homes at a greatly reduced cost for 30 years. This is on an area of 22 acres, which is dwarfed by the proposed Halstead sites, measured at 300 acres. Furthermore, even owners of commercial premises or large estates in land can exploit their assets to earn themselves free electricity and generate additional revenues from more modestly-scaled solar installations.

There is also a wide range of grants available for SMEs (up to £10K) to invest in resource efficiency projects. At a recent seminar hosted by Birkett Long, Low Carbon Business outlined how numerous SMEs had already recouped their outlay in efficiency savings, well within the 3 years targeted. Reduced energy, material or waste management costs coupled with an increase in capacity, compliance or revenue streams can mean real business and environmental benefits in one hit. Low Carbon Business has already helped with £1.7 million of EU grants in the region to date, but it is necessary to remind businesses that profitability is often integral to 'green' interventions.

Perhaps rebranding 'green' to 'eco-Commerce' would help?

When considering energy source alternatives as part of a bigger picture, it is difficult to deny that the UK's best bet is to use a combination of each source - making an increase in renewable energy inevitable. Consequently the prevalent discussion for sustainable energy is not 'NIMBY' but to determine which potential UK sites are best placed to maximise energy production whilst minimising environmental impact. There is every chance that several of these will be in Essex, meaning local businesses ignoring opportunities today will miss out on future profits.

For more information on energy and environment, please contact Ian Allchin.

Ian Allchin
01245 453812
ian.allchin@birkettlong.co.uk

News flash

Change to CITB levy deduction from 6 April 2014

Historically a contractor seeking to recoup the CITB levy from its sub-contractors has made a deduction from the gross invoice payment due to them. This deduction has been excluded from the 'gross amount of payment' shown on a contractor's monthly return.

HMRC is changing this practice as it has concluded that it can no longer be supported by current or past CIS legislation. This change will have implications for VAT and consequently any payroll software. HMRC will be revising its guidance CIS340 from April to reflect the changes.

BIRKETT LONG LLP

PHOENIX HOUSE
CHRISTOPHER MARTIN ROAD
BASILDON SS14 3EX
T 01268 244144

ESSEX HOUSE, 42 CROUCH STREET
COLCHESTER CO3 3HH
T 01206 217300

NUMBER ONE, LEGG STREET
CHELMSFORD CM1 1JS
T 01245 453800

E CONSTRUCTIONLAW@BIRKETTLONG.CO.UK
WWW.BIRKETTLONG.CO.UK

Reference: NEWS/CONSTRUCTION13/2014