PUBLIC PROCUREMENT LAW

Damages as an Effective Remedy

Edited by
Duncan Fairgrieve
and François Lichère

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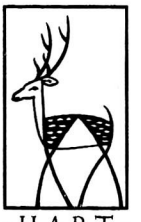

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PUBLIC PROCUREMENT LAW

Public procurement represents more than 15 per cent of European GDP and is one of the fastest growing sectors of the European economy. Public procurement law is also developing rapidly, not least in the area of remedies for breach of procurement rules. The aim of this book is to analyse the remedy of damages in public procurement law. The European Directive of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC has reaffirmed the importance of damages as a tool to enforce the proper award of public contracts, but has left the exact architecture of the damages remedy in the hands of the Member States. This book offers an overview of damages liability which is inclusive, coherent and practical, covering the relevant law and jurisprudence from a number of countries across Europe and further afield.

The contributors are high-profile and authoritative commentators on public procurement law, including policy-makers, judges, academics and practitioners.

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Introduction

DUNCAN FAIRGRIEVE AND FRANÇOIS LICHÈRE

PUBLIC PROCUREMENT IS an essential aspect of public sector activity, and one which is of particular prominence currently, representing more than 15 per cent of the GDP in Europe. The substantive and procedural rules in this sphere governing the procurement are now well developed in most advanced economies.

However, the enforcement of public procurement rules is a topic which has been somewhat overlooked in academic treatment,[1] and the specific topic of damages is all but absent. This publication seeks to remedy this lacuna. The aim of the book is to analyse the award of damages for breach of public procurement law from a comparative perspective. Europe is the focus of the treatment, as public procurement has been subject to an important harmonising influence through European provisions, though we shall venture further afield as well.

From a European perspective, the principle of subsidiarity seems to have played a role within this sphere. Whilst Directive 89/665 indicates that Member States must make provision for the awarding of damages in the case of infringement of EU law on public contracts,[2] there is little detail as to the conditions under which an awarding authority may be held liable or in respect of the determination of the amount of the damages which it may be ordered to pay.

The reason for this lies in the wording of the review procedures Directives, both in the original text of Directives 1989/665 and 1992/13 and in their revised version following the 2007/66 Directive:

> 1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:
>
> (a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

[1] Though the literature is now finally growing : see eg F Lichère and S Treumer, *Enforcement of the EU Public Procurement Rules* (Djof Publishing, 2011).

[2] Art 2(1)(c).

(b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;
(c) award damages to persons harmed by an infringement.

Whereas the rest of the Directive gives detail as to what the various Member States could or should do to comply with the first two requirements, it remains silent on the issue of damages. This is by no means an oversight. The explanation for the silence is in fact given in the impact assessment report that preceded the adoption of the 2007/66 Directive:[3]

> Changes to post-contractual Remedies which would imply changes to the underlying philosophy of the Remedies Directives requiring a completely new set of Directives to be introduced [were discarded at an early stage]: various solutions more specific to post-contractual Remedies were considered. The key issue here is to strengthen the deterrent effect induced by the 'threat' of bringing a damages action. One possible way to do this would have been to amend the Remedies Directives, removing or relaxing the conditions requiring an unsuccessful bidder to provide proof that he had a serious chance of winning the contract. However, this would have directly touched upon the basic national principles governing contractual liability (i.e. the rules on compensation where loss of a chance has to be proved by the plaintiff) with few benefits (i.e. no corrective effects on the award procedure and the contract signed). Initially at least, cases would be brought to 'test' the willingness of the Review bodies to award such damages, which would increase costs for the taxpayer, as Awarding Authorities which have signed a public contract without achieving best value for money would have to pay damages more frequently and in a higher amount. Balancing these potential increased costs, coupled with the significant changes required in the national laws of contractual liability, led the Commission services to discard this solution at an early stage.

In sum, whilst the European instruments, and particularly the European Directive of 11 December 2007[4] reaffirmed the importance of damages as a tool to enforce the proper award of public contracts, the exact architecture of the damages remedy has been left to the Member States.

It would not be correct however to conclude that the Member States have been given an entirely free hand in this matter. The European rules are having an increasing impact, and the European case law illustrates this very point. In *Commission v Portugal*,[5] the ECJ set aside national legislation which required proof of culpability as a precondition for an award of damages:

[3] Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts: Impact assessment report, Remedies in the field of public procurement (SEC(2006) 557).

[4] Amending Council Directives 89/665/EEC and 92/13/EEC.

[5] Case C-70/06.

> [B]y failing to repeal Decree-Law No 48 051 of 21 November 1967, making the award of damages to persons injured by a breach of Community law relating to public contracts, or the national laws implementing it, conditional on proof of fault or fraud, the Portuguese Republic has failed to adopt the measures necessary to comply with the judgment of 14 October 2004 in Case C-275/03 *Commission v Portugal* and has thereby failed to fulfil its obligations under Article 228(1) EC.

Two recent decisions of the Court of Justice of the European Union have also touched upon this issue in *Strabag*[6] and *Spijker*.[7] These decisions will be examined in more detail in the chapters below,[8] but a word will be said at this point. In the first decision, *Strabag*,[9] the Court seems to have asserted, based upon the principle of effectiveness and the objectives of the Remedies Directive, that national legislation which makes the right to damages for an infringement of public procurement law *conditional on that infringement being culpable*,[10] is contrary to EU law. This narrow interpretation of the judgment is uncontroversial. However, there have been suggestions that the judgment of the European court extends further. Adopting a textual analysis of the decision, Treumer has argued that the decision is a 'dynamic and far-reaching' one, which 'appears indirectly to rule out that a Member State may make damages for breaches of EU public procurement law conditional of a "sufficiently serious" breach or "substantial" breaches'.[11] He thus concludes that *Strabag* entails 'that any breach of the EU public procurement rules in principle is sufficient ground for damages'.[12] This is indeed one interpretation of the decision, and if correct, would involve significant consequences. It is possible however, to see the *Strabag* as premised on a more modest proposition, namely that a systematic requirement of *culpability* is not compatible with the requirements of effective remedies under European law. From this perspective, it is not at all certain that the decision *necessarily* involves the setting aside of the sufficiently seriousness standard in public procurement cases. Indeed, such a stance of the court would be surprising, as running directly contrary to the orthodox approach in cases of state liability for breach of community law.[13] It should not be overlooked that the sufficiently seriousness standard does *not* require proof of fault in its subjective sense.[14] Fault may be one of the relevant factors, but this is not *necessarily* so. Indeed, in certain areas, the mere breach of provisions will be considered

[6] Case C-314/09.

[7] Case C-568/08.

[8] See especially S Treumer, 'Basis and Conditions for a Damages Claim for Breach of the EU Public Procurement Rules', ch 8 below.

[9] Case C-314/09.

[10] Including where the application of that legislation rests on a presumption that the contracting authority is at fault.

[11] Treumer, n 8 above at page 160 below.

[12] Ibid.

[13] See for instance P Craig, *EU Administrative Law* (Oxford, 2006) chs 20 and 21.

[14] See eg R *v Secretary of State, Ex p Factortame Ltd (No 5)* [2000] 1 AC 524, 541: 'It was also clear from the cases that it is not necessary to establish fault or negligence on the part of the member state going beyond what is relevant to show a sufficiently serious breach.' (per Lord Slynn).

to be sufficiently serious. This standard is thus flexible and nuanced enough to comply with the approach of the court in *Strabag*.

In the second decision, *Spijker*,[15] there was a difference in emphasis, as the court grounded its decision firmly on the principle of procedural autonomy, holding that 'it is for the internal legal order of each Member State, once those conditions have been complied with, to determine the criteria on the basis of which the damage arising from an infringement of EU law on the award of public contracts must be determined and estimated, provided the principles of equivalence and effectiveness are complied with.'[16] This approach of course allows for greater room for manoeuvre on the part of the Member States in terms of the elements of the test of liability for damages.

Despite the increasing importance of the European framework, national law is – as explained above – still of primary importance. It is for this reason that this publication commences with a number of national reports reviewing the way in which Member States from different legal traditions have dealt with this issue. Over and above the individual country reports in leading jurisdictions, it also includes a number of integrated comparative studies which identify transversal themes, and examines how these are dealt with across the region. These comparative studies deal in turn with issues such as the legal basis and the architecture for damages claims, the test of causation, including thorny issues such as loss of a chance and contributory negligence, the concepts of loss and quantum, as well as access to justice and procedural issues.

The European aspects of this area are complemented by an international perspective, with chapters presenting the approach of US law, as well as the remedies provision in the UNCITRAL Model Law on Procurement.

[15] Case C-568/08.
[16] Ibid, para 92.

I

National Perspectives

1

Damages for Breach of Public Procurement Law

A French Perspective

NICOLAS GABAYET

I. BASIS AND CONDITIONS FOR A DAMAGES CLAIM

A. Basis of Claim

THE RULES APPLYING to damages for breach of EC public procurement law are the same as those applicable generally for the liability of public authorities before an administrative court. It could be considered as a 'public tort law', and probably best translated as public bodies' extra-contractual liability ('la responsabilité extra-contractuelle des personnes publiques').[1] This liability is not specific to breaches of public procurement procedure.

The general liability rules apply broadly to all French administrative law. Thus, when a public body commits a fault that entails a wrong, any citizen harmed by the wrongful action can trigger the liability of the public authority, as far as the citizen can prove that a fault has been committed by the public body and that there is a causal link between the fault and the loss.[2]

As any illegality committed by a public body is considered a fault by French administrative courts, the extra-contractual liability of public bodies is likely to be sought in case of a breach of public procurement rules. As a consequence,

I would like to thank Professor François Lichère, Sophie Boyron and Duncan Fairgrieve for their comments on a previous version of this text.

[1] There is also a distinction between what is called 'responsabilité pour faute': liability in cases when a fault has been committed by public bodies, and 'responsabilité sans faute à prouver': public bodies can be held liable for an activity that entails a wrong, no matter if a fault has been committed or not. The claimant does not have to prove that a fault has been committed. 'Responsabilité sans faute à prouver' is not applicable to breach of public procurement rules.

[2] See generally, D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford, Oxford University Press, 2003).

the damages claim sought by the claimant is a remedy in tort, not in contract. Indeed, there is no doctrine of *implied contract*[3] in French law.

The impact of the EC remedies Directives on the award of damages for breach of public procurement procedures remains quite limited in France. The Council Directive 89/665 on Review Procedures, which was implemented in France by the Law of 4 January 1992, and entailed the creation of a new interim remedy in case of a breach of EC or French public procurement rules during the tendering period. As a consequence, a bidder can go before a single judge in the administrative court, and request a stay of the awarding procedure and the annulment of all unlawful decisions made so far. This remedy is called '*référé précontractuel*'. However, whereas the Council Directive 89/665 explicitly provided for the award of damages in this context, the French Parliament did not need to include this within the new procedure, since the remedy has existed in France for decades.[4] This explains why the power to grant damages has not been included in the '*référé précontractuel*'.

The Law of 7 May 2009 (N° 2009-515) implementing the Council Directive 2007/66/CE, introduces the new summary remedy of '*référé contractuel*', which is actionable by an unsuccessful bidder after the contract has been made so as to request inter alia its annulment, but the new action does not provide for the award of damages. However, in the *Tropic Travaux* case,[5] the Conseil d'Etat created a procedure empowering administrative judges to annul the tendering procedure or compensate the unsuccessful bidder for the loss caused by the unlawfulness of the tendering procedure. Therefore, an unsuccessful tenderer can claim for damages either through a standard damages claim or through a *Tropic Travaux* claim.

B. Pre-conditions of Successful Claim

To be awarded damages, the claimant simply has to prove three things: a breach of a procurement provision during the tendering procedure, loss and a causal link between the two. There is nothing else – such as negligence, intention or breach of a duty of care – to prove. Thus, the conditions for claim in France are quite favourable to the claimant especially since any breach of the law (illegality) is deemed a fault under French administrative law.

[3] Under the implied contracts theory, originated from the *Blackpool and Flyde Aero Club* case, when bidders have submitted an offer to a public body according to public procurement contracts procedures, the latter has a pre-contractual duty to fairly act toward the former.

[4] CE, 19 February 1930, *Société Est et Sud Piketty*, *Lebon* p 196.

[5] CE, Ass, 16 July 2007, *Tropic travaux signalisation Guadeloupe*, RFDA 2007, p 696, concl Casas.

II. ISSUES OF CAUSATION

A. Introduction

When the awarding public authority has committed a fault in the tendering procedure, any unsuccessful bidder may be granted damages provided that he can prove *the loss of a chance* of being awarded the contract. However, the extent of the compensation depends on the probability of a successful outcome in the tender. Thus, when the bidder can only prove that 'he would not have been devoid of a chance to win the contract'[6] had the procedure been lawful, he will be compensated only for the loss of bid costs. If he can prove that he would have had a serious chance of winning the contract, the tenderer will be awarded compensation recovering the loss of potential profit. On the contrary, if the unsuccessful bidder is unable to prove, at the very least, that had the procedure been lawful, he 'would not have been devoid of a chance of winning the contract', then his claim for compensation will fail. These three solutions are now well established and the courts often state all three when an unsuccessful bidder claims compensation.[7]

B. Compensation for the Loss of Bid Costs

The unsuccessful tenderer can be compensated for the loss of bid costs when he can prove that he would not have been devoid of a chance of winning the contract. This possibility is quite favourable to the claimant. Indeed, the notion of 'not having been devoid of a chance of winning the contract' does not mean that had the tendering procedure been lawful, the bidder would have had a *good* chance of being awarded the contract. On the contrary, had the company been able to prove its serious chances of winning the contract, it would be entitled to claim for loss of profits in addition to bid costs. When the bidding company does not make such a claim, it knows that it did not have strong chances of being awarded the contract. Although the loss is then fairly indeterminate, the claimant will be awarded damages as long as there was more than a 0 per cent chance

[6] 'N'était pas dépourvu de toute chance de remporter le contrat'.

[7] CE, 18 June 2003, *Groupement d'entreprises solidaires ETPO Guadeloupe, Sté Biwater, Sté Aqua TP*, *AJDA* 2003, p 1676; CE, 11 September 2006, *Commune de Saran*, req no 257545; CE, 29 December 2006, *Sté Bertele SNC*, req no 273783:

> When a tendering company claims compensation for the loss resulting from its unlawful eviction from the tendering procedure, it is up to the judge to check whether the company was devoid of any chance to win the contract or not; if the company was devoid of any chance, then it will not have any right to compensation; if the company was not devoid of any chance to win the contract, it should have a right to compensation for the bid costs; then the judge has to check if the company had a serious chance to be awarded the contract. Should it be so, the company has a right to compensation for the loss of profit, necessarily including the bid costs, which would then not to be compensated separately, unless it is otherwise provided by the contract.