

Procurement Lawyers' Association; EU case law update; 26 January 2010

Presented by:

Matthew Hall, McGuireWoods
LLP, Brussels

mhall@mcguirewoods.com

www.mcguirewoods.com

Cases to cover:

- Case C-196/08 Acoset SpA (ECJ; 15 October 2009) – PPP issues
- Case C-91/08 Wall AG (AG Bot; 27 October 2009) – change issues
- Case C-376/08 Serrantoni Srl (ECJ; 23 December 2009) – linked undertakings
- Case C-573/07 Sea Srl (ECJ; 10 September 2009) – Teckal rules

Case C-196/08 Acoset SpA (ECJ; 15 October 2009) - PPP issues

- Reference from Italy re management of an “integrated water service”
- New semi-public company plus management contract
- 49% stake in company to be disposed of
- Attempt to cancel procedure

Case C-196/08 Acoset SpA (ECJ; 15 October 2009) - PPP issues

- Assumed to be a service concession outside the rules (water tariff for 30 years); works incidental
- Breach to award direct (Teckal)
- One overall tender permissible
- No change to contract or corporate purpose allowed
- 2008 Communication approved
- NB: possible new EU legislation on concessions during 2010

Case C-91/08 Wall AG (AG Bot; 27 October 2009) – change issues

- Reference from Germany re exploitation and maintenance of public toilets in Frankfurt
- 16 year service concession signed, Wall a subcontractor
- Wall's bid to provide advertising and cubicles rejected
- Frankfurt accepted the change, in accordance with agreement

Case C-91/08 Wall AG (AG Bot; 27 October 2009) – change issues

- pressetext: as a rule, substitution of a contractual partner is a change to an essential term, unless provided for, such as by provision for sub-contracting
- But, here no legitimate justification and therefore new contract and breach of transparency principle
- No obligation to impose an injunction/termination under national law
- NB: see also Case C-250/07 Commission v Greece (ECJ; 4 June 2009)

Case C-376/08 Serrantoni Srl (ECJ; 23 December 2009) – linked undertakings

- Reference from Italy re works contract for district registry offices in Milan
- Value “considerably lower than the thresholds”
- Bidders Serrantoni and its “permanent consortium” excluded on basis of absolute prohibition under Italian law

Case C-376/08 Serrantoni Srl (ECJ; 23 December 2009) – linked undertakings

- Italian court to decide on “cross-border” interest
- Automatic exclusion of this type of consortium breaches equal treatment principle
- Automatic exclusion breaches proportionality principle
- NB: Case C-538/07 Assitur Srl (ECJ; 19 May 2009)

Case C-573/07 Sea Srl (ECJ; 10 September 2009) – Teckal rules

- Reference from Italy re a waste disposal contract entered into by Comune di Ponte Nossa (CPN)
- Sea the incumbent and following termination new contract awarded directly to Setco
- Setco previously 100% owned by various municipalities, with a majority shareholder
- Prior to award, CPN also became minority shareholder and Setco's statutes changed

Case C-573/07 Sea Srl (ECJ; 10 September 2009) – Teckal rules

- Type of contract not clear but irrelevant anyway
- Possible private shareholding irrelevant unless at award there is “real prospect” of this “in the short term”
- Subsequent private shareholding however outside Teckal rules
- Confirms joint control enough
- Confirms need decisive influence over strategic objectives and significant decisions

THE END

Business Department

Capital Markets | Energy & Utilities | Health Care | International | Land Use & Environmental
Mergers & Acquisitions, Securities & Corporate Services | Real Estate Transactions | Tax & Employee Benefits | Technology &
Business

Litigation Department

Antitrust & Trade Regulation | Business & Securities Litigation | Complex Commercial Litigation | Financial Services Litigation |
Government Investigations
IP Litigation/Patents | Labor & Employment | Product & Consumer Litigation | Restructuring & Insolvency | Toxic Torts &
Environmental Litigation

ATLANTA • BALTIMORE • CHARLOTTE • CHARLOTTESVILLE • CHICAGO • JACKSONVILLE • LOS ANGELES
NEW YORK • NORFOLK • PITTSBURGH • RALEIGH • RICHMOND • TYSONS CORNER • WASHINGTON, D.C. • WILMINGTON

ALMATY, KAZAKHSTAN | BRUSSELS, BELGIUM | LONDON, UNITED KINGDOM

www.mcguirewoods.com

© 2009 McGuireWoods LLP