



Transparency in public procurement

R (The Law Society) v Legal Services Commission [2007] EWCA Civ 1264

By Javan Herberg and Mark Vinall

The Court of Appeal has ruled that the Unified Contract for Civil Legal Aid is in breach of EU public procurement law because it gives the Legal Services Commission too wide a power to amend its terms. The judgment raises important points about whether unilateral variation powers in public sector contracts violate the principle of transparency.

The Unified Contract was introduced by the Legal Services Commission in April 2007 as part of the Government's legal aid reform programme. Solicitors' firms wishing to do Community Legal Service work had to sign it. The contract was subject to the Public Contracts Regulations 2006, which required the Commission to "act in a transparent way".

The contract gave the Commission a very wide amendment power. The Court (Lord Phillips CJ, Wall and Lawrence Collins LJJ) described it as "a virtually unlimited power of amendment, subject only to some limited procedural conditions. Indeed, the power to amend is better characterised as a power to rewrite the contract". The Court held that this power did not comply with the principle of transparency: it would create commercial uncertainty which might deter potential contractors. However, the Court accepted that "changes may become necessary or desirable during the life of a contract; and that a contracting authority may need to reserve a power to amend terms". Some amendment powers are therefore permissible, but at present it is not clear how wide such powers can lawfully be. The Court did not need to decide "what level of detail

(substantive or procedural) the principle of transparency would require, or when amendments create a “new contract” which would engage the public procurement process”. These questions will have to be decided in future cases.

In the meantime, those drafting amendment powers in public contracts may wish to err on the side of caution. The impact of the judgment on the Unified Contract, and for civil and criminal legal aid, similarly remains to be seen.

John Howell QC, Javan Herberg and Mark Vinall acted for The Law Society and Dexter Montague & Partners, instructed by Peter Jacobsen at Bircham Dyson Bell LLP.