

The Legal Director
Corporate Legal Team
Legal Services Commission

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PTJ/Y052757

Date
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Dear Madam

The Unified Contract

- 1 We write on behalf of The Law Society.
- 2 In its judgment on November 29th 2007, in *R (The Law Society) v Legal Services Commission* and *Dexter Montague & Partners v Legal Services Commission* [2007] EWCA Civ 1264, the Court of Appeal held that the rights of the Commission to amend the Unified Contract referred to in Clause 13.1 of that Contract (other than the amendments permitted under Clause 13.2) were incompatible with regulation 4(3) of the Public Contracts Regulations 2006, and, insofar as those rights are applicable to technical specifications, regulations 9(2), 9(4) and 9(7) of those Regulations as well as the EU law principle of transparency. It follows that those rights are equally incompatible with articles 2, 23.1, 23.2, and 23.3(b) of Directive 2004/18/EC to which those provisions of the 2006 Regulations seek to give effect.
- 3 The purpose of this letter is to ascertain what the Legal Services Commission takes to be its obligations in the light of the judgment.
- 4 As you will no doubt be aware, article 10 of the Treaty establishing the European Community requires member states to take all appropriate measures to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. As a public authority, that obligation is one imposed on the Commission. Article 10 requires the Commission to nullify the unlawful consequences of a breach of community law: see eg *Case C-6/90 Francovich and Bonifaci v Italy* [1991] ECR I-5357 at [36]. This includes rescinding any measure found to be incompatible with European law and to make reparation for any unlawful consequences which may have ensued: see eg *Case 6/60 Humblet v Belgium* [1960] ECR 559.
- 5 It follows that normally a contract concluded in breach of the public procurement directives must be brought to an end: see *Case C-503/04 Commission v Germany* (2007) July 18th. The failure to do so in that case involved a breach of article 228.1 of the Treaty, which provides that, if the Court of Justice finds that a Member State has

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- failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice. But it can make no difference to the Commission's obligations, given its obligations under article 10 of the Treaty, that in this case the judgment was given by the Court of Appeal rather than the Court of Justice
- 6 It may make a difference, however, that in this case there was no competition for the award of any Unified Contract. In these circumstances it may be sufficient that the rights of amendment found to be incompatible with European law and any amendment purportedly made pursuant to them are recognised to be of no effect or that the Commission nullifies them, as well as paying damages for any loss occasioned by them. What the Commission cannot lawfully do is to seek to take advantage of, or to continue to rely on, rights under the Unified Contract that have been found to be incompatible with its obligations under European law.
 - 7 This means that the changes to the Unified Contract introduced in October this year should in practice be treated as being of no effect and that those planned to be introduced in relation to mental health on January 1st 2008 cannot go ahead. In practice the effect is likely to be that the Unified Contract will continue after October 1st 2007 on the substantive terms (including terms as to remuneration) which had effect initially.
 - 8 We would be grateful to know if the Commission agrees with this analysis and these conclusions and, if not, why not and what the Commission contends that the consequences of the judgment of the Court of Appeal are and the reasons for its view.
 - 9 As you will appreciate it is important in the public interest that the position is clarified at an early date. The Commission's stance will have consequences for those firms whom the Law Society represents and their clients as well as the European Commission in relation to potential infraction proceedings. We have noted from the Legal Services Commission's press release after the judgment in the Court of Appeal that it claimed to have "anticipated" the outcome of the proceedings in the Court of Appeal. Accordingly we assume that the Commission had already taken advice on the consequences of that outcome before the judgment was delivered. Accordingly we would be grateful for the Commission's response by no later than 4pm this Friday, December 7th 2007.
 - 10 We agreed in a telephone conversation yesterday afternoon between your Mr Catling and our Mr Jacobsen that it would be sensible for representatives of the Commission and the Law Society to meet with us to discuss the way forward in order to see if agreement can be reached. The Law Society is happy to do that and we will telephone to arrange a time for that meeting to take place next week.

Yours faithfully

Bircham Dyson Bell LLP

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