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UNIPLEX (UK) LTD V NHS BUSINESS SERVICES AUTHORITY

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Uniplex (UK) Ltd v NHS Business Services Authority

Uniplex is the sole distributor in that Member State of haemostats manufactured by Gelita Medical BV, a company established in the Netherlands.

On 26 March 2007 NHS launched a restricted tendering procedure for the conclusion of a framework agreement for the supply of haemostats. A notice to that effect was published in the Official Journal of the European Union on 28 March 2007.

On 13 June 2007, NHS issued an invitation to tender to five suppliers, including Uniplex, which had expressed interest in that framework agreement. Tenders were to be submitted by 19 July 2007.

The award criteria, with the relevant weighting to be given to each, set out in the tendering documentation sent to the tenderers, were as follows: price and other cost-effectiveness factors (30%); quality and clinical acceptability (30%); product support and training (20%); delivery performance and capability (10%); product range/development (5%); and environmental/sustainability (5%).

Uniplex submitted its tender on 18 July 2007.

On 22 November 2007, NHS sent Uniplex a letter indicating that it had decided to conclude a framework agreement with three tenderers. Uniplex was notified that it would not be awarded a framework agreement, as it had obtained the lowest marks of the five tenderers which had been invited to submit, and which had submitted, bids. That letter set out the award criteria, with the corresponding weighting, and indicated the names of the successful tenderers, the range of the successful scores and Uniplex's evaluated score.

According to that letter, the range of the successful scores was between 905.5 and 971.5, whereas Uniplex had obtained a score of 568.

The letter of 22 November 2007 also informed Uniplex of its right to challenge the decision to conclude the framework agreement in question, of the mandatory 10-day standstill period that would apply from the date of notification of that decision to conclusion of the framework agreement, and of Uniplex's entitlement to seek an additional debriefing.

Uniplex requested a debriefing by email dated 23 November 2007.

NHS replied on 13 December 2007 by providing details of its approach to the evaluation of the award criteria as to characteristics and relative advantages of the successful tenders in relation to Uniplex's tender.

That letter stated, inter alia, first, that Uniplex had been given a score of zero for price and other cost effectiveness factors because it had submitted its list prices. All the other tenderers had offered discounts on their list prices.

Secondly, with respect to the delivery performance and capability criterion, all tenderers which were new to the haemostats market in the United Kingdom received a score of zero for the sub-criterion relating to customer base in the United Kingdom.

On 28 January 2008, Uniplex sent NHS a letter before action alleging a number of breaches of the 2006 Regulations. Uniplex claimed in that letter that time did not start to run for the bringing of proceedings until 13 December 2007. Uniplex requested a reply from NHS by 13 February 2008, but added that if NHS took the view that time did not run from that date, it should reply by 6 February 2008.

By letter dated 11 February 2008, NHS notified Uniplex that there had been a change of circumstances. It had been discovered that the bid of Assut (UK) Ltd was non-compliant and that B Braun UK Ltd, which had been placed fourth

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under the evaluation of tenders, had been awarded a position on the framework agreement in place of Assut (UK) Ltd.

NHS responded to Uniplex's letter before action by letter dated 13 February 2008, denying the various allegations made by Uniplex. In that letter, NHS also asserted, as a preliminary point, that the events giving rise to Uniplex's complaints had occurred no later than 22 November 2007, which was the date on which the decision not to include Uniplex in the framework agreement had been communicated to it. NHS asserted that 22 November 2007 was the latest date from which time began to run for the purposes of Regulation 47(7)(b) of the 2006 Regulations.

Uniplex responded by letter on 26 February 2008. In that letter, it continued to maintain that the period for bringing proceedings under the 2006 Regulations did not begin to run until 13 December 2007.

On 12 March 2008, Uniplex brought proceedings before the High Court of Justice (England and Wales), Queen's Bench Division, inter alia seeking, first, a declaration that NHS had breached the applicable public procurement rules and, second, damages.

The High Court of Justice (England and Wales), Queen's Bench Division, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

"Where an economic operator is challenging in national proceedings the award of a framework agreement by a contracting authority following a public procurement exercise in which he was a tenderer and which was required to be conducted in accordance with Directive 2004/18/EC (and applicable implementing national provisions), and is in those proceedings seeking declarations and damages for breach of applicable public procurement provisions as regards that exercise and award:

(a) is a national provision such as Regulation 47(7)(b) of the Public Contracts Regulations 2006 which states that those proceedings are to be brought promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose, unless the Court considers that there is good reason for extending the period, to be interpreted, in light of Directive 89/665/EEC, Articles 1 and 2, and the Community-law principle of equivalence and the Community-law requirement for effective legal protection, and/or the principle of effectiveness, and having regard to any other relevant principles of EC law, as conferring an individual and unconditional right upon the tenderer against the contracting authority such that the time for the bringing of proceedings challenging such a tender exercise and award starts running as from the date when the tenderer knew or ought to have known that the procurement procedure and award infringed EC public procurement law or as from the date of breach of the applicable public procurement provisions; and

(b) in either event how is a national court then to apply (i) any requirement for proceedings to be brought promptly and (ii) any discretion as to extending the national limitation period for the bringing of such proceedings?"

The questions referred

The first question

By its first question, the national court asks, in essence, whether Article 1 of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain

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damages for the infringement of those rules starts to run from the date of the infringement of those rules or from the date on which the claimant knew, or ought to have known, of that infringement.

The fact that a candidate or tenderer learns that its application or tender has been rejected does not place it in a position effectively to bring proceedings. Such information is insufficient to enable the candidate or tenderer to establish whether there has been any illegality which might form the subject-matter of proceedings.

It is only once a concerned candidate or tenderer has been informed of the reasons for its elimination from the public procurement procedure that it may come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings.

It follows that the objective laid down in Article 1(1) of Directive 89/665 of guaranteeing effective procedures for review of infringements of the provisions applicable in the field of public procurement can be realised only if the periods laid down for bringing such proceedings start to run only from the date on which the claimant knew, or ought to have known, of the alleged infringement of those.

The answer to the first question accordingly is that Article 1(1) of Directive 89/665 requires that the period for bringing proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules should start to run from the date on which the claimant knew, or ought to have known, of that infringement.

The second question

The second question consists of two parts. The first concerns the interpretation of Directive 89/665 in relation to a requirement under national law that proceedings be brought promptly. The second relates to the effects which that directive has on the discretion conferred on the national court to extend periods within which proceedings must be brought.

The first part of the second question

By the first part of the second question, the national court asks, in essence, whether Directive 89/665 is to be interpreted as precluding a provision, such as Regulation 47(7)(b) of the 2006 Regulations, which requires that proceedings be brought promptly.

The objective of rapidity pursued by Directive 89/665 must be achieved in national law in compliance with the requirements of legal certainty. To that end, Member States have an obligation to establish a system of limitation periods that is sufficiently precise, clear and foreseeable to enable individuals to ascertain their rights and obligations. Furthermore, the objective of rapidity pursued by Directive 89/665 does not permit Member States to disregard the principle of effectiveness, under which the detailed methods for the application of national limitation periods must not render impossible or excessively difficult the exercise of any rights which the person concerned derives from Community law, a principle which underlies the objective of effective review proceedings laid down in Article 1(1) of that Directive.

As the Advocate General observed, a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665.

It follows that the answer to the first part of the second

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question is that Article 1(1) of Directive 89/665 precludes a national provision, such as that at issue in the main proceedings, which allows a national court to dismiss, as being out of time, proceedings seeking to have an infringement of the public procurement rules established or to obtain damages for the infringement of those rules on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly.

The second part of the second question

By the second part of the second question, the national court asks, in essence, which effects follow from Directive 89/665 in respect of the discretion conferred on the national court to extend periods within which proceedings must be brought.

In the case of national provisions transposing a Directive, national courts are bound to interpret national law, so far as possible, in the light of the wording and purpose of the directive concerned in order to achieve the result sought by that directive

In the present case, it is for the national court, as far as is at all possible, to interpret the domestic provisions establishing the limitation period in a manner which accords with the objective of Directive 89/665.

In order to satisfy the requirements in the answer given to the first question, the national court dealing with the case must, as far as is at all possible, interpret the national provisions governing the limitation period in such a way as to ensure that that period begins to run only from the date on which the claimant knew, or ought to have known, of the infringement of the rules applicable to the public procurement procedure in question.

If the national provisions at issue do not lend themselves to such an interpretation, that court is bound, in exercise of the discretion conferred on it, to extend the period for bringing proceedings in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules.

In any event, if the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying those provisions, in order to apply Community law fully and to protect the rights conferred thereby on individuals.

The answer to the second part of the second question is accordingly that Directive 89/665 requires the national court, by virtue of the discretion conferred on it, to extend the limitation period in such a manner as to ensure that the claimant has a period equivalent to that which it would have had if the period provided for by the applicable national legislation had run from the date on which the claimant knew, or ought to have known, of the infringement of the public procurement rules. If the national provisions do not lend themselves to an interpretation which accords with Directive 89/665, the national court must refrain from applying them, in order to apply Community law fully and to protect the rights conferred thereby on individuals.