

In the matter of: **REGISTRY TRUST LIMITED AND THE PUBLIC PROCUREMENT LAW IMPLICATIONS OF THE CONTRACT WITH THE LORD CHANCELLOR'S DEPARTMENT**

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**OPINION**

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1. I am asked to consider the procurement law implications of an arrangement whereby certain County Court and other records supplied by the Lord Chancellor's Department ("LCD") are kept and processed by the Registry Trust Limited ("RTL") for the use, principally, of credit reporting agencies. The particular issue that arises is whether there is any requirement under the EU procurement provisions that the contract be tendered, particularly in the light of proposed extensions to the scope of the provision, which might go beyond the variations contemplated by the present agreement.
2. A Report, dated April 2003, produced by the Court Service entitled "Register of County Court Judgments" ("the Report") discusses possible future developments of the Register including the possible need to put the keeping of the Register out to tender if its scope is significantly expanded.

**Principal Conclusion**

3. There is no requirement that the provision of the services supplied by the Registry Trust need be put out to tender under the EU public procurement regime, contrary to the conclusions drawn in the Report. The contract is subject to three possible exclusions from the relevant provisions.

## **The issues**

4. Before considering the relevant procurement law as it applies to the substance of the contract, it is useful to address the particular relevance, if any, of the fact that the contract was entered into before the Public Services Regulations came into force, but that significant changes to the contract are now envisaged. There is no doubt that old contracts, even those for an indefinite period, are not subject to any requirement of retendering (as discussed by the European Court in, for example, Case C-337/98 *Commission v France* [2000] ECR I-8377).
5. There is some doubt as to whether a varied contract, where those variations go beyond those that might expressly be provided for in a contract, can proceed without advertisement if those variations are introduced after the Regulations came into force. In the present contract paragraph 8 permits fairly extensive variations to the contract. Nevertheless most practitioners would caution against introducing very substantial changes without advertising either the whole contract, or the additional requirements, if they can reasonably be the subject of a stand alone contract. Prudence would of course suggest that where there is doubt as to the applicability of the rules tendering is advisable, even if there is a good arguable case that they do not apply.
6. For the reasons set out below it is my opinion that there is, nevertheless, no requirement that the contract be tendered (or retendered). In that case no distinction need be made between the original requirements or the new requirements. In considering the relevant law I have considered both Directive 92/50/EEC (“the Directive”) and The Public Service Contracts Regulations 1993 (“the Regulations”) which implement the Directive. The Directive is directly effective on the LCD, and the Regulations would, in any dispute, be interpreted consistently with the Directive where possible.

## **The contract is an exempt “concession contract”**

7. There has been considerable discussion of concession contracts and public procurement. In order to understand the exemption for services concessions, and what they are, it is useful to

start with the provisions for “works” rather than “services”. Concession contracts are defined in the Works Directive (93/37/EEC) as follows:

“‘public works concession’ is a contract of the same type as that indicated in (a) except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment” (Article 1(d))

Article 1(a), referred to above, provides as follows:

“‘public works contracts’ are contracts for pecuniary interest concluded in writing between a contractor and a contracting authority [as defined] which have as their object either the execution, or both the execution and design, of works....”

8. A typical works concession contract is the construction and operation of a light railway, whereby the contractor receives the proceeds of the sale of tickets. Works contracts and works concession contracts are both subject to tendering requirements under the Regulations (albeit the provisions differ between the two).
9. In the present case the Registry Trust is being employed not to supply a service to the LCD (although the LCD does receive a service: paragraph 4(n)) but a service to the public. Its revenues are derived exclusively from the public rather than the LCD. In respect of the major “consideration” under the contract, the supply of data by the courts to the Trust, the LCD is not *procuring* but *supplying*. The contract is a classic concession contract, and may be compared, at least in every relevant respect, with the services concession contract which was the subject of Case C-331/92 *Gestion Hotelera* [1994] ECR I-1343, and concerned the upgrading of a hotel, and the installation and operation of a casino (in Gran Canaria).
10. Turning to the Services Directive, contracts covered are described as follows.

“public service contracts shall mean contracts for pecuniary interest concluded in writing between a service provider and a contracting authority [subject to exclusions]” (Article 1(a)).

11. There is no mention of services concessions in the Directive, but it is evident from the examination of the Works Directive above, which distinguishes ordinary contracts from concession contracts, that concessions are not included within the Services Directive. However Regulation 1 of the Regulations sets out the position clearly. Public service contracts specifically *exclude* those

“under which the consideration given by the contracting authority consists of or includes the right to exploit the provision of the services” (exclusion (e) of the definition in Regulation 1).

12. This inconsistency between the treatment of concessions under the Works and the Services Directives has been the subject of much comment by practitioners. It is understood to have arisen as a consequence of a compromise offered to the French to protect certain of their service industries from the effect of the Directive.

13. Since all or part of the remuneration earned by RGT is recovered from exploitation of the information supplied by the courts, the contract is quite clearly a services concession contract exempt from the effect of the Services Directive and Regulations.

**The contract is for services which do not have to be tendered, since they fall within Annex IB (the Directive) or Part B (the Regulations, Schedule 1).**

14. While the above “exemption” would be sufficient to take the contract outside the scope of the EU tendering regime there is a further relevant exclusion. The 21<sup>st</sup> Recital to the Directive sets out that only contracts potentially subject to trade between Member States are fully covered by the Directive. An attempt to distinguish the two categories, namely those that might affect trade and those that may not, is made in an Annex, Annex IA defining contracts that are fully covered, and Annex IB covering those that do not have to be tendered, but have to be notified to the Commission (amongst other minor requirements). These categories only approximate to the distinction of principle, but the categories and not the principle determine the proper interpretation of the Directive (and Regulations: Part A and Part B of Schedule 1).

15. The Annex is based on UN trade statistics classifications (available on [www.un.org](http://www.un.org)). Category 21 of Annex 1B/Part B covers “Legal services CPC reference 861”. The relevant CPC series is the “CPCprov” (this is inferred from the fact that it is the only classification that corresponds to the numbering system in the Directive). Category 861 of the CPCprov covers legal advisory work, broadly defined, but *not* the kind of work carried out by RTL.
16. It is frequently difficult to be sure which category any particular contract should be allocated to. The substance of the contract is the “keeping of a register” for the benefit of the public. That is not included in Part A/Annex IA, although there is a category “Computer and related services” – close examination shows that that is restricted to software services and data processing itself. It does not cover a contract in which a service of substance other than processing is supplied, but which inevitably requires data processing for its fulfilment. It *would* cover a contract for the provision of data processing if the Register were to be kept by the LCD and they were to outsource the data processing required.
17. Contracts that do not appear in any of the specified categories are included in Category 27 “Other services” and appear in Part B/Annex IB. It thus follows that if the contract were not excluded as a concession it would be excluded from the tendering requirements as a Part B/Annex IB contract.

**The contract may be excluded for lack of “pecuniary interest” or other “consideration”.**

18. The third exemption that applies arises out of the definition of relevant contracts being restricted in the Directive to contracts for “pecuniary interest”. My understanding (though I have no expert knowledge of the relevant continental law) is that this definition arose because of the different and wider understanding of a “contract” in continental law than English law (as I understand it continental contracts are not limited to those in which consideration is to be found), so that this term conveniently distinguishes those contracts to which the Directive ought to apply from those to which it is inappropriate. The

regulations, however, give a much wider definition, applying to “a contract in writing for consideration (whatever the nature of the consideration)...” (Regulation 2(1)).

19. It is not clear, as a matter of law, whether the attempt to widen the definition in the Regulations is *ultra vires*. The relevant primary legislation is the European Communities Act 1972, which contains a general provision relating to the implementation of all European legislation (Section 2). However, that difficult question, consideration of which would hardly assist the resolution of the current issues, can be avoided for the following two reasons.
20. First, as discussed above the relevant Regulation itself *expressly* excludes contracts “under which the consideration given by the contracting authority *consists of or includes* the right to exploit the provision of the services” (exclusion (e) of the definition in Regulation 1(1): emphasis added).
21. Secondly, in a recent case (Case C-399/98 *Comune di Milano* 12 July 2001) the ECJ considered whether a situation in which the Comune did not pay for works, but enabled the contractor to set-off the cost against a development tax was “pecuniary interest” (it was). Importantly for present purposes, however, the Court held “It must be pointed out that the pecuniary nature of the contract relates to the consideration *due from the public authority concerned in return for* the execution of the works...” (paragraph 77: emphasis added).
22. In the present case it would require an exceptional use of language to argue that the consideration offered by the LCD (provision of the data) is “in return for” the supply of data to the public, whether pecuniary or otherwise, it is an essential *input* only. The *payment* is due from the public not the public authority, and is thus not consideration “due from the public authority”. Indeed the report stresses that the service “operates at no cost to the public purse” (page 14), even though there are other apparently inconsistent references to “optimal cost to the taxpayer” (page 5); “responsibility to show it is getting best value from its contractual relations” (page 6) and “Nor is it clear if the current arrangements offer best value to the taxpayer (page 8). It is not clear what these last three references can possibly refer to – if it means best value to the Register’s users it

could have said so, but they are in any event a distinct group from what is usually meant by “the taxpayer”.

23. In conclusion, therefore, I can see no grounds on which the contract for the provision of the Register need be tendered under the public procurement regime. I would be happy to provide any further help that might be required in respect of any of the above conclusions.

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**OPINION**

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