Client Alert.

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UK Public Procurement Law Digest: Removing Mandatory Suspensions

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Since the new UK public procurement remedies regime came into force, we have been waiting for examples of how the courts will deal with the new mandatory suspension remedy. We now have the answer. Two new court decisions illustrate the way in which UK courts will deal with applications by contracting authorities to remove the automatic mandatory suspension that applies to a public procurement process when a challenge is made by an aggrieved bidder.

As we have previously reported[1], under the new Remedies Regime[2] which came into force in December 2009, where an aggrieved bidder in a public procurement process challenges a contracting authority's decision by formally initiating legal proceedings before the award of contract, the contracting authority is now legally obliged to suspend its procurement process. This automatic suspension of the procurement process essentially turns the tables by requiring the contracting authority facing the legal challenge to make an application for an interim order to lift the automatic suspension if it wishes to continue the procurement.

We had speculated[3] that the courts would follow established approaches to injunction applications; that the primary effect of the new remedies regime would be procedural (*i.e.*, to shift the burden of making an application from the aggrieved bidder to the authority); and that the tests which the courts will apply in assessing the applications will, for all intents and purposes, remain the same. This has been borne out. Thus, all bidders must bear in mind that they will still need to deal with the tests of "serious issue to be tried" and "balance of convenience", if they are to make the most of the automatic suspension by keeping the suspension in place.

WHAT ARE THESE CASES?

The cases are *Exel Europe Limited v. University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 ("*Exel Europe*") and *Indigo Services (UK) Limited v. The Colchester Institute Corporation* ("*Indigo*").

Both of these cases involve decisions by the English High Court. In both cases, the High Court granted the application by the contracting authority to lift the automatic suspension that prevented the authority from entering into a contract with its chosen supplier. In each case, the automatic suspension applied following the initiation of proceedings by an unsuccessful tenderer. Also, in both cases, the High Court treated the application as though it were an application for an injunction by the disappointed tenderer and applied standard *American Cyanamid* test to the merits of the injunction. In doing so, the Court concluded that the balance of prejudice pointed in favour of lifting the suspension and allowing the authority to enter into the contract.

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1 See our January 2010 update: New Remedies Regime New Public Procurement Remedies in the UK

2 The new Remedies Regime came into force on 20 December 2009, implemented by the Public Contracts (Amendment) Regulations 2009 and the Utilities Contracts (Amendment) Regulations 2009. These two Regulations, which amend the Public Contracts Regulations 2006 ("PCR") and the Utilities Contracts Regulations 2006 ("UCR") respectively, implement Directive 2007/66/EC of 11 December 2007.

3 See our May 2010 update: How will an application for an injunction made during an on-going procurement process be determined?

WHY ARE THESE CASES IMPORTANT?

These are the first cases to come to light under the new Remedies Regime which introduced the remedy of mandatory suspension for the first time. As a reminder:

- if a losing bidder commences legal proceedings in respect of a contracting authority's award decision, the contracting authority is not allowed to proceed with the contract award (Regulation 47G(1) of the PCR);
- the authority may apply to the High Court for an order lifting the mandatory suspension (Regulation 47H(1)(a) of the PCR);
- the court may, on the application of the authority, lift the automatic suspension and in considering whether to do so (Regulation 47H(2) of the PCR):
    - the court must consider whether, if the mandatory suspension were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and
    - if the court considers that it would not be appropriate to make such an interim order, it will then make an order lifting the mandatory suspension.

In both of these cases, the process set out above was followed. In making its decision on whether to grant an order lifting the mandatory suspension, the High Court has followed the line which we predicted in our previous update[4] and applied the two stage test set out in *American Cyanamid v. Ethicon* [1975] AC 396. In brief, under the *American Cyanamid* tests applied where an application for an interim injunction is made, the Court will first consider whether or not there is a serious issue to be tried, and then where the balance of convenience between the parties lies (*i.e.*, would it hurt the claimant more if the defendant is allowed to carry on with its affairs pending a full trial than it would hurt the defendant if it is prevented from carrying on with its affairs pending a full trial?). The second limb of the test – *i.e.*, the question of the balance of convenience – usually equates to whether damages would be an adequate remedy for the claimant.

At least now authorities and tenderers are aware of the tests that the courts will apply in these circumstances. Fortunately, the High Court has used a tried and trusted set of standards rather than take the opportunity to come up with a new set of tests. This approach is to be applauded as it gives parties more certainty.

As a practical matter, therefore, although the introduction of the mandatory suspension remedy in December 2009 was a new innovation, the main effect that it might have is simply to slow down, rather than to stop completely, any affected procurements. Although an aggrieved tenderer has a lower initial hurdle to surmount in order to institute the mandatory suspension, the test for whether the suspension ought to become permanent, or the procurement stopped, remains the same.

Overall, these two cases demonstrate the difficulty faced by aggrieved tenderers wishing to claim that there has been a breach of the procurement rules. Courts generally consider that there is a valid public interest in a contracting authority proceeding with a proposed contract award for public services in the absence of a very strong substantive case that there has been a procedural irregularity. If anything, the case underlines the importance of the claimant being able to establish a clear and demonstrable breach of the rules rather than simply a different approach to the subjective application of the project evaluation criteria.

[4] See our May 2010 update: How will an application for an injunction made during an on-going procurement process be determined?

WHAT HAPPENED IN THESE CASES?

The *Exel Europe* decision

The University Hospitals Coventry and Warwickshire NHS Trust ("UHCW") managed and operated a collaborative procurement hub called the Healthcare Purchasing Consortium ("HPC"). HPC was run by UHCW on behalf of itself and about 40 other NHS trusts in the West Midlands. In 2009, UHCW decided to set up a new framework agreement for goods and services and to transfer to a third party the management and operation of HPC. Over 4 months in 2009, UHCW held discussions with a company called HCA as a result of which HCA obtained various data about HPC.

In March 2010, UHCW published a contract notice in the *Official Journal* for a 5 year framework agreement for a single operator to whom the responsibilities of HPC would be transferred. Exel Europe and HCA were among the five bidders.

However, in May 2010, Exel Europe withdrew from the tender process expressing concerns about the inadequacy of the information provided and the stability of the proposed commercial structure. No other tenderers apart from HCA submitted tenders. In July 2010, UHCW wrote to Exel Europe informing it that HCA was the preferred bidder.

Exel Europe did nothing for a number of weeks but, after some correspondence in September 2010, it eventually initiated proceedings in October 2010 alleging 6 particular breaches of the procurement rules. It was this which caused the Regulation 47G(1) mandatory suspension to apply. UHCW applied for a court order to lift the automatic suspension. The court applied the *American Cyanamid* tests set out above.

The first question discussed was whether there was a serious question to be tried; and the second whether the balance of convenience lies in granting or refusing interlocutory relief. Interestingly, the court noted that, in the context of public procurement cases, if a claim by the aggrieved tenderer is so weak as not to amount to a serious claim, it becomes almost inevitable that, in most cases, the balance of convenience is unlikely to favour granting or maintaining the relief and therefore the court is almost bound to lift the automatic suspension.

Serious Issue

The court noted that there is a public interest in securing valid and properly executed procurements although this does not necessarily have an overriding impact, especially perhaps where there is clear proof of a material breach of the process. In relation to whether there is a serious case to be tried, the court noted that Exel Europe had been slow to bring part of its case (*i.e*. that based upon the lack of information in the original tender documents) and therefore was technically out-of-time from bringing proceedings because Exel Europe obviously knew about the alleged deficiencies at the time it withdrew from the tender.

The High Court also drew an adverse conclusion from the fact that Exel Europe had chosen to drop out of the tender process. Authorities owe a duty to economic operators although not necessarily to those who drop out before a deficiency in the procurement process occurs.

Continuing with its analysis, the High Court concluded that the only serious issue to be tried related to Exel Europe's complaint about the pre-tender negotiations between UHCW and HCA which the court felt gave rise to a suspicion of potential irregularity. As for the other complaints raised by Exel Europe, the Court did not consider them as serious issues.

Balance of Convenience

Moving on to the balance of convenience test and the adequacy of damages as a remedy, the court took into account the importance of the public interest in the efficient and economic running of the National Health Service. The defendant had established an urgency for the procurement exercise to go ahead since its existing arrangements had expired and were only being kept alive on a temporary basis. If Exel Europe had been successful then there would had to have been a new tender process which would have meant a further delay of more than six months before a contract would have been awarded. On the other hand. the High Court was also satisfied that damages would have been an adequate remedy for Exel Europe in this case and would have been available based on Exel Europe's lost opportunity. Exel Europe failed to demonstrate that it would have behaved or had the opportunity to behave differently in the absence of the breach and the court was satisfied that damages based on the percentage chance of Exel Europe winning the contract would be readily assessable by accounting experts.

Accordingly, as a result of these factors and the weakness of at least 5 out of 6 Exel Europe complaints, the court decided to grant the authority's application under Regulation 47H(1) and lift the suspension on the authority's ability to enter into a framework agreement.

The *Indigo* Decision

In May 2010, the Colchester Institute (the "Institute"), an educational vocational college, advertised in the *Official Journal* a contract for the provision of cleaning services. The contract was to run for 3 years from 1 January 2011. The incumbent cleaning services provider at one of the two sites when new services were sought was Indigo Services ("Indigo"), whose contract expired on 31 December 2010.

Indigo and four other bidders were pre-qualified and were invited to tender for the contract. The Institute evaluated the bids and placed Indigo in third position and proposed to award the contract to the first place bidder, Emprise Service. As is required, the Institute notified all bidders and adhered to the 10-day standstill period between notification and contract award.

On the last day of the standstill period, Indigo commenced proceedings in the High Court challenging the procurement decision. As a result of Regulation 47G(1), the Institute was hit with the automatic suspension and applied to the Court under Regulation 47H to lift the automatic suspension. The High Court took the same approach as in the Excel Europe decision and applied the *American Cyanamid* tests.

Serious Issue

Initially, the Court considered whether there was a serious issue to be tried. Indigo had raised a number of points regarding the initial advert and the information given to bidders. The court noted that these claims had not been brought in time since the time for bringing an action starts from when the claimant knew of the alleged infringement.

Indigo also complained about the scoring methodology set out in the invitation to tender and how it would be applied. Indigo claimed that the explanations given were opaque and too imprecise to avoid subjective and potentially arbitrary marking. Indigo also complained that some of the marks applied to its tender diverged from those advertised.

The Institute did not dispute these allegations but argued that the marking applied had no effect as Indigo would still have lost the tender even had the markers not departed from the scoring methodology and applied fractional marks where only

whole numbers had previously been advertised. The High Court concluded that there may well be a serious issue to be tried and that, on the basis of the information before it, it could not conclude whether Indigo had suffered material loss of opportunity to obtain the contract. On balance, the Court did not support the Institute's argument that there was no causative link between the alleged breach and Indigo losing the bid. But crucially, the Court felt that even if there was a causative link, there would only be a low likelihood of that making any material difference in the overall scoring.

Balance of Convenience

More importantly, the High Court examined the balance of convenience argument and, in particular, the question of whether damages would be an adequate remedy. In this case, the Court noted that quantification of the profits that could have been earned by Indigo over the period of the new contract would be difficult and imprecise to calculate, and so damages would not necessarily be an adequate remedy for Indigo.

However, the court gave greater weight to the impact of a further standstill on the Institute. Continuing the suspension would deprive the Institute of cleaning services and force closure of the site which would affect the interests of students and the wider public interest in the provision of higher education in the region.

Accordingly, the High Court came to the decision that the prejudicial impact on the Institute and the wider public of continuing the standstill far outweighed any prejudice which may be shown toward Indigo by lifting the standstill and relegating Indigo to a claim for damages. The Court also noted that, even though it could not discount the possibility that there was a serious issue to be tried, the Court did not consider that the chance of loss was great enough to justify ordering some form of re-run of the tender.

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