Client Alert.

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UK Public Procurement Law Digest: How Will an Application for Injunction Made During an On-going Procurement Process be Determined?

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Court confirms approach to applications for injunctions made during an on-going procurement process

Under the public procurement remedies regime, a public contract procurement process must be suspended if an aggrieved bidder brings a legal challenge; and the contracting authority will have to apply for a Court order to lift this automatic suspension. The test which the Courts will apply in determining such an application will be no different from the test that the Courts have traditionally applied in assessing applications for interim injunctions made by aggrieved bidders under the old regime. Whilst the tables appears to have been turned in bidders' favour by the new remedies regime, bidders still need to make sure that their complaints have a sound legal foundation in order to derive a meaningful benefit from the new automatic suspension remedy.

WHAT ARE THE CASES?

The cases are *B2Net v. HM Treasury (sued as Buying Solutions)* [2010] EWHC 51 (QB) ("***B2Net***") and *APCOA Parking (UK) Ltd v. Westminster City Council* [2010] EWHC 943 (QB) ("***APCOA***"). Both of these cases are decisions made by the English High Court and, in both of these cases, an aggrieved bidder brought proceedings in an attempt to suspend an on-going public procurement process.

WHY ARE THESE CASES IMPORTANT?

These two cases provide useful guidance and a reminder as to how similar applications are likely to be determined under the new remedies regime which came into force in December 2009 (the new remedies regime which implements Directive 2007/66/EC in the UK is discussed in greater detail in our previous update[1]).

Under English law, applications for interim injunctions are decided in accordance with case law centred around the two-stage test set out in *American Cyanamid v. Ethicon* [1975] AC 396 ("***American Cyanamid***"). In brief, 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 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 – the question of the balance of convenience – usually equates to whether damages would be an adequate remedy for the claimant.

[1] See our January 2010 update New Remedies Regime New Public Procurement Remedies in the UK .

In the context of public procurement challenges, applications for interim injunctions were typically brought by an aggrieved bidder who was disqualified at an early stage in the procurement process before the final award, and sought to suspend the on-going public procurement process pending a full trial. Under the "old" remedies regime, an interim injunction was seen as the only really meaningful remedy (albeit a difficult one to obtain) available to an aggrieved bidder, due largely to the fact that, once the contracting authority and the winning bidder had concluded the contract or framework agreement in question, the Court could only award damages if a claimant managed to establish a breach of the procurement rules.

Under the new regime, the position has changed considerably, and not only is the set-aside of an illegally awarded contract available as a potential remedy[2], but also, where an aggrieved bidder challenges a contracting authority's decision by formally initiating legal proceedings, a contracting authority is now legally obliged to suspend its procurement process. This automatic suspension of the procurement process essentially turns the tables around 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[3].

Now, in deciding whether to grant an interim order to lift the automatic suspension, the Court "*must consider whether, if* [the rule regarding automatic suspension] *were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract*"[4]. When the answer to this hypothetical question is 'No' (*i.e.*, it would have been inappropriate to grant an interim injunction under the old regime), the Court can grant an interim order to lift the automatic suspension, but when the answer is 'Yes' (*i.e.*, it would have been appropriate to grant an interim injunction under the old regime), the Court cannot grant an interim order to lift the automatic suspension.

This means that, insofar as the new automatic suspension of public procurement is concerned, the primary effect of the new remedies regime is to shift the burden of making an application from the aggrieved bidder to the authority, and that the tests which the Court will apply in assessing the applications will, to all intents and purposes, remain the same. 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.

It is for these reasons that cases such as *B2Net* and *APCOA* will continue to be relevant even in respect of those public procurement challenges that will be subject to the new remedies regime. Whilst aggrieved bidders might well have a much easier time suspending an on-going procurement process (because all they have to do is to start legal proceedings), the way in which the Court decides whether or not to lift such a suspension hasn't changed from the previous regime – a sound legal foundation in a claim remains an essential prerequisite to the holy grail of effective remedy in flawed public procurements.

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[2] See Regulation 47J(2)(a) of the Public Contracts Regulations 2006, as amended (also see Regulation 45J(2)(a) of Regulation 47(9) of the Utilities Contracts Regulations 2006, as amended).

[3] See Regulation 47G of the Public Contracts Regulations 2006, as amended (also see Regulation 45G of the Utilities Contracts Regulations 2006, as amended).

[4] See Regulation 47H(2) of the Public Contracts Regulations 2006, as amended (also see Regulation 45H(2) of the Utilities Contracts Regulations 2006, as amended).

WHAT HAPPENED IN THESE CASES?

The *B2Net* decision

In July 2009, Buying Solutions[5] published a contract notice in the Official Journal of the European Union ("**OJEU**"), advertising an opportunity to tender in respect of a framework contract for the provision of certain IT equipment and services. The procurement consisted of three separate lots, and Lot 2 was for IT infrastructure hardware. B2Net was a storage integrator who provided, amongst other things, services to reduce its clients' operating costs and simplify the operational management of data storage environments.

B2Net submitted its duly completed Pre-Qualification Questionnaire ("**PQQ**"), hoping to win its place in the framework for Lot 2. In October 2009, Buying Solutions announced the results of the PQQ assessment, and it turned out that B2Net was unsuccessful. Following a debriefing, B2Net learnt that it was disqualified from Lot 2 by a very narrow margin because of the way in which some of the questions in the PQQ were framed and the way in which B2Net had responded to those questions. Dissatisfied by Buying Solution's explanation, B2Net launched proceedings against Buying Solutions and made an application for an interim injunction.

Applying the existing case laws developed around *American Cyanamid*, the Court first considered whether or not there was a serious issue to be tried. Based on the particular set of facts available, the Court was prepared to accept that there may be a serious issue to be tried, although it did not considered the merits of B2Net's case to be particularly strong. The Court then went on to consider how the balance of convenience test should be applied. Based on the facts, the Court had little difficulty in finding that damages would be an adequate remedy for B2Net, whereas the consequences of an interim injunction could not be adequately dealt with by way of cross-undertaking in damages. Accordingly, the Court dismissed B2Net's application for an interim junction.

The *APCOA* decision

In April 2009, Westminster City Council (the "**Council**") published a contract notice in the OJEU, advertising an opportunity to tender for contracts for parking enforcement and other related services. APCOA, a major provider of parking management and enforcement services, was one of the bidders. Having realised that it had conducted the procurement process unlawfully in a number of respects, the Council abandoned the first procurement process and initiated a second procurement process.

When it organised the second procurement process, the Council had, amongst other things, increased the qualifying threshold in respect of participating bidders' turnovers to a level which was beyond that which APCOA could achieve. In launching the proceedings and seeking an interim injunction to prevent the Council from awarding the contract to any other bidder, APCOA essentially argued that it was treated unfairly by the Council who increased the qualifying threshold of turnover, and that the Council was not entitled to abandon the first procurement in order to commence the second procurement.

[5] Buying Solutions (formerly known as OGC buying.solutions) is an executive agency of the Office of Government Commerce in HM Treasury. Buying Solutions essentially acts as buyer of goods and services on behalf of government departments and other public bodies to leverage economy of scale. See http://www.buyingsolutions.gov.uk/.

Noting that to grant an interim injunction in the circumstances of this particular case was tantamount to denying the Council its right to abandon a public procurement process (which was both a statutory right as well as a contractual right, as the relevant contract documents made it clear that the Council was entitled not to award the contract at all, and the Council was not committed to any course of action), the Court had little difficulty in concluding that there was no legal basis on which APCOA could found its complaint and therefore APCOA failed to satisfy the first hurdle of the test in *American Cyanamid*.

The Court also noted that APCOA failed to demonstrate why damages would not be an adequate remedy, commenting that whilst a "*flagship contract and the reputation kudos that would have been attached*" were not things that could be reflected in an award of damages, "*it is also difficult to envisage a form of injunctive relief that could do any better*". In the particular circumstances of the case, the Court clearly took the view that the balance of convenience clearly favoured the Council, who would suffer a much greater inconvenience from an interim injunction, having already been forced to arrange a six month extension of its existing contractual arrangements.

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