Legal Briefing

Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust

[2010] EWHC 3332 (TCC), Mr Justice Akenhead

This is the second case within one month to consider an application under Regulation 47H of the Public Contracts Regulations 1996, as amended by the Public Contracts (Amendment) Regulations 2009, better known as the Remedies Directive. Regulation 47G automatically suspends the award of a public contract when a claimant issues a claim form against the contracting authority during the standstill period and Regulation 47H sets out the criteria under which a Court may lift the automatic suspension under 47G(1).

In the first case, *Indigo Services v The Colchester Institute*, the Court held that in situations where a contracting authority applied to have the automatic suspension lifted, the usual American Cynamid guidelines applied. Here, in *Exel Europe v University Hospitals Coventry and Warwickshire NHS Trust*, Mr Justice Akenhead confirmed this approach and went further to consider how the courts should go about dealing with procurement processes which have been automatically suspended under the Regulations.

The Facts

In about 2009, University Hospitals Coventry and Warwickshire NHS Trust, the Defendant, decided to transfer their responsibility for managing and operating the Healthcare Purchasing Consortium ("HPC") by establishing a framework agreement with a single operator. The HPC is a collaborative procurement hub run by the Defendant on behalf of itself and some 40 NHS Trusts in West Midlands and elsewhere and provides a wide variety of medical services, equipment, medications and other medical related items.

In February 2010, it was resolved that a competitive public procurement process should be undertaken and the framework agreement should be established by no later than 30 September 2010. This date was significant as the agreements with all the current HPC subscribers expired on 31 March 2010. The Contract Notice was published on 11 March 2010. On 19 April 2010, five tenderers pre-qualified, including Exel Europe Ltd and HCA International Ltd.

From an early stage in the procurement process, Exel Europe believed that the information provided in the Invitation to Tender ("ITT") was insufficient for the restricted procedure which had been identified in the Contract Notice. As a result, Exel Europe eventually withdrew from the tender process on 28 May 2010. The only tenderer to submit a bid was HCA International. In due course the Defendant chose HCA International as its preferred bidder and notified Exel Europe on 15 July 2010.

Exel complained about the Defendant's lack of contact, lack of communication and lack of a response to its repeated requests regarding various issues. It ultimately issued its claim in the Technology and Construction Court on 28 September 2010, alleging six breaches of duty. On 29 October 2010, the Defendant applied to have the automatic suspension under Regulation 47G lifted.

The Issue

Do the principles with regard to interim injunctions as set out in the well-known case of *American Cyanamid Co v Ethican* apply to situations, such as this, where a contracting authority has made an application under Regulation 47G(1) of the Public Contracts Regulations 1996 (as amended) to bring an end to the automatic suspension such that it can enter into contract with its winning tenderer?

The Decision

Mr Justice Akenhead held that Regulation 47H means that: *"…the Court should go about the Cyanamid exercise in the way in which courts in this country have done for many years."* He found that the Regulations do not favour maintaining the prohibition on the contracting authority against entering into the contract in question.

Accordingly, the Judge applied the American Cyanamid principles. The first question to be answered is whether or not there is a serious question to be tried and the second question involves considering whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought. The governing principle in relation to the balance of convenience test is whether or not the claimant would be adequately compensated by an award of damages. The Judge went on to state:

> *"In reality, however, whether one adopts a strict Cyanamid approach or not probably matters little in many procurement cases. If the claim made by the tenderer was so weak as not to amount to a serious claim, it would be inevitable in most cases that the balance of convenience and discretion of the Court would militate against granting or maintaining the relief… the public interest can be taken into account on a consideration of the balance of convenience… However, that aspect of the public interest does not have, necessarily, an overriding impact."*

Here, Mr Justice Akenhead found that there was a serious issued to be tried only in respect of one of the six allegations advanced by Exel Europe. Exel Europe had complained about the pre-tender history as between the Defendant and HCA International. It alleged that the Defendant's discussions/negotiations with HCA International five months immediately prior to the open public procurement process gave them an unfair advantage, distorted competition or breached the principles of equal treatment and transparency. Mr Justice Akenhead found that this was the only serious issued to be tried and that the remaining five issues were at best weak.

With respect to the balance of convenience test, the Judge found that this was an appropriate case which required that public interest to be taken into account. He held that an important area of public interest is the efficient and economic running of the National Health Service and the procurement of medical goods, drugs, equipment and services. Here, the Defendant had clearly established an urgency for the procurement of this contract, as the existing agreements for the provision of the services had expired in March 2010. If the suspension was not lifted, a judgment would not likely be obtained before May or June 2011 at the earliest, thereby further jeopardising the services currently provided by the HPC.

In addition, the Judge was wholly satisfied that damages would be an adequate remedy. Accordingly, Mr Justice Akenhead found that the automatic suspension imposed by Regulation 47G of the Public Contracts Regulations, as amended, should be brought to an end, thereby allowing the Defendant to enter into an agreement with HCA International.

Comment

Mr Justice Akenhead's decision confirms the approach taken by the Court in the recent case of *Indigo Services v The Colchester Institute* that the *American Cyanamid* principles apply to applications made under Regulation 47H. Again, contracting authorities will take comfort in the fact that the threshold as to whether or not a tenderer can prevent the award of a contract still remains high.

In addition, those wishing to bring a claim against a contracting authority must be mindful of two further factors Mr Justice Akenhead considered when determining whether or not the issues raised by Exel Europe were "serious issues to be tried".

Firstly, the Judge pointed out that several of Exel Europe's claims may well be time barred. As it had dropped out of the tender process on 28 May 2010, some four months had elapsed before it commenced proceedings. Accordingly, any cause of action for matters about which Exel Europe had knowledge of or ought to have known about prior to 28 June 2010 will be time barred, as Regulation 47D provides that proceedings must be started promptly or in any event within three months. Therefore, its claim that the Defendant was in breach of the Regulations when it continued with the procurement process even though a lack of information and certainty had been provided to the tenderers would likely be time barred.

Secondly, Mr Justice Akenhead stated:

> *"If an economic operator drops out of the tendering process for good or bad reason, it is difficult to see that it suffers or risks suffering loss or damage as a result of any breach of duty occurring after it dropped out."*

He found that it was difficult to see that Exel Europe was a "service provider" in accordance with the definition under the Regulations, after it had dropped out. As it did not wish to be considered for the award of the contract, whether or not it is allowed to claim for a breach of duty after it had dropped out was arguable. Accordingly, a tenderer who withdraws from a public procurement process should carefully analyse its claims prior to commencing any proceedings.

Stacy Sinclair
December 2010