



LEGAL BRIEFING

Indigo Services (UK) Ltd v The Colchester Institute Corporation

[2010] EWHC 3237 (QB) (2010), David Donaldson QC

This case is the first to consider an application under the Regulation 47H of the Public Contracts Regulations 2006, as amended by the Public Contracts (Amendment) Regulations 2009, which now automatically suspends the award of a contract when a claimant issues a claim form during the standstill period. The intention of the Amendment Regulations 2009 was to implement the revised EU Remedies Directive (Directive 2007/66).

The Facts

In May 2010, Colchester advertised a contract in the EU Official Journal for the provision of cleaning services at its two campuses, Colchester and Braintree. The contract was for a period of three years from 1 January 2011 with optional annual extensions until 31 December 2015. Colchester's existing contract was with Indigo for the Colchester campus and expired on 31 December 2010.

Following the evaluation of five tenderers, Indigo placed third. Colchester announced the first place winner on 14 October 2010 and therefore the standstill period (the time during which Colchester was prohibited from signing the contract with the winner) expired on 25 October 2010, as required by Regulation 32A.

On the last day of the standstill period, Indigo commenced proceedings, challenging Colchester's procurement decision. In accordance with Regulation 47G, Colchester was therefore unable to enter into the contract with the winning tenderer. Colchester then applied to the Court to lift the automatic suspension as there was some urgency since a 30 day mobilisation period was required prior to the commencement of a new cleaning contract.

The Issue

Should the automatic suspension be lifted so as to permit Colchester to enter into contract with the winning tenderer? And if so, on what grounds?

The Decision

The Court held that although this application was made by the contracting authority, the position is the same as if the unsuccessful tenderer were seeking an interim injunction and therefore the usual *American Cyanamid* guidelines applied. To summarise, these guidelines are:

- (i) whether there is a serious question to be tried;
- (ii) whether damages are an adequate remedy for either side;
- (iii) whether the balance of convenience lies in favour of granting or refusing the injunction;
and
- (iv) whether there are any special factors.

After having discounted several complaints relating to the pre-qualification process and the unlawfulness of the Contract Notice, the Court noted that the main substance of Indigo's case was that Colchester did not apply the scoring methodology as described in the Invitation to Tender. Colchester did not disagree; however, it said that this had no

causative effect and that Indigo would still have lost even if the scoring methodology had been strictly applied.

Based on the evidence put forward, the Court held that it was not possible to conclude that there was plainly a lack of causative effect and held that there was *"a serious issue to be tried as to whether Indigo has suffered, or is threatened by, loss of a more than fanciful chance of obtaining the contract."* However, the Court considered that:

- (i) Colchesters's case on causation would be more likely than not to be accepted at trial; and
- (ii) even if it failed there was only a low likelihood that the Court would assess that loss of chance as much more than the minimum threshold level of non-fanciful.

However, to deprive Colchester of a contract for cleaning services would force closure of the campus because of the impact of the health and safety regulations. Therefore, the prejudicial impact on Colchester and the wider public of continuing the standstill far outweighed any prejudice Indigo may be caused by lifting the standstill and relegating it to a claim in damages.

The Court held that *"the balance of irremediable prejudice points clearly in favour of lifting the standstill..."* Even if the prejudice caused had not been as clear, it was found that the limited prospects of an injunction being ordered at trial would have made it inappropriate to do anything else but terminate the standstill.

Although Indigo had passed the threshold of having a serious issue regarding its cause of action, he held that that does not mean that a court would grant an injunction at trial. Therefore the Court, for the first time, lifted the automatic suspension thereby allowing Colchester to enter into a contract with the winning tenderer.

Comment

This is the first case to consider an application under the Regulation 47H of the Public Contracts Regulations 2006 to lift the automatic standstill. 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. This is particularly because the Court rejected the argument raised by the tenderer that the new legislation provided some kind of presumption in favour of maintaining the injunction. The Court will apply the same test as if the unsuccessful tenderer were seeking an interim injunction. A significant factor here which the Court took into account was the potential harm to the general public if the tender process and therefore the services had been delayed by a continuation of the suspension.

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December 2010
