

No Right for Bidders to Negotiate in Fantasystan

By Ben Rayment
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BFS Group Ltd (trading as 3663 First for Food Service) v Secretary of State for Defence; Purple Foodservice Limited¹

The Claimant (3663)'s main challenge was to the decision by an agency of the Ministry of Defence, the Defence Logistics Organisation (DLO), to award the 2nd Defendant (Purple) a 5 year contract for the provision of food and bottled water to the armed forces. 3663 was the incumbent supplier. The contract award was made under the 1995 Regulations pursuant to the negotiated procedure.² As part of the assessment process bidders were required to make a presentation on how they would meet the supply requirements for a fictitious operation, operation "Fantasystan".

With the post-decision debrief on 15 May 2006 and a judgment given on 23 June, this case demonstrates the speed with which the High Court is capable of dealing with procurement cases.

One of the key issues raised was whether the use of the negotiated procedure actually required DLO to negotiate with 3663. As the judge said, "Quite what right the use of the negotiated procedure confers on the contracting authority and the bidder is not evident from the 1995 Regulations." Equally he noted there is no authority on the issue. The New Regulations are scarcely more informative.

3663 contended that advertising that a contract was to be awarded under the negotiated procedure was "a clear and unequivocal representation that negotiations are envisaged" and that, under such a procedure, "one does not expect tenderers to start off with their best and final offers, or that that one will, in the event necessarily be the one that is most likely to recommend itself to the contracting authority. It also followed, according to 3663 that "the contracting authority must negotiate with all those admitted to the negotiation stage of the procurement, even if it is believed that they will not be successful".

Looking at the matter "entirely generally" the judge took the view that "what the negotiated procedure contemplates is that, subject to maintaining transparency and the even-handed treatment of

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¹ [2006] EWHC 1513 (Ch), 23 June 2006, Blackburne J. Those searching for the case electronically should note that the claimant was originally misreported as 'BSF'.

² Public Supply Contracts Regulations 1995, since repealed and replaced with effect from 31 January 2006 by the Public Contracts Regulations 2006 ("the New Regulations")

other bidders, and subject also to the terms of the particular tender invitation, the contracting authority is entitled, but not bound, to negotiate with the bidders, for example with a view to eliminating some of the bidders or, which is much the same thing, with a view to selecting a preferred bidder to whom the contract may ultimately be awarded." He said, "I find it hard to see how adoption of the negotiated procedure confers on the bidder any right to put forward reviewed or improved terms once his tender has been submitted." On the facts a change in procedure which might have implied that negotiations would be held with each of the bidders was not sufficient to give rise to a "right" to negotiate. It is an open question, however, whether in different circumstances this would necessarily be the case.

As to the selection criteria and their application, the English Court expressly endorsed the dicta made in the Irish High Court in *SIAC v Mayo* as to the "wide discretion" in this regard enjoyed by contracting authorities.³

On causation it was contended by the defendants that 3663 was so far behind in the contest for the new contract that even if there had been no breaches it would still not have been selected. However, the Court did not accept that submission and considered that if 3663 could have established the relevant breaches it must have been an open question whether it could show that in that event it would have had a material prospect of winning the contract. The Courts do not always adopt such a generous approach to this stage of the analysis.

All the breaches alleged were outside the 3 month backstop period for bringing proceedings under regulation 29(4)(b) of the 1995 Regulations. The Court concluded however that there was a sufficiently arguable case for establishing that there was a good reason for extending time in relation to certain alleged breaches as these were not known to 3663 until the debrief meeting. In relation to other breaches the fact that 3663 may not have realised that the DLO's decision not to conduct any negotiations constituted breaches of the 1995 Regulations (assuming that they did) did not avail it for the purposes of establishing a good reason for delay in bringing a challenge based on those alleged breaches.⁴

In considering the 'balance of justice' as to whether to grant interim relief, the Court accepted that damages were not an adequate remedy if 3663 were to establish at trial that it was entitled to the award of the contract. However, in exercising its discretion, which was "far from easy", the Court declined to grant the interim injunction sought. The Court took into account the following factors:

- The weakness in the allegations of breach of duty.
- The fact that in relation to the claimed failures to negotiate action should have been taken at an earlier stage.
- The risk that if an injunction was granted there would be a break in the supply chain before the new contract could be awarded. Interestingly, although 3663 volunteered to continue supplies until the issues could be resolved at trial the Court was not convinced that a fixed-term public supply contract could be extended in this way for a potentially open ended period.
- The interests of Purple. If an interim injunction was granted but not maintained at trial and even assuming that despite the delay Purple could take up and fulfil the new contract formidable difficulties might arise in quantifying just what its losses arising as a result of any delay.

Paul Lasok QC and Jennifer Skilbeck represented the claimant and Michael Bowsher represented the 2nd defendant.

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³ [2003] Eur LR 1, at paras 78-79.

⁴ relying on observations made by the CA in *Jobsin.co.uk plc v Department of Health* [2001] EuLR 685, at paras 33-38.