

PROCUREMENT LAW

EXEL EUROPE LTD v UNIVERSITY HOSPITALS COVENTRY & WARWICKSHIRE NHS TRUST [2010] EWHC 3332 (TCC)

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Exel Europe is one of two recent judgments, the other being *The Halo Trust v Secretary of State for International Development* [2011] EWHC 87 (TCC), where the High Court (Akenhead J in both cases) has applied a robust American Cyanamid analysis in exercising its discretion under regulation 47H(1)(a) of the Public Contracts Regulations 2006 (“the Regulations”) to lift an automatic suspension of contract award arising by virtue of regulation 47G. The Exel judgment suggests that the merits of the underlying claim and the public interest will both be important factors that the court will take into account in assessing the balance of convenience on an application to lift an automatic suspension.

FACTUAL BACKGROUND

The case concerned the procurement of a single operator framework agreement in order to transfer the responsibility for managing and operating the Healthcare Purchasing Consortium (“HPC”), a trading arm of University Hospitals Coventry and Warwickshire NHS Trust (“UCHW”) – (“the HPC transfer procurement”). HPC was a collaborative procurement hub run by UCHW on behalf of itself and a number of other NHS Trusts, it was funded by all of the supporting NHS Trusts and provided its subscribers with medical services, equipment, medications and other medical related items at their request. Around 2009, UCHW decided that it needed to divest itself of the responsibility for running HPC. The main reason for this decision was UCHW’s desire to achieve “Foundation Trust status”. In order to obtain approval for such status, UCHW had to develop an integrated business plan focused on the essential goods and services that it would be required to provide under the terms of its authorization from the relevant regulator: the running of HPC fell outside of the scope of these essential

services. Further, UCHW took the view that maintaining the efficient running of HPC required additional investment staff and technology, which UCHW was ill equipped to make in light of its savings target for 2010/11.

While UCHW ultimately decided to run a competitive tender to appoint a new operator for HPC, at some point in 2009, it held discussions with HCA International Ltd ("HCA") – a subsidiary of a US company with substantial experience in medical procurement – about the possibility of HCA taking over the business of running HPC. These discussions saw UCHW exchange certain information with HCA about such matters as the staff, pensions and other running costs of HPC. HCA was later a tenderer in the challenged procurement. How far these discussions went was a matter in dispute at the hearing before Akenhead J; UCHW was adamant that there was never any "done deal" between itself and HCA in relation to the running of HPC.

UCHW published an OJEU Contract Notice for the HPC transfer procurement on 11 March 2010; an accelerated restricted procedure was adopted. The OJEU Notice stated that UCHW was procuring such transfer on behalf of itself and a number of other (listed) confirmed participant health authorities, but that the framework would be open to other health authorities and private sector businesses wishing to join in future. The contracts between HPC and its subscriber health authorities terminated on 31 March 2010, but 38 subscribers decided to remain with HPC on a temporary stopgap basis while the procurement was completed.

The challenger, Exel, ran the "NHS Supply Chain", a large NHS logistics body and a competitor of HPC. It was one of five tenderers - along with HCA - that pre-qualified for the HPC transfer procurement and was invited to tender on 19 April 2010.

On 12 May 2010, while the ITT remained open, Exel wrote a letter to UCHW complaining of insufficient information in the ITT and insufficient time allowed to enable it to submit a detailed and fully priced tender response. Exel requested a substantial amount of further information from UCHW, indicating that it expected other tenderers to have similar problems responding to the ITT, unless one bidder had been given information beyond what was contained in the ITT: Exel raised concerns that a deal may have already been done between UCHW and HCA in relation to the outcome of the procurement. On 21 May 2010, UCHW made the further information (regarding HPC employment and salary details)

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requested by Exel available to all tenderers and extended the period for response to ITT until 28 May 2010; UCHW also responded substantively to Exel's letter, denying that any deal had ever been done with HCA.

On 28 May 2010, Exel withdrew from the HPC transfer procurement tender process. In the event, the only bidder for the HPC transfer procurement was HCA; its tender response was marked, received a score 77.2% and was decided to be the most economically advantageous tender. HCA was appointed as UCHW's "preferred bidder"; Exel was informed of this by letter dated 15 July 2010. There followed correspondence between the parties in August and September 2010, where Exel made assorted complaints about the running of the procurement and requested further information and UCHW denied any allegations of impropriety and provided some of the information requested. It became evident in the course of this correspondence that UCHW intended to award the contract for the running of HPC to Health Trust-Europe LLP ("HTE") "*a newly created entity within the same group as HCA*".

EXEL'S CHALLENGE TO THE HPC TRANSFER PROCUREMENT

On 28 September 2010, Exel issued a claim against UCHW in the TCC for breach of the Public Contracts Regulation 2006 ("the Regulations"). Six breaches were pleaded, briefly, they were:

1. Failure by UCHW to establish the most economically advantageous tender because only one tender had been received and was accepted;
2. Breach in continuing the procurement notwithstanding Exel's complaints about use of the accelerated restricted procedure and a lack of information thereunder;
3. Unauthorised negotiations with HCA – both (1) before the procurement kicked off and (2) post-award negotiations with the successful tenders – in breach of the principles of transparency and non-discrimination;
4. Appointment of a party who did not submit a tender – i.e. HTE;
5. Appointment of an unlawful central purchasing body in breach of the fundamental requirements of procurement law – this challenge was based on the fact that HPC would be run as a central purchasing body;
6. Failure to identify contracting parties, insofar as the ITT indicated the HPC framework would be open to other parties.

Exel sought a declaration that the HPC transfer procurement had been unlawful and should be rerun, and orders preventing UCHW from awarding the contract to HCA or any related company. Since the HPC transfer procurement was conducted under the Regulations as amended by the Public Contracts (Amendment) Regulations 2009, and Exel issued and served its claim upon UCHW before any contract had yet been concluded with HCA or HTE, the automatic suspension provision in regulation 47G operated so prevent UCHW from entering into a contract.

UCHW applied to the court for an order that the claim be struck out or summary judgment entered upon it in UCHW's favour and an order under regulation 47H(1) lifting the automatic suspension. The application under regulation 47H was heard by Akenhead J on 1 and 2 December 2010.

THE JUDGMENT OF AKENHEAD J

In the second ever judgment of its kind, following the judgment of David Donaldson QC in *Indigo v Colchester Institute* [2010] EWHC 3237 (QB), Akenhead J granted UCHW's application to lift the automatic suspension.

Application of the American Cyanamid principles under regulations 47H(1)(a)

Akenhead J had little difficulty holding that the court's regulation 47H(1)(a) discretion to lift the automatic suspension imposed by regulation 47G was to be exercised in accordance with the *American Cyanamid* principles applicable on an ordinary application for an interim injunction. In essence, *American Cyanamid* principles state that an interim injunction ought only to be given where (1) the claim raises a "serious issue to be tried" and (2) the balance of convenience lies in favour of awarding the interim injunction.

Akenhead J noted that regulation 47H(2) said "*in the clearest terms*" that the court asked to make an order under regulation 47H(1)(a) ought to approach the question of interim relief "*as if the statutory suspension in regulation 47G(1) were not applicable*" (paragraph 28). He found it "*quite clear*" that, prior to the introduction of regulation 47G, the question of whether or not an injunction preventing contract award was granted to an unsuccessful tenderer was approached on *American Cyanamid* principles (paragraph 27). The application of *American Cyanamid* was also accepted in the *Indigo* case.

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As in the *Indigo* case, Akenhead J considered and rejected arguments that the existence of regulation 47G weights the regulation 47H(1)(a) discretion in favour of maintaining the prohibition on entering into a contract. He did not find such arguments to be bolstered by a compliant interpretation with the Remedies Directive 2007/66/EC, noting that Article 5 of that Directive states that a court “*may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences would exceed their benefits*”; he saw no inconsistency between the application *American Cyanamid* principles and the Remedies Directive (paragraph 29).

Akenhead J expressly stated that the strength of a claim and the public interest are both factors affecting the court’s assessment of the balance of convenience (paragraph 30).

Serious issue to be tried

The judgment is robust in its assessment of whether Exel’s claim raised any serious issue to be tried. Akenhead J indicated from the outset that any claims which were evidently time barred – because Exel knew or ought to have known of the alleged infringement of the Regulations more than three months before the claim was brought (see on the limitation point *Uniplex* [2010] PTSR 1377 and *Sita* [2010] EWHC 680 (Ch) - raised no serious issue to be tried. He found that the limitation point disposed of two of breaches of the Regulations alleged by Exel - regarding the continuation of accelerated procurement despite a lack of information and the failure to identify contracting parties in the tender documentations - as both of these breaches arose and were known about prior to 28 June 2010, more than three months before Exel brought its claim (paragraph 34).

Akenhead J also doubted whether the complaint about UCHW’s failure to establish the most economically advantageous tender could give rise to a serious issue to be tried. He could see “*no obvious reason why a single tender which is compliant with the Invitation to Tender cannot fulfill*” the tender criteria and be acceptable to a contracting authority (paragraph 37). The judge also had some difficulty in accepting that Exel could raise this breach of duty owed to it by UCHW under regulation 47A when Exel had already dropped out of the procurement process by the time that the decision to award was made and so was no longer an “economic operator” for the purposes of the Regulations (paragraph 35). He stressed that this did not prevent Exel from claiming in respect of infringements of the Regulations that occurred while Exel was still involved in the procurement but were only discovered after Exel had dropped out (paragraph 36).

Similarly Exel's complaint that the contract was to be awarded to HTE, a company that had not actually tendered for it, was not considered a strong one. Akenhead J took a commercial approach, noting that companies often formed special purpose vehicles to perform a given contract and that was, in essence, what HCA had sought to achieve with the creation of HTE (paragraph 41). The complaint that the effect of the HPC transfer procurement was to form an unlawful central purchasing body was also considered weak – the judge could not see that the contract documentation available to him would see HPC operated as such a body within the definition given in regulation 2.

Of all the claims raised by Exel only the claim relating to unauthorized negotiations with HCA – both prior to the start of procurement and after the decision to award – were held to be reasonably arguable. Akenhead J indicated that the court simply could not determine the issues at this stage *“and, indeed, it would be inappropriate to do so particularly in circumstances where there has not yet been full disclosure of documents in the continuing litigation”* (paragraph 38). As noted above, the other complaints were held either to give rise to no serious issues or to be, at best, weak.

The balance of convenience

In considering the balance of convenience, the judge took in to account:

- (1) Exel's relatively weak case of liability;
- (2) the public interest in the efficient and economic running of the NHS and, in particular, the fact that continuation of the automatic suspension and of existing arrangements for UCHW to operate the HPC on the stopgap basis pending a full trial may cause subscribers to drop out of HPC leading to its demise or to the *“intolerance of unaffordable expense by the remaining subscribers”* either of which the NHS could ill afford during the current round of government cuts;
- (3) the fact that UCHW's inability to divest itself of the running of HTC were the suspension to be continued would jeopardise its gaining Foundation Trust status which was good for UCHW and its patients; and
- (4) the fact that damages were an adequate reedy for Exel – notwithstanding the possibility that they may be insubstantial (*“the damages will be whatever they will be”*) and/or difficult to quantify (paragraph 48).

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For those reasons, Akenhead J allowed the application and lifted the automatic suspension on UCHW's award of the HPC transfer contract.

COMMENT

The judgment is of note as the most detailed rejection to date of arguments that *American Cyanamid* is no longer the applicable test in light of the automatic suspension on the award decision introduced into the amended Regulations. Although the automatic suspension ensures a standstill period until a case can be considered by the Court, claimants hoping for any additional strengthening of their position in these circumstances will be disappointed. Indeed it is striking that in the first three cases to which the new automatic suspension applied (*Indigo*, *Exel* and *Halo Trust*) the Court in each case discharged the effect of that suspension on orthodox *Cyanamid* grounds.

Limitations points also featured strongly in the judgment demonstrating yet again the importance that claimants must not sit on their hands as soon as they have relevant knowledge of a claim.

It is also clear that an extremely experienced trial Judge took a relatively robust view on the question as to the adequacy of damages. The fact that a Court may have to assess damages on the basis of a loss of a chance does not make those damages "inadequate".

Of considerable practical interest is the willingness of the Court to make orders for early disclosure in respect of issues such as pre and post tender negotiations in order to inform the question of whether or not there was a serious issue to be tried. Inevitably there is likely to be an asymmetry of information in relation to such matters between the parties. It may be that such applications will become more frequent before the hearing of Regulation 47H applications although 'fishing expeditions' will no doubt not be encouraged.

On Regulation 47H applications the defendant is in the slightly odd position of having to go first to make the application to discharge the automatic suspension, including having to deal with such issues as to why there is no serious issue to be tried before that issue has formally been "opened" in detail by the claimant as would be the case in a normal interim injunction application.

It is clear that the procedures to be followed on these applications will evolve and indeed at an initial hearing Coulson J raised with Counsel the desirability of developing a protocol to ensure such applications are dealt with efficiently and with the appropriate degree of urgency. No doubt that suggestion if taken up will be warmly welcomed by practitioners.

Michael Bowsher QC and Ben Rayment appeared on behalf of the Contracting Authority that was successful in obtaining the lifting of the automatic suspension.