



Automatic suspension hearings – bar raised slightly higher for challengers to maintain an automatic suspension?

In the latest of a series of automatic suspension cases, the Court has allowed the public purchaser to proceed with the contract.

Further to our *Should I stay or Should I go?* briefings on automatic suspensions where we commented that challengers may feel increasingly confident on the prospect of upholding an automatic stay, the High Court has refused to uphold an automatic suspension under the Public Contracts Regulations 2006 and perhaps swung the pendulum back slightly towards contracting authorities at these key early hearings in procurement challenges.

OpenView Security Solutions Limited v The London Borough of Merton Council [2015] EWHC 2694 (TCC) concerned the provision of CCTV and automatic number plate recognition systems in the Borough of Merton, and their ongoing maintenance. OpenView was the second placed bidder and challenged the award.

The Court reaffirmed the American Cyanamid test but potentially set a slightly higher bar for challengers in proving that damages will not be an adequate remedy and in proving that a continuing suspension is justified on the balance of convenience.

The adequacy of damages

Loss of a chance

A number of recent cases have considered that the speculative nature of assessing damages for 'loss of a chance' in procurement cases can be considered as a reason to find damages an inadequate remedy for a challenger and therefore a possible reason to uphold the suspension of the procurement process. The Court in *OpenView* took a slightly different approach.

The Court found that the mere fact that damages will be for loss of a chance is not of itself evidence that damages are an inadequate remedy.

Whilst the Court did accept that there may be some scenarios where the variables are so numerous that damages would be inadequate, Stuart-Smith J concluded by saying that the reverse will likely be true in many or most cases, because principles have been developed to establish the commercial value of the chance that is lost.

Loss of reputation

Similarly, the Court held that in relation to alleged loss of reputation often claimed by challengers, the remoteness and irrecoverable nature of damages under this head should not be a reason to find damages inadequate. The Court held that the very fact these would be potentially irrecoverable as damages suggests that the Court should use restraint when considering them at all.

The above is a potentially significant development for challengers who often rely on the difficulty of calculating the loss or the damage to their reputation in losing a key tender as a reason to uphold an automatic suspension.

Summary - are damages an adequate remedy?

- The difficulty of a challenger in quantifying the loss of a chance will not render damages automatically inadequate.
- The fact loss of reputation may not be recoverable in damages does not render damages automatically inadequate.

The balance of convenience - the role of the public interest

The Court noted that there is an ever present element of public interest in the outcome of public procurements, and that there "*will frequently be a public interest in contracting authorities being able to go ahead with their plans promptly*".

Comment

Just when challengers were perhaps becoming more confident on the ability to uphold a stay following the *NATS* and *Edenred* cases, the *OpenView* case swings the pendulum (at least for the moment) back slightly towards the contracting authority. The emerging themes of the Court appear to be:

- Proving damages will not be an adequate remedy may be increasingly difficult for a challenger; and
- The Court may start from a position that allowing a contract to go ahead will be in the public interest as part of the balance of convenience and a challenger may need to displace that assumption.

However, challengers should not be put off, the Court will still uphold suspensions in the right circumstances. As we commented in our previous briefings, the right circumstances are likely to involve a challenger committing to a very early trial and to providing an appropriate cross-undertaking in damages. The right circumstances may also now involve more substantive reasons why damages will not be an adequate remedy for a challenger and the displacement of an assumption that going ahead with the contract will be in the public interest.

Contacts

For more information, please contact:



Chris Jackson
Partner

+44 (0) 117 939 2238
chris.jackson@burges-salmon.com



Richard Binns
Senior Associate

+44 (0) 117 902 7249
richard.binns@burges-salmon.com

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burges-salmon.com

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