Procurement challenges - Should I stay or should I go?

Not the famous song by the Clash but the choice facing claimant bidders and the Courts in procurement challenges.

Two English judgments reported in October 2014 have reinforced the principles determining whether a contract award is to be halted pending a trial or allowed to go ahead, leaving a disappointed bidder trying to make out a damages claim only.

In *NATS (Services) Limited v Gatwick Airport Limited* the challenging bidder was the incumbent air traffic control provider at Gatwick. After being unsuccessful in a new tender process, it issued proceedings claiming breaches of the Utilities Contracts Regulations 2006 ("UCR") and of an implied tender contract. It succeeded in its aim to prevent the contract award to its competitor, the winning tenderer, pending trial. The Court upheld an automatic suspension on the procurement process and ordered an expedited trial to take place on a very tight (sub 6 month) timetable.

In *NP Aerospace Limited v Ministry of Defence* an unsuccessful bidder sought to challenge a procurement for armoured vehicle refurbishment carried out under the Defence and Security Public Contracts Regulations 2011. Allegations were made about the outcome of the procurement and its evaluation. The challenger again sought to delay the completion of the award. Here however the contract was allowed to go ahead. The challenger was left to try to make out a claim in damages only.

Both cases were heard in the Technology and Construction Court ("TCC") which is rapidly becoming the focus for many reported procurement disputes.

The test

The Claimant in *NATS* argued that EU procurement law requires a "balance of interest" test rather than the traditional *American Cyanamid* test. It argued that to require a cross-undertaking in damages and to assess whether damages was an adequate remedy were not permitted as they did not represent a level playing field in the necessary balancing of interests.

That argument was not accepted. The Court (as all other English judgments have done) reaffirmed the *American Cyanamid* test whether this was an application for an injunction or an application by the Authority to lift an automatic stay.

This is an argument that may resurface on an appeal or reference to the European Courts in a future case. The English Courts are however currently unequivocal on the point.

Principles currently established in procurement challenges

- Whether the case involves an application to lift an automatic stay or the granting of an injunction, the traditional *"American Cyanamid"* test will be applied by the Court.
- The first limb of the test is whether there is an **arguable case/serious issue to be tried**.
- Then the Court will consider the **adequacy or not of damages** (for both parties) and the balance of convenience.
- The question of the (in)adequacy of damages and the basis of calculation of damages is often fiercely contested on the facts. There are some apparent subtle divergences of emphasis between different Courts.
- The balance of convenience may well be strongly influenced in practice by the public interest (or not) in having the contract completed swiftly and on the degree of urgency which the Authority has shown in running its own procurement.
- A challenging bidder will have to give a cross-undertaking to cover any losses of the Authority (and probably also the successful bidder) if it ultimately loses. This can be a significant and open ended exposure – particularly if the trial date slips.

Serious issue to be tried

This is generally a low hurdle. All a bidder must show is that there are arguments that are not hopeless and which should therefore properly be allowed to go to trial for a decision. In complex procurements, evaluation and other issues of fairness or transparency will generally give rise to material factual issues

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which cannot be dealt with in an injunction hearing. This was accepted to be so in both recent cases.

In *NATS* there were two further issues. Firstly the interesting question of whether Gatwick Airport is subject to the UCR was looked at. This turned on whether the airport had a *"special or exclusive right"* derived from licensing or regulatory obligations as opposed to merely its physical characteristics. If it did then it was subject to the UCR. The issue was complex and held to be an important triable issue.

NATS also argued that there was an implied tender contract on the facts. It is (following the Court of Appeal judgment in *JBW Group Limited v Ministry of Justice* [2012] EWCA Civ 8) now difficult to establish an implied or explicit tender contract. However this was also a triable issue.

Adequacy of damages

In *NATS* the Court adopted the principles previously laid down in the case of *Covanta Energy Limited v Merseyside Waste Disposal Authority* [2013] EWHC 2922:

- If damages are an adequate remedy that will normally (but not always) defeat an injunction/stay.
- More recently the concept of adequacy of damages has been modified so that the Court must assess whether it is just in all the circumstances for the Claimant to be restricted to damages.
- If damages are difficult to assess or involve a speculative ascertainment of the value of a "loss of chance", that may not be enough to prevent an interim injunction/stay.
- In procurement cases the availability of a remedy of review before the contract was entered into is not relevant to the adequacy of damages but it is relevant to the balance of convenience.
- In a number of procurement cases the difficulty of assessing damages based on loss of chance has been a factor which the Court has taken into account in concluding that damages would not be an adequate remedy. There are however other procurement cases where **on the facts** damages have been held to be an adequate remedy.

The situation is therefore very fact specific. In *NATS* damages were held **not** to be an adequate remedy for the Claimant (based largely on the loss of chance uncertainties). They were however held to be adequate for the Defendant airport.

In contrast in *NP Aerospace* damages **were** held to be an adequate remedy for the Claimant. The position of the Defendant (the MOD) was not dealt with in the judgment.

Balance of convenience

In *NATS* the procurement process had been protracted. There was a continuing, proven air traffic control service provider pending trial and therefore the contract award was ordered by the Court to be held over pending trial.

In contrast in *NP Aerospace* the public interest/defence considerations in getting the armoured vehicle contract underway were held to be significant (although not reported in detail for security reasons). The balance of convenience was therefore judged to be heavily in favour of lifting the stay and allowing the contract award.

Comment

Until recently, there had not been any English judgment granting an injunction/upholding a stay. Following the recent cases of *Covanta* and now *NATS*, this has changed. The Courts have shown themselves willing in practice to hold over an Award on certain facts. The principles (so far as the English Courts are concerned) are well established – the traditional *American Cyanamid* test.

However attempts by Claimants to soften the impact of *American Cyanamid* (in particular to try to avoid the open ended liability exposure of a cross-undertaking in damages) are proving to be unsuccessful. It is clear that any future determined challenger seeking change will have to persuade the Appeal Courts or obtain a reference to the European Court to review whether the current English procedural approach balances the interests of all of those involved in accordance with EU law – or alternatively presents Claimants with higher hurdles that are not permitted.

That would however require a particularly determined challenger. Given the timings of European Court references it would either face liability uncertainty on a cross-undertaking for an extended period or a challenger would have to accept a damages route only - but pursue the legal principle only. The challenger would also need to persuade the Courts that a reference or appeal was justified in a situation where the English Courts have taken a consistent line that the *American Cyanamid* test is consistent with European Law.

Bidders giving cross-undertakings in damages on the basis of very tight trial timetables also need to be realistic about the potential for timetable slippage in highly complex cases. Expedited trials are both achievable and achieved. However experience shows that the potential for slippage can exist even with tight and capable Court case management and the shared wish of all parties to bring the case to a conclusion.

If the obligation (currently) to give a cross-undertaking is clear, the position on adequacy of damages is less so. The principles

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are established - but the arguments on the facts about what is and is not a "loss of chance" action and what impact that has on the entitlement to an injunction/stay seems set to smoulder on in future challenges.

Finally, it is interesting to note that the appetite to prevent awards going ahead in different Courts within the different legal jurisdictions of the United Kingdom and in the Republic of Ireland apparently does still materially vary.

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Approach around the UK and Ireland

Scotland – to date, no Claimant has successfully upheld an automatic suspension – see *Street Lighting Suppliers & Co Ltd v Scotland Excel and Renfrewshire Council* [2014] ScotCS CSOH 145 for the latest example.

Ireland – the Irish Courts have concluded in the case of *OCS One Complete Solutions Limited v Dublin Airport Authority plc* that cross-undertakings and the Irish American Cyanamid test (American Cyanamid was brought across into the Irish jurisdiction by the case of *Campus Oil*) are not compatible with EU law and the Supreme Court has recently said that the Irish Courts do not have jurisdiction to hear applications for the lifting of automatic suspensions. The domestic Irish regulations are not however identical to UK domestic procurement law.

Northern Ireland – to date, the Northern Ireland Courts have upheld several applications to maintain an automatic suspension.

England and Wales – to date, three successful reported applications to maintain a stay of contract award. American Cyanamid test upheld.