

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2018

Before:

MRS JUSTICE O'FARRELL DBE

Between:

**BOMBARDIER TRANSPORTATION UK
LIMITED**

(Claimant in Claim No HT-2018-000204)

- and -

**HITACHI RAIL EUROPE LIMITED
(Claimant in Claim No HT-2018-000205)**

- and -

**ALSTOM TRANSPORT UK LIMITED
(Claimant in Claim No HT-2018-000222)**

- and -

LONDON UNDERGROUND LIMITED

Claimants

Defendants

- and -

SIEMENS MOBILITY LIMITED

Interested Party

Philip Moser QC, Valentina Sloane and Anneliese Blackwood (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Claimant** in Claim HT-2018-000204 and

(instructed by **DLA Piper UK LLP**) for the **Claimant** in Claim HT-2018-000205

Sarah Hannaford QC and Ewan West (instructed by **Hogan Lovells International LLP**) for the **Claimant** in Claim HT-2018-000222

Jason Coppel QC, Joseph Barrett and Rupert Paines (instructed by **Ashurst LLP**) for the **Defendant** (in all three claims)

Rob Williams (instructed by **Osborne Clarke LLP**) for the **Interested Party** (in all three claims)

Hearing dates: 17th and 18th October 2018

Judgment Approved

Mrs Justice O'Farrell:

1. The following applications are before the Court:

- i) applications by the Defendant in each claim (“LUL”), supported by the Interested Party (“Siemens”), for the lifting of the automatic suspension which arose on issue of the claims pursuant to section 45G of the Utilities Contracts Regulations 2006 (as amended) (“the UCR 2006”) and which prevents LUL from entering into contracts with the successful tenderer, Siemens; and
- ii) application by the Claimant in HT-2018-205 (“Hitachi”), supported by the Claimant in HT-2018-204 (“Bombardier”) and the Claimant in HT-2018-222 (“Alstom”) for an expedited timetable for the trial(s).

Background

2. These proceedings concern a procurement exercise conducted by LUL under the UCR 2006, in respect of part of the Deep Tube Upgrade Programme (“the DTUP”), comprising contracts for the manufacture and supply of 94 new trains and equipment for the Piccadilly Line, the provision of technical support and provision of spares for the new trains, together with options for the manufacture and supply of additional trains for the Bakerloo, Central and Waterloo & City Lines. The potential contracts have a duration of 40 years and a value of up to £2.5 billion.
3. LUL is responsible for the delivery of London Underground services. The tube stock fleet used on the Piccadilly Line was manufactured in 1973 and introduced into service in 1975. The trains have a design life of 40 years. LUL planned to replace the trains by 2014 under the Public Private Partnership (“the PPP”) but, as a result of the collapse of the PPP, the planned upgrade was cancelled.
4. On 4 March 2014 the procurement for the rolling stock project was published in the Official Journal of the European Union (“the OJEU”). The notice stated that the negotiated procedure under the UCR 2006 would be used. The scope of the project would include the design, manufacture, testing, commissioning, entry into service and maintenance of new rolling stock, comprising, approximately, 100 new trains for the Piccadilly line, with options for 100 trains for the Central line, 40 trains for the Bakerloo line and 10 trains for the Waterloo & City line. The trains were required to have a design life of 40 years. The estimated value of the procurement was £1 billion to £2.5 billion.
5. Following the pre-qualification responses, on 8 October 2014, five of the applicants were shortlisted.
6. On 18 January 2016 LUL issued the invitation to negotiate (“the ITN”) documents to the shortlisted bidders. The ITN documents included the instructions to bidders (“the ITB”), the draft Manufacture and Supply Agreement (“the MSA”), which included the train technical specification, and the draft Fleet Support Agreement (“the FSA”).
7. The ITB stated that the trains and equipment element of the upgrade programme would be effected by:
 - “(1) the MSA, whereby London Underground Ltd (LUL), as Purchaser, procures a new fleet from the Manufacturer by way of a Base Order of New Trains and Equipment for the Piccadilly line. LUL has the right to exercise Whole Line Options (WLOs) to procure separate fleets

of Trains and Equipment for each of the Bakerloo, Central and Waterloo & City lines (with the Waterloo & City line fleet anticipated to be ordered alongside one of the other fleets or the Base Order). There is also the option for LUL to supplement the Base Order and each WLO with further option Trains and Equipment; and

(2) the FSA, whereby LUL, as Customer, procures certain technical support services and establishes spares supply arrangements (additional to and following on from those in the MSA) to support maintenance (to be carried out by LUL) of the fleet or fleets supplied under the MSA...”

8. The ITB stated that the first fleet to be replaced would be approximately 94 trains on the Piccadilly line, with subsequent whole line options for the other lines.
9. The ITB stated that the procurement process would be carried out in four stages:
 - i) Stage 1 – general review and mandatory requirements;
 - ii) Stage 2 – technical compliance;
 - iii) Stage 3 – project deliverability;
 - iv) Stage 4 – contractual compliance (stage 4A) and whole life costs and benefits (stage 4B).
10. Bidders were required to satisfy minimum threshold scores for each of stages 1 to 4A to pass to the next stage of the evaluation process. At stage 4B, LUL would assess the net present value (“NPV”) for each line, using discounted cash flow methodology applied to the Rolling Stock CAPEX OPEX Model (“the RSCOM”) and the Rolling Stock Tender Evaluation Model (“the RSTEM”), completed by each bidder. The RSCOM identified key capital, maintenance and associated costs of the project. The RSTEM was intended to identify the marginal operational cost and benefit impacts of the new trains, by reference to costs associated with train ownership, such as energy consumption, track damage, cooling and platform interface, and benefits, such as improved journey time and carbon emissions.
11. The ITB stated that LUL intended to award the contract to the most economically advantageous tender (“MEAT”), that is, the proposal that passed each of stage 1, stage 2, stage 3 and stage 4A, and achieved the highest overall NPV.
12. The original procurement programme provided for a tender submission deadline of 18 July 2016, an award decision on 13 October 2017 and execution of the contracts on 23 October 2017.
13. The tender submission deadline was postponed and revised to 26 September 2016. Bombardier and Hitachi, acting as a joint venture (“the JV”), Alstom and Siemens submitted bids.
14. In 2017 revised commercial bids were requested and submitted by the bidders.

15. On 15 June 2018 LUL sent letters to the bidders, notifying them of the outcome of the procurement exercise. Siemens was identified as the successful bidder.
16. The anticipated date on which the contracts will be commenced by LUL and Siemens is 8 November 2018.

Proceedings

17. On 13 July 2018 the JV issued proceedings seeking to challenge the procurement as contrary to the UCR 2006. Particulars of Claim were served on 27 July 2018. Although Bombardier and Hitachi have issued separate proceedings, the pleaded allegations concern the evaluation of the JV's bid and are identical in all material respects for the purpose of these applications. The alleged breaches include manifest error and/or unlawful procedure in the evaluation of the JV tender, failure to provide to or seek from the JV adequate information during the procurement exercise, application of unlawful and undisclosed award criteria, discrimination and apparent bias. The remedies claimed by the JV include an order setting aside or amending LUL's decision to award the contracts to Siemens or damages.
18. On 27 July 2018 Alstom issued proceedings seeking to challenge the procurement as contrary to the UCR 2006. Particulars of Claim were served on 3 August 2018. The alleged breaches include manifest error and flawed methodology in LUL's assessment and evaluation of Siemens' tender, unlawful post-bid negotiations and amendments to the Siemens tender, and failure to provide adequate reasons for the award decision, including the characteristics and relative advantages of the successful tender. The remedies claimed by Alstom include an order setting aside LUL's decision to award the contracts to Siemens, a declaration that LUL was in breach of the UCR 2006, a declaration that the contracts should be awarded to Alstom or damages.
19. On 5 September 2018 LUL issued its applications to lift the automatic suspension in each claim.
20. On 7 September 2018 the Defence to the JV's claim was served and on 14 September 2018 the Defence to Alstom's claim was served, in each case disputing the allegations.
21. On 27 September 2018 Hitachi issued its application for an expedited trial.
22. On 4 October 2018 Alstom served a Reply.
23. At a directions hearing on 3 October 2018, Fraser J ordered that Siemens should be joined as an interested party to the claims for the purposes of that hearing, the hearing of the suspension and expedition applications, and issues concerned with the disclosure or inspection of Siemens' confidential information.

Application for part of the hearing to be held in private

24. At the commencement of this hearing, Mr Coppel QC, counsel for LUL, made an application for the Court to sit in private for part of the hearing because he wished to refer to confidential material in the pleadings and evidence. Ms Hannaford QC, counsel for Alstom, indicated that it was a matter for the Court but that she intended to make her submissions in open court. Any references to confidential information would be

made by drawing the Court's attention to relevant parts of the written submissions, pleadings and evidence without quoting from them. Ms Sloane, counsel for the JV, indicated a similar approach. Mr Williams, counsel for Siemens, was content to leave this matter to the Court.

25. I refused the application to hold part of the hearing in private for the following reasons.
26. The general rule is that a hearing should be held in public - see: Article 6 of the European Convention on Human Rights and CPR 39.2. Hearings in private are derogations from the principle of open justice and can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. Where justified, they should be proportionate and no more than strictly necessary to achieve their purpose.
27. There is no general exception to open justice where privacy or confidentiality is in issue. CPR 39.2(c) provides that a hearing, or any part of it, may be held in private if it involves confidential information and publicity would damage that confidentiality. However, even where there are confidential materials before the court, applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusion must be no more than the minimum strictly necessary for that purpose. Parties are expected to consider before applying for such an exclusion whether some other measures short of exclusion can meet their concerns.
28. Where a party wishes to make an application for part or the whole of a hearing to be in private, the issue should be raised with the other parties in advance of the hearing. The party making the application should identify specific issues or parts of the hearing from which it is proposed to exclude the public and/or certain parties, so that the proposal, its practical application and any alternative measures can be considered. Save in cases of urgency, the application should be set out in a skeleton argument, identifying the grounds relied on and the proposed arrangements for the hearing.
29. In this case, the nature of the challenges made to the procurement process set out in the claims involves reference to, and reliance upon, details of the bids made by the tenderers and the evaluations carried out by LUL. Those details include technical and commercial information that is confidential to the parties. As required by the TCC Guidance Note on Procedures for Public Procurement Cases, the parties have discussed these issues and established confidentiality rings to manage access to such confidential information pending a full review at the case management conference. Pleadings, witness statements and counsel's submissions have been redacted or highlighted to identify those parts in respect of which confidentiality claims are made.
30. The parties have agreed that there is a serious issue to be tried for the purpose of the applications to lift the suspension. Therefore, analysis of the pleaded claims is unnecessary to determine whether that threshold test is satisfied. However, at the outset of the hearing Mr Coppel explained that he wished to refer to the confidential material in the bundle, in particular, the pleaded allegations, to support his submissions that the claims are weak and speculative. LUL's case is that such weakness should weigh in its favour when the Court assesses where the balance of convenience lies. Mr Coppel was concerned that it would be very difficult for him to make those submissions without express references to the confidential material.

31. In my judgment, it was not necessary for the public, or any of the parties, to be excluded from this hearing. The court had the benefit of unredacted versions of full written submissions, pleadings and evidence. Counsel were entitled to refer to the redacted sections of the documents to develop their submissions and properly put the case of their clients. That was achieved by counsel drawing attention to the relevant parts on which they wished to rely without quoting from them in open court. The arguments made by Mr Coppel did not justify overriding the principle of open justice. For those reasons the application was refused.
32. Given the commercial sensitivities raised by the parties, this judgment identifies in general terms the nature of the claims, facts and arguments before the Court, to allow an understanding of the reasons for the decisions reached, but it does not include details of the confidential materials.

The UCR 2006

33. It is common ground that the procurement was subject to Council Directive 2004/17/EC and the UCR 2006, including the requirements of equal treatment, transparency, non-discrimination, proportionality and good administration.
34. Regulation 45I provides that where the Court is satisfied that a decision has been taken by a utility in breach of the UCR 2006, the remedies available to the Court include a power to set aside the award decision, amend any document and award damages.
35. The issue of proceedings by the claimants resulted in an automatic suspension imposed by Regulation 45G, preventing LUL from entering into the contracts with Siemens:

“(1) Where –

- (a) a claim form has been issued in respect of a utility's decision to award the contract; and
- (b) the utility has become aware that the claim form has been issued and that it relates to that decision; and
- (c) the contract has not been entered into,

the utility is required to refrain from entering into the contract.

(2) The requirement continues until any of the following occurs –

- (a) the court brings the requirement to an end by interim order under regulation 45H (1)(a);
- (b) the proceedings at first instance are determined, discontinued or otherwise disposed of and no order has been made continuing the requirement (for example in connection with an appeal or the possibility of an appeal) ...”

36. Regulation 45H empowers the Court to lift the suspension:

- “(1) In proceedings, the Court may, where relevant, make an interim order –
- (a) bringing to an end the requirement imposed by regulation 45G(1)
- ...
- (2) When deciding whether to make an order under paragraph (1)(a) –
- (a) the Court must consider whether, if regulation 45G(1) were not applicable, it would be appropriate to make an interim order requiring the utility to refrain from entering into the contract; and
 - (b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a).
- (3) If the Court considers that it would not be appropriate to make an interim order of the kind mentioned in paragraph (2)(a) in the absence of undertakings or conditions, it may require or impose such undertakings or conditions in relation to the requirement in regulation 45G(1).
- ...
- (5) This regulation does not prejudice any other powers of the Court.”

Principles to be applied

37. It is well-established that the applicable test is the *American Cyanamid* test as confirmed by the court in the following cases: *DWF LLP v Secretary of State for Business Innovation and Skills* [2014] EWCA Civ 900 per Sir Robin Jacob at [45]-[47]; *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 per Coulson J at [34] and [48], *OpenView Security Solutions Limited v The London Borough of Merton Council* [2015] EWHC 2694 per Stuart-Smith J at [10]-[11]; *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200 per Fraser J at [16]-[18].
38. A helpful summary of the applicable principles enunciated by Lord Diplock in *American Cyanamid* is set out by Browne LJ in *Fellowes & Son v Fisher* [1976] 1 QB 122 at pp.137-138:

- “1. The governing principle is that the court should first consider whether, if the [claimant] were to succeed at

trial, he would be adequately compensated by damages for any loss caused by the refusal to grant an interlocutory injunction. If damages would be an adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted.

2. If, on the other hand damages would not be an adequate remedy, the court should then consider whether, if the injunction were granted, the defendant would be adequately compensated under the [claimant's] undertaking as to damages. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the [claimant] would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.
3. It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.
4. Where other factors appear to be evenly balanced it is a council of prudence to take such measures as are calculated to preserve the status quo.
5. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies.
6. If the extent of the uncompensated disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the [written] evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party.
7. In addition ... there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

39. In this case, the Court must consider the following issues:

- i) Is there a serious issue to be tried?
- ii) If so, would damages be an adequate remedy for the JV and/or Alstom if the suspension were lifted and they succeeded at trial?
- iii) If not, would damages be an adequate remedy for LUL if the suspension remained in place and it succeeded at trial?
- iv) Where there is doubt as to the adequacy of damages for any or all of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong, that is, where does the balance of convenience lie?

i) Serious issue to be tried

40. LUL concedes, for the purpose of this application, that there is a serious issue to be tried.
41. Despite that concession, Mr Coppel has sought to rely on perceived weaknesses in the claims pleaded by the JV and Alstom as factors that tip the balance in favour of lifting the suspension. He submits that none of the claimants has identified any cogent basis to indicate that the outcome of the procurement was incorrect or flawed.
42. In respect of the Alstom claim, he draws attention to the absence of any challenge based on LUL's evaluation of Alstom's tender. The claim seeks to mount a wide-ranging root and branch attack on the conduct of the procurement and evaluation relating to the Siemens tender but Alstom has failed to condescend to detail in respect of such allegations. As such, it is submitted that Alstom's claim is based almost entirely on speculation.
43. In respect of the JV claim, Mr Coppel draws attention to the high hurdle the JV would have to clear to establish that LUL's decision on its tender was *Wednesbury* irrational, given the margin of appreciation it would be afforded: *Woods Building Services v Milton Keynes Council* [2015] EWHC 2011 per Coulson J at [56].
44. Mr Coppel submits that the obvious and serious flaws and weaknesses in the claims advanced in the pleadings fall to be considered in the context of the balance of convenience. It would be quite wrong, and contrary to the public interest if speculative and optimistic claims were able to significantly delay, and potentially even imperil, the delivery of projects for substantial public benefit such as arise in the current proceedings.
45. I consider that LUL's concession that there is a serious issue to be tried for the purpose of the applications currently before the Court is well made. The pleadings in each claim disclose an arguable cause of action. Alstom's pleaded case focuses on LUL's evaluation of the Siemens bid. Alstom does not take issue with the evaluation of its own bid but alleges that the evaluation of the Siemens bid was flawed and wrong. If its allegations were established, they could provide the basis for setting aside the award of the contracts to Siemens. The JV's pleaded case centres on alleged manifest error on the part of LUL in evaluating the JV bid. I accept that the evidential hurdle is high in such cases but, if established, those allegations could provide the basis for setting aside the award of the contracts to Siemens.

46. Mr Barber of LUL has set out in his witness statements details of the evaluation process adopted by LUL. He provides an explanation for the decisions taken in relation to each of the challenged bids, which he asserts were within the range of reasonable decisions open to LUL. However, that evidence is untested and necessarily incomplete at this stage in the proceedings. Each of the bidders has requested substantial additional disclosure in respect of the procurement exercise so that it can analyse the decision-making by LUL. The requests are resisted by LUL on grounds that the far-reaching scope of the requests is speculative and unnecessary. However, that is a dispute which the Court has not yet been asked to determine. Each claim will require the Court to consider in some detail the technical merits and economic advantages of each bid. That will necessitate an examination of the specification, the technical content of the proposals, the technical evaluations and the numerical models used to carry out the NPV evaluation exercise. It would be inappropriate for the Court to attempt to weigh the likely strengths and weaknesses of each party's case without the benefit of full evidence and reasoned submissions.
47. For those reasons, I decline to make any observations about the likely outcome of the trial or take such matters into consideration in determining the applications.

ii) Adequacy of damages for the claimants

48. The JV and Alstom submit that damages would not be an adequate remedy for them if the suspension were to be lifted and they succeeded at trial.
49. Firstly, the claimants submit that the contracts are highly prestigious, very high value and of global interest. Loss of this procurement will affect adversely their reputation in the global market, including their ability to secure other commercial opportunities. They will lose the opportunity to develop and exploit technological advancements and innovations linked to this project. Loss of this procurement will also have an adverse impact on their strategy for investment in factories and employment in the UK and other entities within the supply chain.
50. The JV relies on the witness statements of Martin Rennoldson, group account director for TfL at Bombardier, dated 9 October 2018; Nicholas Hughes, sales director of Hitachi (two statements dated 9 October 2018; and third statement dated 16 October 2018); and Garry Mowbray, finance director of Bombardier, dated 9 October 2018. Those witnesses explain that the procurement is exceptional because of its prestige, 40-year duration and potential value of £2.5 billion. LUL is the largest purchaser of rapid transit trains in the UK and winning the contracts would secure a pipeline of long-term work in the UK market. The scale of this opportunity is not comparable to other current and anticipated future opportunities. LUL is unlikely to place an order of this size again until the replacement of the Northern and Jubilee line fleets, potentially in the mid to late 2030s. The successful bidder will have an obvious technical and commercial advantage over any other bidders in subsequent competitions for new trains on the other London Underground lines. Loss of these contracts will adversely affect the reputation and standing of Bombardier and Hitachi in this sector and their ability to secure other commercial opportunities. Loss of these contracts will also have wider impacts on the JV's plans for investment in the UK, including a risk that employment at UK facilities may be reduced.

51. Alstom relies on the witness statements of Nicholas Crossfield, managing director of Alstom, dated 3 October 2018 and 16 October 2018, and Piers Wood, manager responsible for Alstom's participation in the procurement, dated 2 October 2018. The size and nature of the contracts make them highly prestigious. The procurement offers one of the largest metro rolling stock opportunities in the world. LUL has described it as a: "*once in a generation opportunity to transform the customer experience and the operating and maintenance model through technology-enabled change*". Alstom currently has no contract for the supply of metro rolling stock in the UK. These contracts will provide a platform for winning other procurements, by offering Alstom a means of demonstrating its capability for future contract opportunities. Further, it will facilitate the development of new technology for deployment in other industries. Loss of the procurement will affect adversely Alstom's factories and employees in the UK.
52. Secondly, the claimants submit that there would be great difficulty in accurately and fairly quantifying the loss. Difficulty in estimating damages is a factor to be taken into account in determining whether it would be unjust to confine the claimants to damages for breach: *NATS (Services) Ltd v Gatwick Airport* [2014] EWHC 3133 per Ramsey J at [82] and [83].
53. Thirdly, the claimants submit that the impact of the decision of the Supreme Court in *Nuclear Decommissioning Agency v Energy Solutions EU Ltd* [2017] UKSC 34 raises the real prospect that if the suspension were lifted and the claimants established their claims, so that the lifting of the suspension were shown to be wrong, they would be deprived of any damages. Ms Hannaford submits that at this stage of proceedings, the Court cannot determine whether any breach would be sufficiently serious to merit an award of damages. This is particularly the case where, as here, the claims are made by two of the three bidders and are made on different grounds. Mr Moser QC, counsel for the JV, submits that it is conceivable that a court could find that the claims established multiple illegalities in the procurement but that none of them was, on its own, "sufficiently serious" to give rise to damages. In those circumstances, the claimants would be left without any effective or substantive remedy.
54. LUL's position is that damages would be an adequate remedy for the claimants. Mr Barber's evidence, set out in his witness statements dated 4 September 2018 and 12 October 2018, is that each of the claimants is a fully integrated part of the world's largest and most successful rolling stock manufacturers. The rolling stock market is global in nature. Assessed in that context, these contracts are not exceptional or special. The claimants will have opportunities to invest in research and development and to deploy their innovative design solutions in other procurements and on other contracts. Loss of this procurement will not affect the claimants' credentials in future procurements. Each of the claimants qualified for the present procurement in reliance on multiple contracts being delivered worldwide and each is well-placed to qualify for future procurements, such as the substantial HS2 rolling stock procurement. Loss of these contracts will not affect the claimants' prospects of winning future contracts with LUL, as demonstrated by the outcome of this procurement, which was won by Siemens despite the absence of any current or recent major rolling stock contracts with LUL. The claimants have not provided evidence of any harm to their reputation that could not be fully vindicated by a finding at trial that LUL acted unlawfully, or by an award of damages. The evidence in support of assertions that loss of this procurement would result in a reduction in employees and facilities is vague, speculative and unsupported

by internal documents. The claimants each have very healthy order books and backlogs of business in a robust and growing global market.

55. Mr Coppel disputes that there would be any difficulty in assessing damages in this case. The primary case pleaded by each of the claimants is that if LUL had conducted the procurement lawfully then it would have been awarded the contracts. Therefore, it will not be necessary to evaluate the loss of a chance. In any event the mere fact that damages might be assessed for loss of a chance would not of itself be evidence that damages would be an inadequate remedy. Case law has established the principles that would be applicable, enabling the Court to reflect the true commercial value of the lost chance: *Openview* (above) at [32].
56. In response to the “sufficiently serious breach” argument, Mr Coppel submits that any breach of duty that prevented the relevant contract being awarded to the correct bidder would satisfy the sufficiently serious requirement: *Energy Solutions (EU) Ltd v Nuclear Decommissioning Agency* [2016] EWHC 3326 per Fraser J at [56] and [57]. He agrees with Ms Hannaford’s submission that the Court is not in a position to determine at this stage of the proceedings whether any of the allegations of breach would fall to be characterised as sufficiently serious. That uncertainty is simply part of the difficulty faced by the Court in assessing the strengths and weaknesses of the claim on incomplete evidence. If that uncertainty led to a conclusion that damages would not be an adequate remedy, then damages would never be an adequate remedy applying the *American Cyanamid* test. That would be contrary to the principle of effective remedies set out in the Remedies Directive, which formed the basis for the Supreme Court ruling in *Energy Solutions* (above).
57. Firstly, I consider the loss of reputation claims that the claimants submit cannot be compensated by an award of damages. The relevant principles to be applied in procurement cases when considering whether damages would be an adequate remedy for the claimants are helpfully set out by Coulson J (as he then was) in *Covanta* (above) at [48], including the following at (b):

“In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the Court must assess whether it is just, in all the circumstances, that the claimant be confined to his remedy of damages.”
58. Each case must be considered on its own facts. In most cases, unsuccessful bids are part of the normal commercial risks taken by a business and will not have any adverse impact apart from potential wasted costs of the tender and lost profits. Not every failed bid will result in damage to reputation causing uncompensatable loss. There must be cogent evidence showing that the loss of reputation alleged would lead to financial losses that would be significant and irrecoverable as damages or very difficult to quantify fairly: *Alstom Transport v Eurostar International Ltd* [2010] EWHC 2747 per Vos J at [129]; *NATS* (above) at [84]-[85]; *DWF* (above) at [52]; *Openview* (above) at [33]-[40]; *DHL v Secretary of State for Health and Social Care* [2018] EWHC 2213 at [45] & [46].
59. This procurement is distinctively prestigious because of its size, location and value. Success in such a competition would enhance the reputation of the winning bidder in the global rolling stock industry. It would provide evidence of competence and

expertise that could be used to increase its chances of securing other high-value commercial opportunities. Conversely, failure in such a competition through unlawful procurement procedures would deprive the unsuccessful bidder of those advantages and place it at a disadvantage in competing for other commercial opportunities. Mr Coppel argues that the claimants were successful in pre-qualifying for this procurement exercise. That argument ignores the fact that such success was no doubt founded, at least in part, on the technical and commercial expertise of the claimants evidenced by their other successful projects. In future competitions, they will be able to rely on other projects carried out but they will be deprived of the opportunity to rely on the scale and innovative design of this project as demonstration of their capabilities. It would be very difficult to prove a causal link between the loss of reputation and loss of subsequent business; for that reason, it would be very difficult to quantify.

60. I do not consider that the claimants will suffer uncompensatable losses in respect of investments in technological advancements and innovations. As a matter of principle, any wasted expenditure on research and development could be compensated for by an award of damages. Each of the claimants is a leading rolling stock manufacturer and member of a substantial global corporation. It is likely that the intellectual property will prove of value in other areas of the business of the companies.
61. Likewise, given the size and international scope of the claimants' business activities, it is likely that alternative opportunities will be found for their employees and facilities in the UK. If, and to the extent that, the claimants could identify losses associated with reductions to their workforce and facilities caused by the wrongful loss of these contracts, such losses could be compensated for by an award of damages.
62. The suggestions in the witness evidence that loss of these contracts will affect the claimants' strategic decisions on investment in people, facilities and research are speculative. Each of the claimants is involved in bidding for the HS2 project, has an active business in the UK and healthy accounts. In any event these factors do not indicate that losses would be sustained by the claimants as opposed to those third parties or the wider economy. They are neutral factors in assessing the impact of the outcome of the procurement on the public interest because any such lost investments would be balanced by an increase in investment by the successful bidder, in the UK or elsewhere within the EU.
63. The "sufficiently serious breach" issue does not affect any part of the above assessment. The claims made are for breaches of the UCR 2006. As explained by Lord Mance, delivering the judgment of the Supreme Court in *Energy Solutions* (above) at [10]-[27], Directive 89/665/EEC ("the Remedies Directive") introduced minimum requirements for effective remedies to be available for breaches of the regulations. The *Francovich* conditions include a restriction that damages pursuant to the Remedies Directive are limited to circumstances in which the breach is sufficiently serious. Lord Mance at [28]-[39] recognised that it is open to national states to lay down criteria that provide for a less restrictive remedy in damages than would be provided by the *Francovich* conditions. The 2006 regulations did not seek to do so. The UCR 2006 must be read as providing for damages only where the breach is sufficiently serious. There is a significant distinction between a claim for damages based on breach of an EU-based duty and a private law claim for breach of a domestically-based statutory duty: Lord Mance at [37]. That distinction must be borne in mind when considering whether the more restrictive damages available for breach of the UCR 2006 would provide adequate

compensation. By reference to the Remedies Directive, damages subject to the *Francovich* conditions are effective remedies for breaches of the regulations. Therefore, to the extent that the claimants can be compensated by damages for breaches of the UCR 2006 (absent the impact of *Energy Solutions*), it is just, in all the circumstances, for the claimants to be confined to such damages as satisfy the *Francovich* conditions.

64. In any event, in his oral submissions, Mr Coppel confirmed on behalf of LUL that if the JV or Alstom succeeded in establishing that LUL had awarded the contracts to the wrong bidder, and it should have been awarded to them, then on the current law (i.e. *Energy Solutions EU Limited v Nuclear Decommissioning Authority* [2016] EWHC 3327 (TCC)) the breach would be sufficiently serious to justify an award of damages. The primary remedy sought by each claimant is an order that the award to Siemens is wrong and should be set aside. I consider that this concession would be sufficient to address the potential difficulty caused by the threshold requirement of a sufficiently serious breach.
65. In conclusion, I am satisfied that the loss of these contracts is likely to have a substantial adverse effect on the reputation of the claimants which would cause losses that would be very difficult properly to quantify.
66. For the above reasons, it is likely that damages would not be an adequate remedy for the claimants if they were to establish their claims at trial.

iii) Adequacy of damages for LUL

67. The JV and Alstom have confirmed that the usual undertakings in damages would be given to LUL and to Siemens.
68. Mr Coppel submits that, in addition to the financial losses that could be compensated by way of damages, LUL would suffer very considerable non-financial prejudice to the delivery of its core public functions and public service mission if the suspensions were maintained and the introduction of the new trains delayed until after conclusion of the proceedings.
69. Mr Williams supports LUL's position with regard to the impact of further delay and submits that a continuation of the suspension would cause Siemens to suffer both financial and non-financial harm.
70. A report dated 16 May 2018 was prepared by Transport for London ("TfL") and submitted to the Programmes and Investment Committee in support of its request for approval for the award of the MSA and FSA contracts for delivery of the new trains and infrastructure between 2023 and 2026. The key objectives of the DTUP were described as:
 - (a) maximising capacity: delivering a 36% increase across 4 Deep Tube lines;
 - (b) reducing journey times: through faster and higher frequency train services (up to 33 trains per hour (tph) on the Central and Piccadilly lines);

- (c) renewing life expired assets more efficiently through a multi-line approach;
- (d) improving safety and reliability: a step change in performance through the introduction of modern train and signalling technologies;
- (e) enhancing the customer experience: through the introduction of a consistent brand of new air cooled, fully accessible train; and
- (f) driving down whole life costs through greater standardisation in system specification, procurement, operations and maintenance.”

71. Paul Baines, sales director for Siemens, explains in his witness statements dated 30 August 2018 and 9 October 2018 the steps that would be required for Siemens to mobilise for commencement of the project following execution of the contracts and the delay that would be caused by continuation of the suspension. Delay has already occurred to the mobilisation period by reason of the suspension currently in force. If the suspension were lifted now, Siemens would endeavour to work to the planned contract programme. However, delay beyond the intended contract commencement date of 8 November 2018 would prevent Siemens from meeting the programme as key milestones would be missed. The delay would not be confined to the period for which any suspension was maintained. Delay to Siemens’ integrated supply chain would cause disruption that would threaten the capacity of those suppliers to meet a revised timetable. Further, there would be widespread impact on Siemens’ plans for investment in its test facilities, its workforce and other infrastructure plans that have been put in place to support the project.
72. In his first witness statement dated 4 September 2018, David Hughes, director of strategy and network development for London Underground, sets out in a table a summary of the impacts of a delay of 12 months to the procurement. Some losses, such as increased costs of maintenance and loss of revenue arising from the deferred increase in capacity can be estimated fairly readily. However, loss of other public benefits, such as comfort and accessibility, and wider economic benefits, such as housing and employment, do not have a direct financial cost or would be very difficult to quantify for the purpose of claiming damages.
73. The claimants submit that any losses caused to LUL or Siemens would be financial and capable of remedy in damages. Ms Hannaford submits that LUL has had control over the Deep Tube rolling stock for decades and there have already been serious delays to its replacement. The claims by Mr Hughes as to the parlous state of the rolling stock are not supported by the documentary evidence. Reliance is placed on a presentation: “New Tube for London” dated 2013 in which the Piccadilly line rolling stock was described as: “*highly reliable*” with only “*modest life extension works required to maintain in service until renewal*”. LUL has already agreed an extension to the time for compliance with the Rail Vehicle Accessibility (Non-Interoperable Rail System) Regulations 2010 (“RVAR”) and could obtain a further extension for any suspension period. The modelling exercise produced by Mr Hughes to assess the non-financial

detriment to LUL is somewhat artificial and caution should be exercised when considering it.

74. The JV and Alstom submit that the overall period of delay caused by the suspension of the procurement could be mitigated by starting the mobilisation period prior to award of the contracts, using contingency built into the current programme, re-sequencing the delivery of the trains or reducing the time allowed for testing.
75. I consider that the claimants' suggestions for re-programming are unrealistic. LUL and Siemens are entitled to decide not to carry out full mobilisation activities, if the suspension is maintained pending a determination by the Court as to the lawfulness of the contract award. It is fanciful for the claimants to suggest that a project of this scale can be re-sequenced to fit around their legal challenge. The project has taken years to plan, the manufacturing and supply lines have been integrated to meet the timetable and there are limited facilities to accept delivery of trains out of sequence. It would be reckless to remove contingency from the outset of a project of this scale and complexity. Even more wishful is the suggestion that the testing of new trains which incorporate innovative designs could be curtailed. Such measures would introduce unnecessary risks into a vast, expensive public infrastructure undertaking.
76. Having rejected the suggestion that delay in implementation of the project could be avoided if the suspension were not lifted, it follows that LUL would suffer non-financial losses as explained by Mr Hughes.
77. On that basis, it is likely that damages would not be an adequate remedy for LUL if it were to succeed at trial.

Balance of convenience

78. The balance of convenience test was set out by Lord Diplock in *American Cyanamid v Ethicon* [1975] AC 396 at p.406:

“The object of the interlocutory injunction is to protect the [claimant] against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the [claimant's] need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the [claimant's] undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and to determine where “the balance of convenience” lies.”

79. The Court may have regard to the public interest when determining where the balance of convenience lies: *Alstom v Eurostar* (above) at [80]; *Openview* (above) at [16].
80. Mr Moser and Ms Hannaford submit that maintaining the suspension in place for the time being and pending an expedited trial is the course which seems likely to cause the

least irremediable prejudice to one party or the other. There is a serious issue to be tried and lifting the suspension would irrevocably deprive the claimants of an effective remedy and potentially of any remedy. A short further delay, in the context of a replacement of fleet which has progressed very gradually for over a decade, is proportionate and serves both the requirements of EU law and the public interest.

81. In this case, the starting point in assessing the balance of convenience is to consider how long the suspension might have to be kept in force: *DWF* (above) at [50]. That requires the Court to consider the application by the claimants for an expedited trial of the disputes.
82. The position of the claimants is that the parties could be ready for an expedited trial by spring/summer of 2019. Alstom's estimate for the trial of its claim is 4-6 days. The JV's estimate for the trial of its claim is 4 days. The trials would have to be heard together or back-to-back to ensure a consistent outcome. Therefore, the composite estimate for the claimants would be 8-10 days. LUL considers that a trial could not take place before October/November 2019. Its initial estimate was a trial of 3-4 weeks but that has grown during the hearing to 5 weeks.
83. The trial of this dispute will not be ready for trial before November 2019. Disclosure has scarcely started and the requests to date indicate that it will be a substantial exercise. The parties recognise that the current pleadings are based on limited information and it is likely that disclosure will lead to amendments to the claims. The volume of documentary material produced for this hearing indicates that the trial probably will involve large numbers of documents. Given the technical nature of the procurement under challenge, it is likely that expert evidence will be required. I recognise that it is rare for expert evidence to be permitted in procurement cases. In procurement challenges the Court is concerned with the lawfulness of the process rather than re-assessing the decision. It is not required to make its own determination as to the winning tenderer and therefore in many cases, expert evidence is not appropriate. However, in this case, the Court will be asked to determine whether LUL's evaluation of at least two of the technical proposals was within the range of reasonable conclusions open to it. If, as is likely based on the pleadings, the parties disagree on what would be a reasonable range of conclusions, it is difficult to see how that could be determined in the absence of expert evidence.
84. The application for an expedited trial is refused. A reasonable estimate for the hearing, involving four parties and two separate claims in respect of this challenge is 4 weeks. Such a trial could not be accommodated before November 2019 without causing unjustified disruption to other cases in the list.
85. Following a trial in November 2019, time would have to be allowed for the Court to give judgment and, potentially, for any appeal.
86. Mr Coppel submits that the Court should also take into account further delay that would be necessary in the event that LUL was required to re-run the procurement exercise.
87. I reject that submission as wrong in principle and on the facts. The balance of convenience test in *American Cyanamid* is intended to identify the course of action that should be taken by the Court at an interlocutory stage that will cause the least risk of injustice if it proves to be wrong. The balancing exercise is required because at the

interim stage the Court does not know what the final outcome will be. In this case, if the procurement had to be re-run at the end of the trial, it would be in circumstances where the Court found that LUL had acted unlawfully *and* the appropriate remedy for such unlawfulness required the award of the contracts to be set aside (as opposed to limiting the claimants to a remedy of damages). In those circumstances, an interlocutory decision to maintain the suspension would be proved to be correct. It would be wrong in principle for the Court to grant on an interim basis a remedy that it would not be prepared to grant on a final determination of the dispute.

88. Of course, there may be cases where the works or services are critical for health or safety, or where a significant deadline will occur before the dispute can be determined. Urgency in delivering works or services could be a persuasive argument for or against the grant of interim relief by reference to the public interest. Each case must be judged on its own facts. Such critical factors do not arise in this case.
89. Mr Coppel drew the Court's attention to a number of cases in which reference was made to detriment that might ensue by reason of a delay to the works or services, including a re-tendering exercise. Those cases do not assist. Each of those cases was decided on the ground that damages would be an adequate remedy for the claimants. The issue discussed above was not addressed.
90. The TfL report dated 16 May 2018 explained the justification for the Piccadilly line upgrades as follows:
 - “3.12 The DTUP delivery will commence with modernisation of the Piccadilly line. The Piccadilly line is the first in the DTUP line sequence in view of its very high levels of demand, ageing rolling stock and signalling assets and inherent line capacity constraints. The line is currently operating at capacity on the busiest sections and an increase in service frequency with higher capacity trains will cater for the forecast expansion of London's population and will support continued economic growth.
 - 3.13 The Piccadilly line provides key transport links between Heathrow Airport, the West End and the North and West of London and carries 207 million customers per annum ... The combination of the limited fleet size (86 trains) and legacy signalling system design capability currently restricts the peak period service to only 24 trains per hour.
 - 3.14 The existing Piccadilly line 73 tube stock trains were introduced from 1975 in conjunction with the extension of services from Hounslow West to Heathrow Airport by 1977. These trains are now one of the oldest train fleets in passenger service in the UK. With a design life of 40 years, the fleet was originally scheduled for replacement by 2014 under the Public Private Partnership (PPP). With the cancellation of the PPP line

upgrades, a programme of life extension and repair works was carried out between 1996 and 2001 to enable these trains to continue to operate safely and reliably until replacement under the DTUP.

3.15 A number of age-related issues have begun to occur on these trains. This is being proactively managed through an inspection and repair regime to maintain train ability availability. Reliability performance has declined in the last three years and is projected to deteriorate further in the final six to eight years of asset life as it becomes more challenging to sustain reliability and availability whilst addressing an increasing volume of repairs...

3.16 If this life expired fleet is not replaced, further temporary life extension works will be required throughout the remaining life of the trains to sustain performance. Unpredictable failure modes can also lead to significant and prolonged disruption as large numbers of trains are removed from service for inspection and repair. Obsolescent design and the limited availability of specialist engineering skills can further extend the time required to restore the trains to passenger service.

3.17 Additionally, extensive modifications will be required to enable these trains to achieve compliance with the Rail Vehicle Accessibility Regulations (2009).”

91. Mr Hughes of LUL explains the prejudice that would be suffered if there were further delay in signing the contracts with Siemens. The limited size of the fleet restricts the level of service that can be provided; capacity is insufficient to meet current and future demand. The condition of the rolling stock is deteriorating such that age-related failures have begun to occur and reliability performance has declined. Following refurbishment of the trains in 2003, reliability performance grew from 5000 km mean distance between failures (“MDBF”) to 65,000 km MDBF in 2014 but has declined since then and is currently 35,000 km MDBF. The reliability specification for the new trains is 120,000 km MDBF. Even if the contracts with Siemens are signed in November 2018, some of the Piccadilly line trains will continue in service until Autumn 2026 when they will be over 10 years beyond their intended design life. Introduction of the new trains will enable LUL to offer a significantly improved service in terms of capacity, frequency, comfort and accessibility. The Piccadilly line upgrade will deliver substantial benefits to its daily users and the London economy. Any delay to the introduction of the Piccadilly line trains will delay the programme for new trains on other lines, thereby delaying benefits to customers on those lines.
92. In his witness statement dated 8 October 2018, Michael Underwood, head of entity in charge of maintenance and head of independent design integrity at Bombardier, challenges LUL’s case that a short delay to the procurement would create any additional safety risks, adverse impact on reliability or significant increased costs. LUL has in place adequate systems to manage safety risks and deal with maintenance of the rolling stock for the short extended period before replacement.

93. LUL does not claim that deferred procurement of the new trains would have an adverse effect on safety. LUL is aware of the vulnerability of the old trains and has implemented enhanced inspection and maintenance regimes to ensure that the rolling stock put into operation is safe. However, there is credible evidence that reliability is decreasing and the age-related failures are difficult to predict. They are likely to cause more and more disruption.
94. In any event, maintenance of the old train stock does not address the public benefit argument for the upgrade works, namely, improved journey time, improved comfort, improved capacity and improved access.
95. I have considered but rejected the further factors relied on by the claimants because they do not affect the above assessment as to where the balance of convenience lies:
- i) The claimants rely on delay to the procurement of the rolling stock before and during the procurement and/or in issuing the application to lift the suspension. However, the time taken to prepare the procurement following the PPP collapse was reasonable and proportionate given the scale of the re-organisation required and the potential cost of the project during a period of national austerity. The time taken to scrutinise the economic viability and funding of the scheme during the procurement can't be seen as unreasonable. LUL's delay in issuing the applications between August and September 2018 had no impact on the hearing date of the same.
 - ii) The claimants rely on LUL's inability to point to actual urgency that would arise from the automatic suspension remaining in place, including in circumstances where the current rolling stock would in any event be well past its design life if the procurement proceeded to the envisage timetable. However, the *American Cyanamid* test does not require LUL to establish urgency in proceeding with the works. The test is where the balance of convenience lies.
 - iii) The claimants submit that substantial capital savings and hence benefits to the public would accrue if it were found that LUL should have awarded the contracts to one of the claimants. However, as is clear from the ITB referred to above, the capital costs of the procurement form part only of the benefits to be derived from the project. The claimants' argument ignores the non-financial benefits to the public and the whole life cost-benefit assessment which were expressly identified as additional factors on which the bids were judged.
 - iv) The claimants rely on the detriment to the public interest if LUL has to pay twice, including in circumstances where there is more than one claimant. There is a risk that LUL would have to pay damages to the claimants if it lost but that is balanced against the risk that the claimants would have to pay damages to LUL if they lost. In each case, it is a matter for the parties to assess the risks of the litigation. It is not for the court to police LUL's strategic decisions based on legal advice.
 - v) The claimants rely on the public interest in LUL complying with procurement law. However, that is balanced against the public interest in LUL's entitlement to proceed with the MEAT tenderer following a lawful and fair procurement

exercise. At this stage, the Court is not in a position to judge which case will prevail. Therefore, this point is a neutral one.

96. The evidence produced by LUL establishes that there is a strong public interest in introducing the new trains as soon as possible and decommissioning the old stock. Maintaining the suspension is likely to cause years of delay to the works. The public benefit has already been deferred as a result of the collapse of the PPP. Further delay is not justified in this case.

Conclusion

97. For the reasons set out above, the balance of convenience lies in lifting the automatic suspension and permitting LUL to enter into the contracts with Siemens. Accordingly, LUL's application is granted.