



Neutral Citation Number: [2021] EWHC 114 (TCC)

Case No: HT-2020-000359

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

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 January 2021

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

Between :

AQUILA HEYWOOD LIMITED

Claimant

- and -

**LOCAL PENSIONS PARTNERSHIP
ADMINISTRATION LIMITED**

Defendant

Azeem Suterwalla (instructed by **DLA Piper UK LLP**) for the **Claimant**
Valentina Sloane QC and **Joseph Barrett** (instructed by **Burges Salmon LLP**)
for the **Defendant**

Hearing date: 19 January 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and
that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. This judgment concerns a short point of costs upon the settlement of an application to lift any automatic suspension that might still be subsisting in this case pursuant to regulation 95 of the Public Contracts Regulations 2015. Its resolution, however, raises important questions as to the scope of regulation 95. Specifically, does the regulation have any application in a case in which the contracting authority is not required to allow a standstill period pursuant to regulations 86-87? Further, where it does apply, does regulation 95 suspend the contracting authority's freedom to award the contract in accordance with the challenged decision, or is it of broader effect such that the automatic suspension continues to bite after the withdrawal of the challenged decision so as to prevent the contracting authority from entering into a contract pursuant to a subsequent decision which is not the subject of any legal challenge?

THE FACTS

2. Local Pensions Partnership Administration Limited ("LPPA") administers pension schemes on behalf of a police force and a number of local authorities and fire services. On 10 July 2020, LPPA issued an invitation to tender in order to rationalise its IT systems. At that time, it used two different systems – its own internally developed Case Management System for workflow and document management and Aquila Heywood Limited's Altair system for pension calculations. In addition, it had three different software systems for exchanging data with its clients and pension scheme members. The purpose of the procurement exercise was to establish a single core administration system. LPPA sought to enter into a contract for a maximum of ten years, comprising an initial five-year term with a five-year extension period.
3. Aquila submitted its bid on 14 August 2020. On 14 September 2020, LPPA informed Aquila that it had been unsuccessful and that the contract would be awarded to Civica UK Limited. The letter informed Aquila that the standstill period before it would award the contract expired the following day on 15 September.
4. Aquila immediately challenged the scoring of its pricing methodology which, it asserted, was demonstrably wrong; the adequacy of the feedback; LPPA's failure to give any substantial insight into the scoring of either its tender or that of the successful bidder; and the brevity of the standstill period. On 15 September, LPPA extended the standstill period until 25 September.
5. Further detailed correspondence ensued as to the feedback and scoring. On 23 September, LPPA provided amended scores by which Aquila's score for its pricing methodology more than doubled from the original 6.7% to 13.8%; a score which curiously was even higher than that which LPPA had previously asserted was the maximum achievable by Aquila for the pricing criterion. Meanwhile, Civica's pricing score was reduced. Nevertheless, Civica's total score remained higher than

that achieved by Aquila. The standstill period was again extended in order to allow Aquila to absorb this further information.

6. On 2 October 2020, Aquila issued the current proceedings against LPPA. It alleged that LPPA had acted in breach of the Public Contracts Regulations 2015 and the applicable principles of EU law in its evaluation of tenders and the September decision to award the contract to Civica.
7. On 14 October 2020, LPPA conceded that errors had been made in the tender evaluation process and that proper records had not been made. It therefore decided to “rewind” the procurement, withdraw the initial notice of intention to award the contract to Civica and re-evaluate the tenders submitted. Meanwhile LPPA filed and served its Defence on 6 November 2020. LPPA pleaded at paragraph 2 of the Defence:

“By correspondence communicated to the bidders on 14 October 2020, the Authority decided that the Procurement should be rewound to the stage at which tender responses were received and that the Procurement should be re-run from that point onwards, with the tender responses being considered, evaluated and scored by a new evaluation panel... The contract award decision and scoring decisions made in the course of the previous, now overtaken, evaluation (the ‘first evaluation’) have been withdrawn, are not relied on by the Authority, and are of no legal effect. Accordingly, it is averred that the decisions and matters relating to the now overtaken first evaluation that are subject to challenge in the [Particulars of Claim] no longer have any legal status or effect and have been overtaken by events. The alleged breaches are academic and not actionable as the challenged decision was withdrawn and the Claimant has not suffered and/or does not risk suffering, loss or damage. The Authority therefore does not plead further in respect of these matters. Further or alternatively, the proceedings are academic and/or [Aquila] is not entitled to the relief claimed, or any relief. In the premises, the proceedings should be discontinued.”
8. On 8 December 2020, LPPA issued its second award decision. It again intended to award the contract to Civica. The decision indicated a standstill period until 18 December 2020.
9. On 10 December 2020, LPPA sought Aquila’s consent to lift the automatic suspension. It required such consent by 14 December. By a letter dated 14 December 2020 expressly written without prejudice save as to costs, Aquila offered to discontinue its claim on the basis that LPPA agreed to pay its costs. Such letter did not directly address the suspension point save that of course the suspension would have fallen away upon discontinuance: reg. 95(2)(b) of the Public Contracts Regulations 2015.
10. There was then further correspondence as to the proper costs order on discontinuance in which LPPA offered to pay costs of £30,000.

THE APPLICATION

11. On 18 December 2020, LPPA issued its application seeking an order pursuant to regulation 96(1)(a) of the 2015 regulations bringing the automatic suspension imposed by regulation 95 to an end. The parties agree that there is no difficulty with such order. Aquila contends that it is unnecessary but does not oppose such relief. The issue before me is therefore a narrow one as to the costs of this application.
12. Valentina Sloane QC and Joseph Barrett, who appear for LPPA, argue that the application has been successful and that it could and should have been avoided by Aquila's timely agreement to such relief. Accordingly, they seek LPPA's costs in the sum of £107,921.50.
13. Azeem Suterwalla, who appears for Aquila, argues that the application was misconceived and entirely unnecessary since no automatic suspension ever arose in this case, alternatively the automatic suspension only applied to the first decision to award the contract to Civica. Since such decision was withdrawn and there is no pleaded case challenging the second decision, he argues that any suspension in this case never bit upon that decision. Further, he argues that LPPA gave a very short timetable to consider its request in circumstances where there was no apparent urgency. Thirdly, he complains that LPPA's conduct was unreasonable, that LPPA has moved the goalposts and sought to impose unreasonable deadlines rather than co-operate in the sensible and proportionate settlement not just of this application but the underlying proceedings. Mr Suterwalla therefore seeks Aquila's costs in the sum of £30,920. Alternatively, if Aquila is to be ordered to pay costs, he contends that there should be a very large percentage reduction in the costs payable.

THE LAW

14. Regulations 95 and 96(1) of the 2015 Regulations provide:
 - “95. Contract making suspended by challenge to award decision
 - (1) Where—
 - (a) a claim form has been issued in respect of a contracting authority's decision to award the contract,
 - (b) the contracting authority 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 contracting authority 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 96(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).

- (3) This regulation does not affect the obligations imposed by regulation 87.

96. Interim orders

- (1) In proceedings, the Court may, where relevant, make an interim order—
- (a) bringing to an end the requirement imposed by regulation 95(1);
 - (b) restoring or modifying that requirement;
 - (c) suspending the procedure leading to—
 - (i) the award of the contract, or
 - (ii) the determination of the design contest, in relation to which the breach of the duty owed in accordance with regulation 89 or 90 is alleged;
 - (d) suspending the implementation of any decision or action taken by the contracting authority in the course of following such a procedure.”

15. In construing these Regulations, the court is seeking to interpret the words used by the draftsman having regard to the context and the mischief which the regulations sought to address. As Lewison LJ explained in Pollen Estate Trustee Co. Ltd v. Revenue & Customs Commissioners [2013] EWCA Civ 753, [2013]1 W.L.R. 3785, at [24]:

“The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose... In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole...”

THE EFFECT OF EXEMPTION FROM THE OBLIGATION TO ALLOW A STANDSTILL PERIOD

16. Regulation 86(1) provides:

“Subject to paragraphs (5) and (6), a contracting authority shall send to each candidate and tenderer a notice communicating its decision to award the contract or conclude the framework agreement.”

17. Where a notice pursuant to regulation 86(1) is sent by facsimile or electronically, it must include, among other matters, a statement as to the standstill period of ten days during which the contracting authority will not enter into a contract: regs 86(2)(d) and 87(1)-(2).

18. It is common ground that the award in this case was made pursuant to a framework agreement and that accordingly the case fell within the exemption at regulation 86(5)(c). In such circumstances, regulation 86(5) provides that the contracting authority “need not” comply with the obligation otherwise imposed under regulation 86(1). That said, as a matter of fact LPPA elected to allow a standstill period in respect of both the first decision to award the contract in September 2020 and the second decision in December 2020.
19. Mr Suterwalla argues that regulation 95 should be construed in the overall context of the statutory scheme and that the purpose of the automatic suspension under regulation 95 is to afford economic operators an additional interim remedy beyond the expiry of the standstill period. Accordingly, he argues that regulation 95 is simply not engaged in a case such as the present which falls within the exemption under regulation 86(5). Thus, he submits that there never was a suspension in this case following the issue of proceedings in October. I did not call upon Ms Sloane to respond to this argument which, in my judgment, is obviously untenable:
- 19.1 First, there is nothing in regulation 95(1) to limit the automatic suspension to cases not falling within one of the exemptions to regulation 86(1).
- 19.2 Secondly, the automatic suspension plainly arises where the three conditions enumerated in regulation 95(1) are met. There is no doubt that those conditions were met upon LPPA’s becoming aware of the issue of Aquila’s claim, and it is impossible to read into the regulation some further requirement that the case did not fall within an exemption to regulation 86(1).
- 19.3 Thirdly, even if I am wrong as to the first and second points, regulation 86(5) does not prevent a contracting authority from giving notice pursuant to regulation 86(1). Indeed, in this case LPPA elected to do so and specified a standstill period.
- 19.4 Fourthly, there is in any event no reason of principle or policy why regulation 95(1) should not apply in a case that is exempt from the obligation under regulation 86. Of course, if no standstill period is allowed because the case falls within such an exemption, it is axiomatic that it will be less likely that the unsuccessful bidder will be able to move quickly enough to issue and give notice of a claim before the award of the contract. That is not, however, a reason for reading into regulation 95(1) some additional requirement beyond those expressly identified by the draftsman.

THE LIMITS OF THE SUSPENSION

20. The automatic suspension under regulation 95 arises upon timely communication of the fact that a claim form has been issued challenging the contracting authority’s decision to award the contract. Where that is achieved before the contract has been entered into, then the contracting authority is required to refrain from entering into the contract. The purpose of the automatic suspension is self-evidently to ensure that the contracting authority does not act upon the decision that is subject to challenge before either the challenge can be heard or the merits of such interim suspension considered upon an application for its discharge under regulation 96(1)(a). Where, faced with a challenge or a potential challenge, the contracting

authority elects to withdraw its original decision to award the contract and re-evaluate the bids received then it follows that the suspension serves no further purpose. As LPPA argues in its Defence and subject to the qualification that withdrawal of the first decision might not of itself defeat an accrued claim for damages (per Stuart-Smith J, as he then was, in Amey Highways Ltd v. West Sussex Council [2019] EWHC 1291 (TCC), [2019] P.T.S.R. 1995), the challenge to the original decision to award the contract then became academic.

21. Ms Sloane points out that the terms of regulation 95(1) require the contracting authority to refrain from entering into “the contract.” Such obligation is, she contends, broadly put and not limited to a bar on entering into the contract in accordance with the challenged decision. Regulation 95(2) provides that the suspension continues until either (a) the court brings it to an end by an interim order under regulation 96(1)(a), or (b) the proceedings are determined, discontinued or otherwise disposed of and the court does not order that the suspension should remain in place pending appeal. There is, Ms Sloane observes, no further category of case under regulation 95(2) in which the suspension lapses without further order of the court where the contracting authority withdraws its decision to award the contract. Further, she argues that Aquila’s suggested construction of regulation 95 is contrary to principle and policy in that it would be undesirable if a contracting authority could sidestep the suspension by the simple expedient of amending its decision.
22. In my judgment, the natural reading of regulation 95(1) is that it prevents the contracting authority from entering into the contract pursuant to the challenged decision. Such construction is supported by the terms of regulation 95(2) since there is no need for the third category of case postulated by Ms Sloane if the authority is only required to refrain from contracting pursuant to the challenged decision.
23. I consider that my preferred construction sits well with the scheme of the regulations. On such construction, the automatic suspension under regulation 95 is limited so that it prevents the authority from contracting on the basis of the challenged decision. I consider that a construction of the regulation which does not limit the authority’s freedom to enter into a contract where no other party has pleaded a claim challenging the decision to award such contract is entirely consistent with the underlying policy of the regulations, namely to strike a fair and sensible balance between the authority’s contractual freedom and the need to protect economic operators seeking to challenge the lawfulness of the procurement exercise. Should wider protection be necessary, the court has jurisdiction under regulation 96 to make some alternative order.
24. Further, I consider that the broader construction urged by Ms Sloane (that the automatic suspension continues to bite after the withdrawal of the challenged decision so as to prevent the authority from entering into a contract pursuant to a subsequent decision which is not the subject of any legal challenge) would serve no sensible purpose. Indeed, such a construction would unnecessarily fetter the authority’s freedom of contract and require an entirely academic application in all

such cases for no better reason than that the claimant had not yet got around to discontinuing what might (subject to the possibility of a subsisting damages claim) have become an academic challenge to an earlier decision.

25. Accordingly, I conclude that upon the proper construction of the 2015 regulations, the suspension in this case only prevented LPPA from awarding the contract to Civica pursuant to the September decision. Once that decision had been withdrawn and the bids re-evaluated, it served no further purpose. Where, as here, no challenge was pleaded to the second decision to award the contract either by way of a fresh claim form or amendment to the initial proceedings, the contracting authority was not required to refrain from entering into a contract pursuant to such second decision. This was therefore an unnecessary application pursuant to regulation 96(1)(a).

THE PROPER COSTS ORDER IN THIS CASE

26. Had this application been necessary then I should have rejected Mr Suterwalla's submissions that it was either premature or that LPPA had so conducted itself that I should deny LPPA its costs. While it is arguable that there was no particularly pressing reason why LPPA needed to award this contract urgently, the automatic suspension is a fetter on the freedom of a contracting authority to enter into a contract with the economic operator judged to have submitted the best tender and LPPA was entitled to require a quick answer to its pre-application demands for consent to the lifting of the suspension. Indeed, the parties are expected to deal with applications pursuant to regulation 96(1)(a) urgently; see, for example, Waksman J's observations in Iridium Concesiones de Infraestructuras SA v. Transport for London [2019] EWHC 3589 (TCC), at [30]. In view, however, of my conclusion that this application was unnecessary, I do not accept Ms Sloane's submission that LPPA was the successful party.
27. Aquila was therefore the successful party. Rather than, however, simply assert that LPPA was free to enter into a contract with Civica, Aquila initially sought to withhold its agreement to such course as a bargaining counter in its attempt to achieve a satisfactory settlement of the issue of costs upon its intended discontinuance of the underlying claim. It failed either to agree from the outset that LPPA was free now to contract with Civica or sign a simple consent order to that effect. It inconsistently and inaccurately asserted that the suspension prevented LPPA from contracting before subsequently, when it then suited Aquila after the application had been issued, arguing that the application had in fact been unnecessary. That is, in my judgment, conduct that the court should take into account pursuant to rule 44.2(4) of the Civil Procedure Rules 1998. I therefore award Aquila half of its costs.