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Case No: HT-2022-000273

Neutral Citation Number: [2022] EWHC 2471 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY AND CONSTRUCTION COURT (KB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 6 October 2022

Before :

THE HONOURABLE MR JUSTICE FRASER

Between :

INHEALTH INTELLIGENCE LIMITED

Claimant

- and -

NHS ENGLAND

Defendant

JUDGMENT

Deok Joo Rhee KC (instructed by **Trowers & Hamlins LLP**)
for the Claimant

Rhodri Williams KC and Jonathan Lewis (instructed by **Hempsons LLP**)
for the Defendant

Hearing Date: 29 September 2022

Mr Justice Fraser:

Introduction

1. These detailed written reasons follow brief oral reasons given to the parties at the conclusion of an application by the Claimant, InHealth Intelligence Ltd (“the Claimant”) seeking to gain interim relief against the Defendant, NHS England (“NHS England”) in respect of a procurement competition in which the Claimant has not fully participated. The Claimant was considered not to have submitted a compliant bid by the strict deadline that was given in the procurement competition document, the Invitation to Tender (“the ITT”). The bid was not therefore considered for evaluation, and the Claimant’s challenge is to that decision which it maintains is unlawful. NHS England is an umbrella body through which NHS providers obtain services. Amongst other things, NHS England conducts procurement for the NHS more widely. The best description of the events that led to the non-participation by the Claimant in the competition is, perhaps, controversial, but is explained more fully below. In summary terms, the online portal (“the e-Portal”) through which bidders were required to lodge their bids did not allow the Claimant to lodge a compliant bid by the deadline. The reason for this was an error on the part of the Claimant’s employee who was seeking to upload bid documents on to the e-Portal correctly, but who did not do so. That error led to the Claimant’s failure to lodge or upload all the necessary documents correctly on to the e-Portal by the deadline specified in the tender documents, namely the ITT. This meant that NHS England did not recognise the Claimant as a bidder, with the result that the evaluation required by the tender competition of the different bids will not include any evaluation of the Claimant’s tender or tenders.
2. This became clear in late July 2022 when NHS England notified the Claimant that it would not evaluate its bid. The total value of the lots in respect of which the Claimant was seeking to lodge a bid or bids was a sum slightly in excess of £140 million.
3. The Claimant therefore, on 10 August 2022, issued a claim seeking a variety of relief, including damages, against NHS England in respect of the decision not to allow the Claimant to participate (“the procurement claim”). This was followed in very short order by an application issued on 12 August 2022 for interim relief under regulation 96(1)(c) of the Public Contracts Regulations 2015 (“PCR 2015”) and CPR Part 25.1(a) (“the Suspension Application”). The Claimant seeks an order preventing NHS England from continuing with the procurement that is the subject of the procurement claim, pending determination of its substantive claim. The Claimant therefore seeks suspension of the entire procurement competition until such time as the court is able to hear and decide the substantive procurement claim.
4. During the hearing of the Suspension Application before me on 29 September 2022 the parties reached an accommodation whereby it was agreed that it was not necessary to proceed with the application. This occurred when it became clear that a trial date was potentially available on 30 January 2023 for determination (at first instance, at least) of all liability issues. The parties were agreed that they could “live with” the delay until then, and it was not necessary to hear full argument on the Suspension Application. I then continued to deal with all directions necessary to impose a truncated timetable upon the parties so that trial date could be met. During the course of doing so, a point of principle arose concerning the provision of a cross-undertaking in damages by the Claimant. This is a point that could, potentially, arise in other cases, hence these written reasons. Equally, the parties had attempted to impose their own trial date upon the court

in the week before the Suspension Application was to be heard. That too is something that may also arise in other cases. The terms of the draft consent order in which the parties sought to do that are relevant to the cross-undertaking point too (“the draft consent order”). Basically, after NHS England agreed with the Claimant that the Suspension Application need not be decided, and that it would suspend the competition anyway, it asked the court to order the Claimant to provide an undertaking in damages as part of the timetable leading to the trial in January 2023. I refused to do this. I explained to the parties that I would provide more detailed written reasons following the application. These are those reasons.

The basis of the substantive claim

5. The Claimant served four witness statements in support of the application. These were two statements from Ms Lucy James of the Claimant’s solicitors, Trowers & Hamblins LLP; one from Mr Andrew Searle, the CEO of the InHealth Group, which owns the Claimant; and one from Mr Philip Kirby, the Managing Director of the Claimant. NHS England served three statements. These were two from Ms Rosalind Lindridge, of NHS England; and one from Mr Tim Dennis of the solicitors acting for NHS England, Hempsons LLP.
6. The reason that I described the description of the circumstances leading to the Claimant’s non-participation as potentially controversial is that it could be described either as an error or mistake by the Claimant (with implicit within that description that the Claimant be forgiven the error); or as a failure to comply with the bid requirements and deadline set out in the ITT. It could also potentially be described as something that, had the act of lodging or uploading the bid documents on to the e-Portal not been left until the last minute, could – again potentially – have been remedied in time for the Claimant to have lodged a compliant bid. Most people in their professional lives will make mistakes of one sort or another, from time to time. Some of those mistakes may be minor and never come to light; others may have serious consequences. In this case, there was a mistake. In a judgment such as this, on an application such as this one, all that can be done is to recite what has occurred. It is not necessary to consider or apportion blame, and for that reason I do not intend to name the employee of the Claimant who was responsible for the mistake in uploading the bid documents.
7. Put very shortly, that employee uploaded a document that formed part of the Claimant’s bid on to the e-Portal, but in the wrong place. This document is entitled the Communication and Stakeholder Plan in support of Question 121 (SD04d Lot 4 Midlands West Communication, Reporting and Data Quality) (“the Question 121 document”). When he tried to upload it to the correct place, the e-Portal would not permit this as the document name was the same as the name of the identical document, already lodged (but in the wrong place). The e-Portal design would not permit the same document to be uploaded in two locations. An error message was generated by the e-Portal that said “the file you are trying to upload already exists. Please try again”. This error message appeared more than once, as the employee attempted to upload the Question 121 document multiple times. Screenshots are available of the majority of these messages.
8. The deadline for uploading all documents was 12.00 noon on 12 July 2022, and prior to that deadline at 11.54am the employee sent a message via the e-Portal pointing out that he was receiving an error message but could not resolve it. He requested investigation and assistance. This assistance was not received in time, although the

message was acknowledged at 12.52pm, and further details were invited from the Claimant. There were various communications between the parties about this, but the matter was not resolved and on 20 July 2022 North of England Commissioning Support (“NECS”), the body that was conducting the procurement on behalf of NHS England, sent a letter stating that the Claimant was excluded from the competition.

9. This led to letters between solicitors and the Claimant firstly issued its substantive claim, and then its Suspension Application, on 10 and 12 August 2022 respectively.

An application for suspension

10. In procurement cases generally where the challenge is to the outcome of a competition, the Regulations provide for what is called the “automatic suspension” to be imposed upon the contracting authority once a disgruntled bidder issues proceedings under the Regulations challenging the result of the competition. In the PCR 2015, this is provided for in regulation 95 that states as follows:

“95.—(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).”

11. There are other similar provisions in similar regulations that govern other types of procurement, for example regulation 57 of the Concession Contracts Regulations 2016, the regulations which governed the recent procurement competition concerning the National Lottery. If the contracting authority wishes to have the automatic suspension lifted, they apply to the court and (if this is opposed by the economic operator) that application is considered on its merits. The principles are very similar, if not identical to, those applied when a party makes an application for an injunction as interim relief. They are usefully set out most recently by O’Farrell J in *Camelot UK Lotteries Ltd v The Gambling Commission* [2022] EWHC 1664 (TCC):

“[47] The applicable principles for determining such an application are set out in *American Cyanamid v Ethicon* [1975] AC 396 per Lord Diplock at pp.407G-408H; *National Commercial Bank Jamaica Limited v Olint Corporation Limited* [2009] UKPC 16 per Lord Hoffmann at [17]-[18]; *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 per Coulson J (as he then was) at [34] and [48];

and summarised in *Alstom v Network Rail Infrastructure Ltd* [2019] EWHC 3585 (TCC) at [29].

[48] The relevant questions for the court, when determining an application to lift the automatic suspension in a procurement challenge case, are as follows:

i) Is there a serious issue to be tried?

ii) If so, would damages be an adequate remedy for the claimant(s) if the suspension were lifted and they succeeded at trial; is it just in all the circumstances that the claimant(s) should be confined to a remedy of damages?

iii) If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial?

iv) Where there is doubt as to the adequacy of damages for either 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?"

12. However, not all procurement challenges are to the result of a competition. Some, such as this one, relate to how the procurement competition is being run, prior to a result being available. Regulation 96 states:

“96.—(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.

(2) When deciding whether to make an order under paragraph (1)(a)—

(a) the Court must consider whether, if regulation 95(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority 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 95(1).

(4) The Court may not make an order under paragraph (1)(a) or (b) or (3) before the end of the standstill period.

(5) This regulation does not prejudice any other powers of the Court.”

13. Where, as here, the procurement challenge is not to the outcome of the competition, the provisions of regulation 95 do not apply. The instant case is an example of a bidder seeking to stop a procurement competition altogether (or at least, until such time as – if it wins its litigation – it can re-join the competition). The court does have the power to suspend or pause the competition. That can be done both expressly under regulation 96(1)(c), and also under the court’s general powers to grant interim relief under CPR Part 25.1(a).
14. It was common ground before me, and I consider it to be correct in law, that in such a scenario as this one, where a claimant economic operator is seeking an order from the court to suspend the competition under either of the two routes explained in [13] above (as opposed to a regulation 95 situation, where a defendant contracting authority seeks removal of the automatic suspension imposed by the regulation), the same principles as those set out in [48] of *Camelot v The Gambling Commission* apply in any event. In other words (and in the context of the disagreement between the parties in this case) adequacy of damages is a material consideration whether the application is to lift the automatic suspension, or is to suspend the competition.
15. Damages, however, are not always what an aggrieved bidder wishes to obtain. This is for at least two reasons. Firstly, it might be difficult for such a bidder to obtain an award for damages, given the requirement for there to have been a sufficiently serious breach by the contracting authority. A sufficiently serious breach is sometimes referred to as the second *Francovich* condition; *Nuclear Decommissioning Authority v EnergySolutions EU Ltd* [2017] UKSC 34. That case concerned the 2006 Regulations, the predecessor to the PCR 2015, but in my judgment the ratio applies to the current regulations too. In that case, the Supreme Court at [39] stated, per Lord Mance:
“[39] The scheme of the Remedies Directive is a balanced one. The *Francovich* conditions represent the Court of Justice’s conclusion as to the appropriate minimum protection by way of damages which an economic operator can expect. Although there is no *Marleasing* imperative to construe the scheme so far as possible consistently with the *Francovich* conditions, it is I think a natural assumption that the UK legislator will not go further than required by EU law when implementing such a scheme, without considering this and making it clear. That is fortified by the legislator’s clear intention not to gold plate when substituting the new Part 9 scheme for the old in 2009. In these circumstances, I consider that the 2006 Regulations as amended in 2009 should be read as providing for damages only upon satisfaction of the *Francovich* conditions. That is also consistent with the use of the word “may” which otherwise seems to me to have no real significance.”
(emphasis added)
16. The second reason is that an economic operator may indeed want, for a wide variety of commercial considerations, to be the winning bidder, rather than have damages. Some commercial organisations may prefer to conduct the economic operations that are the

subject of the procurement rather than be excluded, or lose, with a competitor enjoying the profits of the operation in question. This may be more so in the case of an existing incumbent provider where services are put out to tender, but such considerations may apply in many cases.

17. Equally, a contracting authority may prefer to avoid exposure to a damages claim. Here, NHS England is a major provider of services, and has a very large annual budget. That public money is provided to supply healthcare and associated services, and sums paid out as damages to disgruntled bidders in litigation are, by definition, not being expended on the primary purpose of the NHS. Public bodies such as NHS England will want to award contracts to the most economically advantageous tenderer who wins properly run procurement competitions leading to a lawful result.
18. It is against that background that the parties sought, each for reasons of their own (and what those reasons are does not matter) to accommodate a way forward in the litigation that did *not* involve contesting the Suspension Application by the Claimant. Had the Claimant won that application, it would have obtained the chance at least of re-joining a competition that had not run its course, but it would have been potentially exposed under the undertaking in damages that the court requires as a condition of granting such interim relief. Had NHS England been successful in resisting the Suspension Application, it would have been permitted to continue the procurement and grant the contract(s) to the winning bidder(s), but at the risk of being potentially ordered to pay damages to the Claimant at the conclusion of the substantive procurement challenge, were it to lose in the substantive action, if any breaches that are found satisfy the second *Francovich* condition. Such damages could prove to be sizeable.
19. Therefore there were both pros and cons to both parties in seeking to agree a way forward consensually, rather than fully contesting the Suspension Application.

Expedition and the compromise of the Suspension Application

20. The parties therefore discussed matters between themselves, during early September, and this led to their lodging a draft consent order seeking to have the Suspension Application vacated, in which they also agreed that NHS England would pause the procurement. The parties sought an order for expedition, together with a trial date of 5 December 2022. Their agreed trial estimate was 1½ days.
21. This order was put before the court in the week before the Suspension Application was due to be heard. The draft consent order came before the Vacation Judge but could not be approved. The reasons for this are as follows. Firstly, the court simply could not accommodate a trial date in the week of 5 December 2022. There are a limited number of judges, there are other trials already in the court lists, and parties simply cannot leap to the front of the queue by agreeing between themselves that a specific trial date is one that suits them, and that this is what they wish to do. The over-riding objective requires consideration of other court users.
22. Secondly, the trial estimate of 1½ days was, in my judgment, not just unrealistic, but unrealistic to a significant degree. Those who conduct cases such as these are well aware of the time that such matters take, and it is – save in the most unusual of circumstances – rarely the case that a trial can be properly conducted in a period shorter than a few days, dealing with subject matter such as this. This became even more clear during the hearing of the Suspension Application, when the parties moved to a trial estimate of 3 days. This is an increase of 100% in the trial estimate within a period of

only about 10 days. Even the higher 3 day estimate allows only one full day for any evidence of fact to be heard. The parties said that they did not anticipate much cross-examination, but neither of them have prepared even draft witness statements, and so it is not possible to be confident about that. Further, neither of them was prepared to commit to calling no evidence at all. Therefore this too could prove to be unrealistic. I suspect that the short and unrealistic time estimate of 1½ days was chosen to give them the best chance of obtaining a trial date of 5 December 2022. This is counter-productive and is not to be encouraged.

23. I would add the following, in terms of unrealistically short time estimates. Judges who sit in the specialist lists of the King's Bench Division in the Business and Property Courts are finding an increasing tendency amongst counsel who appear in these courts, for cases and hearings to be compressed more and more, into shorter and shorter estimates. When these hearings occur, the following usually occurs. There is insufficient time for parties properly to address the court on principles in the authorities relied upon, and this is dealt with by inviting the judge to go away and study the authorities in detail later, without making clear the purpose for which a particular case is being cited. This is becoming an increasingly common practice. In my experience, this particularly applies both in heavy applications, and also shorter trials. If the parties collectively cite – say - 20 authorities or more, the amount of court time required for oral submissions on the law would, one imagines, be longer than a couple of hours.
24. Legal points are kept alive, or not formally abandoned, but very few, if any, oral submissions are made on some of them. Another feature is that counsel will explain that there is insufficient time properly to challenge all the important evidence and general challenges are therefore made, without any attempt at particularity. Judges do not need (or want) every point to be taken, and parties do not need to challenge everything. But there is a limit, and unreasonably short time estimates make conducting hearings or trials much more difficult.
25. I wish to emphasise that making considered and realistic time estimates are an important part of the function of counsel instructed in a case. It helps no one, and potentially hinders the administration of justice, for unrealistically short time estimates to be provided, usually in an attempt to manipulate an earlier listing.
26. Thirdly, there is nothing particularly unusual in a case such as this to justify such unwarranted expedition. A substantive trial in December 2022, in an action that was only commenced in August 2022, is very rapid indeed. The court will always do its best to accommodate the parties where this can sensibly be done, but there is the potential in every procurement challenge which triggers the automatic suspension to avoid the damages conundrum explained above at [15] to [18] by expediting the case and deciding the substantive claim as quickly as possible. Just because a case is a procurement claim is not enough. There must be good and cogent reasons to justify expedition.
27. Tellingly, however, in the draft consent order seeking both expedition and a trial on 5 December 2022, there was no provision for any cross-undertaking in damages by the Claimant as a quid pro quo for NHS England to agree to suspend the competition. That was the choice of the parties. Given the court could not approve that order, this made no difference at that stage, and therefore the parties were notified that the Suspension Application remained in the list.

28. The application commenced on 29 September 2022 and after about one hour of submissions it became clear that, given the trial date that was available was at the very end of January 2023, the parties wanted time to take stock. This time was given, and NHS England stated that it would agree that the procurement would be paused until the substantive action was decided on liability.

The undertaking in damages

29. Before turning to what happened next, it is convenient to set out in summary terms the nature of an undertaking in damages when a party seeks interim relief. There are some exceptions, but an applicant to the court seeking interim relief will, as a matter of practice, generally be required to give an undertaking to the court to abide by any order for damages that may subsequently be made by the court, if the respondent to the application suffers loss as a result of the order being made, and the court is of the opinion that the applicant should compensate him or her. There is a discretion in terms of whether the undertaking will be required (and whether it needs to be fortified), but in the vast majority of commercial cases, it will be. Regulation 96(3) also expressly deals with undertakings or conditions.
30. An undertaking is given to the court; it is a promise to the court, and a failure to honour it is a contempt of court. There are a wide number of authorities dealing with this subject generally, and the subject (as an example of its breadth) merits an entire chapter of its own in *Commercial Injunctions: Gee Sweet & Maxwell* (7th ed. 2021). The jurisprudence that has emerged in the procurement field over the last 20 years or so has considered and adopted the same principles when a claimant seeks to delay or postpone the outcome of a procurement competition. There may be a loss suffered by a contracting authority by postponing the implementation of the new contract; that loss is caused by an unsuccessful bidder challenging the outcome of the competition. It is only just and fair that, to preserve the status quo ante, the bidder is potentially exposed to reimbursing the contracting authority for such loss, if it asks the court to order that the procurement is paused, or that the contract with the winning bidder is not executed. This is achieved through the undertaking in damages, if the court is persuaded either not to lift the automatic suspension under regulation 95, or (as here) to make an order that has similar effect under regulation 96. The undertaking in damages is, sometimes, not required. For example, in *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200 (TCC) the defendant Council did not seek an undertaking in damages from the claimant which was challenging the procurement competition for the supply of mental health services to young people. This is consistent with the principle that an undertaking will not be required from the Crown, a law enforcement agency or a body acting for the public; *Financial Services Authority v Sinaloa Gold Plc (Barclays Bank Plc intervening)* [2013] 2 AC 28.
31. Given the nature of an undertaking, the court cannot make an order that a party provides an undertaking to it, if the party is not willing to provide one voluntarily. Without embarking upon a historical analysis of why that is, it appears clear that this would amount to extracting a promise to do something, breach of which would constitute a contempt of court, where the party is not prepared to give such a promise.
32. In the *NDA v EnergySolutions* case referred to above, one preliminary issue was the attempt by the NDA to contend that EnergySolutions' failure to issue proceedings within the time required to trigger the automatic suspension under the 2006 Regulations was unreasonable, causative of any damage EnergySolutions might have suffered, and

also constituted a failure to mitigate its loss. That question was ultimately decided by the Supreme Court against the NDA. In doing so, at [54] of the *NDA v EnergySolutions* case, the Supreme Court (per Lord Mance) stated that:

“[54] The provision of an undertaking or security as a condition of the continuation of a stop order or stay is a matter of free choice for a party. There is no basis for regarding the victim of an alleged breach seeking interim relief as obliged to exercise that choice in the interests of the other party, or indeed of anyone save itself. I am unable to accept the NDA’s proposition that, because the court could reasonably demand a cross-undertaking or security as a condition of a continuation of the stop order, it would or could be regarded as unreasonable for ATK to refuse to put this up. For the court to impose a condition as the price of continued relief which a party is seeking is quite different from treating the victim of a breach as acting unreasonably if it fails to seek a particular form of relief or to back it with an undertaking or security.”

(emphasis added)

33. The use of the term “matter of free choice” in that passage makes it further clear, if such extra clarification is needed, that a court cannot order a party to provide an undertaking in damages. It can – and does – in applications for interim relief require an undertaking as a condition of granting that interim relief. That is what Lord Mance was referring to when he said “because the court could reasonably demand a cross-undertaking or security as a condition of a continuation of the stop order”. But that is not the same as ordering a party to make a promise to the court.
34. Turning then to the point between the parties in this case when the Suspension Application was compromised, at the point of the parties’ drafting and amending the directions order, NHS England asked the Claimant to provide an undertaking in damages. The Claimant refused. The Claimant was bolstered in its position by the fact that the draft consent order lodged by the parties the week before the hearing (wherein the trial date of 5 December 2022 was sought) did not include such an undertaking; that there had been no written or email request by NHS England to the Claimant to give such an undertaking in any of the correspondence prior to 29 September 2022; and that no oral request for such an undertaking had been made of the Claimant, or its leading counsel, until after it had been agreed that the Suspension Application would not proceed.
35. In those circumstances, the Claimant was confident in its own position that it would not provide an undertaking in damages. It had, effectively, obtained all that it wanted, by NHS England agreeing to pause the procurement competition until the substantive trial on liability has been determined. This was particularly so given that NHS England confirmed, even during the drafting of the order and the hearing regarding directions, that it was not conceding the Suspension Application should succeed. The draft order lodged with the Suspension Application itself had included the normal undertaking in damages, but that was not the order that the court was making (and indeed NHS England opposed the making of that order in its opposition to the Suspension Application).
36. In those circumstances, although NHS England asked me to order the Claimant to provide an undertaking in damages, I was not prepared to do so. Firstly, and crucially, I do not consider that the court has the power to order a party to give an undertaking. It can be sought as a condition of granting interim relief, but that is different. Secondly, even if I am wrong about that, given that the parties had freely agreed between them

that the procurement competition be paused until the substantive liability trial has been determined in January/February 2023, I do not consider that it would be right to interpose into that agreement an undertaking in damages by one of the parties, when that party was opposing such a term being included, and was not prepared to provide such an undertaking.

Conclusion

37. The procurement competition is therefore paused, by consent, on the terms of the order agreed by the parties before me on 29 September 2022. This suspension will last until the substantive trial on liability is determined in February 2023, or until further order. Once that liability judgment is available, dependent upon its outcome, the matter of continuation or otherwise of the ongoing procurement competition can be revisited.