

Neutral Citation Number: [2022] EWHC 787 (TCC)

Case No: HT-2021-000435

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25 March 2022

Before :

Mrs Justice O'Farrell DBE

Between :

Atos IT Services UK Ltd

Claimant

- and -

**(1) Secretary of State for Business, Energy and
Industrial Strategy**

Respondent

(2) The Meteorological Office and Interested Parties

(1) Microsoft Limited

(2) EntServ UK Ltd

**Valentina Sloane QC and Azeem Suterwalla (instructed by Burges Salmon LLP) for the
Claimant**

Sarah Hannahford QC and Ewan West (instructed by Hogan Lovells) for the Respondent

Hearing dates: **25th March 2022**

RULING

Mrs Justice O'Farrell DBE
(11:57 am)

Friday, 25th March 2022

Ruling by MRS JUSTICE O'FARRELL DBE

1. The court will make an order today for consolidation of the four claims before it for the following reasons.
2. CPR 1.1 sets out the overriding objective of enabling the court to deal with cases justly and at proportionate cost, including dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and financial position of the parties; ensuring that it is dealt with expeditiously and fairly; and allotting to it an appropriate share of the court's resources, taking into account the need to allot resources to other cases.
3. Section 49(2) of the Senior Courts Act 1981 provides that subject to the provisions of that Act itself or any other enactment, every court shall so exercise its jurisdiction in every cause or matter before it so as to secure that (a) as far as possible, all matters in dispute between the parties are completely and finally determined, and (b) as far as possible, all multiplicity of legal proceedings with respect to any of those matters is avoided.
4. CPR 3.1(2)(g) provides that the court's case management powers include the power to consolidate proceedings so that two or more claims proceed as one claim. The benefit of consolidating proceedings is that there can be a significant saving of costs and time in the avoidance of a multiplicity of proceedings. In this particular case it is clearly the sensible way forward, because it will enable the court to fully understand the way in which the case as a whole is put and the response to the case, so that it can efficiently and effectively case manage this dispute to a fair and just resolution.

5. The dispute concerns the conduct of a procurement in respect of a new super-computer dedicated to weather and climate change, to be procured by the second defendant, the Met Office, with an estimated value of £854 million. By a notice dated 15 January 2021, the Met Office informed the claimant, Atos, that it had not been selected as the preferred bidder, that its final tender submission was a non-compliant final tender and that the contract had been awarded to Microsoft Limited. The claimant seeks to challenge the lawfulness of the procurement exercise and to set aside the award of the contract to Microsoft.
6. Claim 1, HT-2021-000038, was issued on 1 February 2021. The pleaded case is that the claimant was wrongly disqualified at the final tender stage by scoring zero in respect of requirements B2.5, U6.2 and U6.3 and that the decision to award the contract to the interested party, Microsoft, was unlawful. The relief claimed includes a declaration that the conduct of the procurement was unlawful; and a declaration that the contract should have been awarded to the claimant.
7. At the time that the case was pleaded, there was a further declaration sought that it would be unlawful for the defendants to enter into the contract with Microsoft but that has been overtaken by events, following an agreement by the parties that the automatic suspension could be lifted, and the defendant has concluded a contract with Microsoft.
8. Claim 2, HT-2021-000435, was issued in November 2021 and relates to the same procurement, arising out of inspection of the defendants' disclosure in Claim 1. The reason that a separate claim form was issued was to avoid falling outside the strict limitation period of 30 days from the date of information relevant to the new breaches.

9. Claim 2 refers to, and relies on, the background facts and obligations under the Public Contracts Regulations and principles of retained EU law as set out in Claim 1. Further, it introduces additional breaches of in respect of the evaluation not just of the claimant's tender, which led to disqualification, but also in relation to the evaluation of Microsoft's tender. As in Claim 1, there is reference to the evaluation in relation to the requirements B2.5, U6.2 and U6.3. The relief sought is effectively the same as the relief sought in Claim 1, including a declaration that the conduct of the procurement was unlawful, a declaration that the contract should have been awarded to the claimant and a declaration at the time that it was unlawful for the defendants to enter into a contract with Microsoft.
10. On 14 December 2021 Eyre J ordered Claim 1 and Claim 2 to be case managed together. On 28 January 2022 Kerr J ordered both claims to be heard at the trial of liability and causation (but excluding quantum) currently fixed to start on 9 May of this year, that is six weeks away, with a slightly extended time estimate of 12 days, to include one judicial reading day.
11. On 23 February 2022, two further claims were issued by the claimant, again, as separate claims to avoid expiry of the strict limitation period for procurement challenges. Claim 3, HT-2022-000047, makes reference to claims 1 and 2 and indeed attaches them as appendices to the Particulars of Claim in Claim 3. Further, paragraph 11 states that the claimant refers to and repeats paragraphs 15 to 76 of Claim 1 as part of its pleaded case in Claim 3. The claim is said, at paragraph 8, to arise out of the defendants' response of 21 January 2022 to the claimant's third request for further information in claims 1 and 2, responses to recent pre-action correspondence and the service of witness evidence in claims 1 and 2 on 11 February 2022.

12. In Claim 3 it is pleaded that these documents show that in breach of the PCR the defendants committed manifest errors and acted in breach of the principles of transparency and equal treatment in the procurement; in particular, by manifest errors in the evaluation of Microsoft's tender in relation to the previously identified requirements and in treating Microsoft and the claimant's final tenders in an inconsistent and/or unequal way, wrongly evaluating Microsoft's final tender and wrongly evaluating the claimant's final tender as non-compliant. The relief sought is again a declaration that the conduct of the procurement was unlawful, a declaration that the contract should have been awarded to the claimant and a declaration that it was unlawful for the defendants to enter into the contract with Microsoft.
13. Claim 4, HT-2022-000048, was also issued on 23 February 2022. Claim 4 refers to Claims 1, 2 and 3. At paragraph 8 it is pleaded that Claim 4 arises out of the defendants' response of 21 January 2022 to the claimant's third request for further information in claims 1 and 2; and the defendants' letters of 11 and 17 February 2022 provided in response to pre-action correspondence.
14. In Claim 4 it is said that the new information gives rise to allegations made by the claimants of further discrete breaches of the PCR and/or general principles of retained EU law by permitting specifications and/or a timetable which are materially different from those which were provided in Microsoft's final tender and thereby effecting substantial modifications to the contract in breach of the PCR and awarding Microsoft a new contract, which was different to that advertised in the procurement. On that basis, the relief sought is the same effectively as the relief sought in the other claims, namely, a declaration that the conduct of the procurement was unlawful, a declaration that the contract should have been awarded to

the claimant and a declaration that the Microsoft contract should be set aside on the grounds of ineffectiveness.

15. Having considered the pleadings in each of Claims 1, 2, 3 and 4, it is clear to this court that they should be consolidated. The claims concern the same parties. The parties have the same legal representation. They concern the same procurement. They raise different breaches, but all concern the evaluation of tenders, treatment of the competing bidders, and basis on which the defendants disqualified the claimant and awarded the contract to Microsoft. The claim for relief in each of Claims 1, 2, 3 and 4 is essentially the same, namely, that the procurement was unlawful, that the contract should have been awarded to the claimant, and that the award of the contract to Microsoft was unlawful and/or should be set aside. In each of the claims there is also a claim for damages, although quantum is not included in the forthcoming trial.
16. It is clear from a brief analysis of the pleadings this morning that there is a very significant overlap as to the issues of liability and causation in each of the Claims. Indeed, there are cross-references between the Particulars of Claim, Further Information and Replies to various parts of each of the Claims. It would be inefficient and clumsy for the court to embark on a trial of just Claims 1 and 2 without first considering whether it should include in that trial Claims 3 and/or 4.
17. The court is also very concerned that the trial is just six weeks away, leaving relatively little room for manoeuvre. The obvious question that needs to be grappled with is whether this trial can or should go ahead at all on 9 May 2022, or whether it should be adjourned to allow for the inclusion of Claims 3 and/or 4.

18. It is clearly appropriate that counsel, those instructing them and their clients should have an opportunity to fully address the court on these matters. Suffice it to say, that the court is satisfied that there should be consolidation. It makes that order today. It follows that there should be consolidated pleadings. The court will consider an appropriate timetable for such consolidated pleadings at the next hearing on 31 March 2022 at 10.30. At that hearing the court will also consider whether any of the claims should be tried together; if so, when; and what further directions in general to make for further progress in this matter.
19. I would invite the parties to do is to consider carefully the way in which they would invite the court to deal with the consolidated claim, including proposals for the trial and directions.