



Neutral Citation Number: [2018] EWHC 1303 (TCC)

Case No: HT-2017-000035

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: 25/05/2018

Before :

MRS JUSTICE O'FARRELL DBE

Between :

MLS (OVERSEAS) LIMITED

Claimant

- and -

THE SECRETARY OF STATE FOR DEFENCE

Defendant

- and -

**SCA SHIPPING CONSULTANTS ASSOCIATED
LIMITED**

**Interested
Party**

Philip Moser QC and Daisy Mackersie (instructed by **Pinsent Masons LLP**) for the
Claimant

Alan Bates and Michael Armitage (instructed by **the Treasury Solicitor**) for the **Defendant**
Joseph Barrett (instructed by **Preiskel & Co LLP**) for the **Interested Party**

Application dealt with on paper

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

Introduction

1. An expedited trial of the dispute in these proceedings, limited to liability, was heard on 23, 24, 25, 26 and 27 October 2017. On 21 December 2017 judgment was handed down, in which this Court made findings that: (i) the defendant (“the MoD”) acted unlawfully, in breach of its obligations of transparency and equal treatment in applying criteria that were arbitrary or not sufficiently clear from the Invitation to Tender (“the ITT”) and in rejecting the claimant’s tender on that ground; (ii) there was no manifest error in the MoD’s assessment and evaluation of the tender; and (iii) had the MoD discretion to reject a tender for a “fail” score on Question 6.3, it did not act in an irrational or disproportionate manner in exercising such discretion.
2. On 27 March 2018 the claimant (“MLS”) issued an application, seeking the following relief:
 - i) a declaration that the procurement was carried out unlawfully;
 - ii) an order setting aside the decision to award the contract to the interested party (“SCA”); and
 - iii) an order requiring the MoD to amend its award decision to award the contract to MLS.
3. The parties have submitted written submissions in respect of the order that should be made on disposal of these proceedings:
 - i) submissions of MLS dated 27 March 2018;
 - ii) submissions of the MoD dated 10 April 2018;
 - iii) submissions of SCA dated 16 April 2018;
 - iv) supplementary submissions of the MoD dated 18 April 2018;
 - v) supplementary submissions of MLS dated 23 April 2018;
 - vi) reply submissions of SCA dated 25 April 2018;
 - vii) further submissions by email from MLS dated 25 April 2018;
 - viii) further submissions by email from SCA dated 26 April 2018.
4. MLS and the MoD have indicated that they are content for the outstanding matters to be dealt with in writing. SCA has indicated that the court might be assisted by oral submissions. Having regard to the court time and costs already incurred, and the full written submissions produced by the parties, I have concluded that it is not necessary to have an oral hearing and this matter can be dealt with on paper.

5. The issue before the court is whether MLS is entitled to any, and if so, what remedy, following the finding of unlawfulness against the MoD in respect of its decision to reject MLS's tender.

Position of the parties

6. Upon making its procurement challenge, MLS continued to provide port agency services for the MoD under its pre-existing contract pending the determination of these proceedings. Following the judgment, the MoD and MLS have agreed in principle to an extension to that arrangement so as to meet the Royal Navy's operational requirements, subject to the Court's order.
7. MLS's submission is that the court has made a finding on liability in its favour. The logical consequence of the judgment is not only that the decision to award the contract to SCA cannot stand but also that the contract should now be awarded to MLS. As between MLS and the MoD, it is agreed that if the MLS bid had not been rejected for the "fail" score in respect of Question 6.3, which rejection has been found to be unlawful, MLS would have been awarded the contract as the highest scoring tenderer.
8. The MoD wishes to ensure that it acts lawfully and properly. It adopts a neutral position in respect of MLS's application for relief, save that it opposes a mandatory order requiring it to award the contract to MLS. In that regard, the MoD's position is that, if the Court agrees with MLS's argument that it would be lawful for the MoD now to award the contract to MLS, then the appropriate order for the Court to make to reflect that conclusion would be an order declaring this, rather than mandating that the MoD now award the contract to MLS.
9. SCA opposes MLS's application and submits that no remedy can, or should, be ordered by the Court because (i) MLS has failed to establish that its response to Question 6.3 would have been different, and that it would have been the successful bidder if the ITT had stated the consequence of a "fail" to that question; and (ii) the claim is subject to a statutory time bar. SCA invites the Court to amend paragraph 78 of the Judgment accordingly. Alternatively, SCA invites the Court to exercise its remedial discretion in a manner that does not disturb the MoD's decision that SCA should be awarded the contract. In any event, SCA submits that the Court should decline to make any mandatory order that MLS should be awarded the contract.

Statutory Time Bar

10. SCA submits that the relevant breach of the Defence and Security Public Contracts Regulations 2011, as amended, ("the 2011 Regulations") was the MoD's publication of the ITT without specifying what would be the consequences of a "fail" score for Question 6.3. Regulation 53(3) provides that proceedings must be started within 30 days beginning with the date when the economic operator first knew or ought to have known the grounds for starting the proceedings had arisen. Time started to run from the date of the breach and not from the later date when MLS was excluded from the tender process. MLS did not start proceedings within 30 days of the publication of the ITT. Therefore, the claim is statute-barred.
11. SCA relies on the case of *Jobsin Co UK plc v Department of Health* [2001] EWCA Civ 1241 per Dyson LJ at paragraph [26]:

“[26] ... It is clear that, as soon as the Briefing Document was issued without identifying the criteria by which the most economically advantageous bid was to be assessed, there was a breach of [the regulations] ... Moreover, it was a breach in consequence of which Jobsin, and indeed all other tenderers too, were then and there at risk of suffering loss and damage. It is true that it was no more than a risk at that stage, but that was enough to complete the cause of action. Without knowing what the criteria were, the bidders were to some extent having to compose their tenders in the dark. That feature of the tender process inevitably carried with it the seeds of potential unfairness and the possibility that it would damage to prospects of a successful tender.

“[27] ... it is sufficient to found a claim for breach of the Regulations that there has been a breach and that the service provider may suffer damage as a result of the breach. It is implicit in this that the right of action may and usually will arise before the tender process has been completed.”

12. Reliance is also placed on subsequent authorities that have affirmed and applied *Jobsin: R (Nash) v Barnet LBC* [2013] EWCA Civ 1004; *Parker Rhodes Hickmotts Solicitors v Legal Services Commission* [2011] EWHC 1323; *Matrix SCM v Newham LBC* [2011] EWHC 2414; *Allan Rutherford LLP v Legal Services Commission* [2010] EWHC 3068; *Hereward & Foster Ltd v Legal Services Commission* [2010] EWHC 3370; *Irish Waste Services Ltd v Northern Ireland Water Ltd* [2010] NIQB 13.
13. SCA invites the Court to amend the liability judgment to make a finding that the procurement challenge was made out of time and submits that, as a result, no remedy should be granted.
14. MLS and the MoD do not accept that they overlooked the possible limitation argument. The parties were aware of the issue and the MoD addressed it in its submissions to the Court. There is no application by the MoD for permission to appeal the liability judgment and SCA has no standing to seek to re-open the Court's findings.
15. SCA was not a party to the liability trial and does not have standing to challenge the Court's findings. However, I have considered the points raised as they have been argued fully in submissions and could have a bearing on the jurisdiction to grant a remedy or the appropriate disposal of this matter by the Court.
16. The issue that arose at trial can be summarised below:
 - i) MLS's case, as pleaded and argued at trial, was that the MoD was not entitled to reject its tender based on a “fail” score against Question 6.3 because (a) the MoD determined that MLS's tender was the most economically advantageous tender (“MEAT”) using the criteria set out in the ITT; and (b) the ITT did not identify a “pass” against Question 6.3 as necessary to render the tender compliant.

- ii) It was common ground that the ITT did not state expressly that a “pass” against Question 6.3 was a threshold criterion as part of the MEAT determination.
 - iii) It was also common ground that the ITT did not state expressly that a “pass” on Question 6.3 was required to render the tender compliant.
 - iv) The MoD clearly articulated its case that any challenge by MLS to the lawfulness of the ITT in respect of a defect that was identifiable on the face of that document would have had to have been brought within 30 days (pursuant to Regulation 53(2)). Therefore, any allegation of a breach of transparency in the procurement process by reason of a lacuna in the ITT, in terms of its failure to state expressly the consequences of a “fail” score, would be out of time.
 - v) The MoD’s defence to the pleaded challenge was that it was entitled to reject the MLS tender based on its “fail” score against Question 6.3 because, although the ITT did not expressly state that the consequence of a “fail” score would be mandatory or discretionary disqualification, such result could be discerned from the ITT on an objective interpretation i.e. from the perspective of the hypothetical reasonable and well-informed and normally diligent (“RWIND”) tenderer.
 - vi) The issue for the Court was whether, on a proper interpretation of the ITT, it would have been apparent to the RWIND tenderer that the consequence of a “fail” score against Question 6.3 would be mandatory or discretionary disqualification.
 - vii) The Court rejected the MoD’s case that the consequences of a “fail” score against Question 6.3 were implicitly clear to a RWIND tenderer. The ITT did not, expressly or implicitly, include a “pass” on Question 6.3 as part of the MEAT threshold criteria or as a minimum threshold for a compliant tender.
17. I reject SCA’s submission that the claim is statute-barred. On a proper construction of the ITT, it identified the criteria by which the most economically advantageous tender would be assessed. The identified criteria did not include Question 6.3. Further, the ITT did not make it clear to the RWIND tenderer that a “pass” on Question 6.3 was required to make the tender compliant. The relevant breach was the MoD’s failure to assess the tenders and award the contract in accordance with the published criteria.
18. The decision in *Jobsin* can be distinguished on its facts. In that case, the relevant breach of the regulations was that the ITT did not contain any criteria by which the tenders would be assessed as MEAT, a fact that would be immediately apparent to the bidders and gave rise to an immediate risk of loss and damage. Likewise, in the other authorities cited by SCA, the deficiencies relied on by the claimants as constituting the relevant breaches occurred, and were apparent, on the face of the ITTs. In contrast, the ITT in this case was not in breach of the Regulations. The relevant breach was the MoD’s failure to apply the criteria set out in the ITT.

Causation

19. SCA’s case is that the claim fails for lack of causation. It submits that, in order to establish an entitlement to any remedy under the Regulations in respect of the relevant

breach of duty that would involve setting aside the contract award decision, MLS would need to establish, based on the evidence that was adduced at trial, that it is more likely than not that “but for” the breach of duty it would have been successful in the procurement. In this case, SCA submits that MLS was required to establish that if the MoD had transparently stated in the ITT that the consequence of a “fail” for Question 6.3 would be discretionary exclusion, MLS would have submitted a response to Question 6.3 that was sufficiently good to achieve a “pass”. MLS cannot do so. It must have been aware that a “fail” would have some adverse consequences in the procurement and, therefore, would have provided the best answer that it could to Question 6.3. MLS failed to adduce evidence showing that it would have formulated a materially different, better response to Question 6.3 that would have achieved a “pass” if the question had transparently stated that a “fail” could lead to discretionary exclusion.

20. Regulation 52 of the 2011 Regulations provides that:

“A breach of the duty owed in accordance with [the 2011 Regulations] is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage.”

21. The test on causation in such procurement challenges is summarised in *Mears Limited v Leeds City Council* [2011] EWHC 1031 per Ramsey J at paragraphs [205] to [209]. MLS had to establish loss or damage, or a risk of loss or damage, by reason of the breach. There must be a real or significant, rather than a fanciful chance, that MLS would have been successful if the ITT criteria had been applied.

22. I reject SCA’s submission that MLS failed to establish causation. The MoD was in breach of the 2011 Regulations in assessing compliance of the tenders by reference to criteria that were not identified as such in the ITT, namely, Question 6.3. The MoD’s letter dated 25 January 2017 stated expressly that MLS’s tender would have been successful had it not been scored a “fail” on Question 6.3. Therefore, if the MoD had assessed the tenders based only on the published criteria in the ITT, it would have awarded the contract to MLS.

Remedy

23. Regulation 58 of the 2011 Regulations provides that where there has been a breach of the obligations under the Regulations and the contract has not been entered into, as in this case, the Court has power to (a) order the setting aside of the decision or action concerned; (b) order the contracting authority to amend any document; (c) award damages to an economic operator which has suffered loss or damage as a consequence of the breach.

24. MLS submits that the Court should make a declaration of unlawfulness and set aside the decision to award the contract to SCA. The MoD’s position is a neutral one; it does not oppose the application. SCA opposes the application and submits that MLS’s remedy should be confined to damages.

25. MLS submits that the Court should order the MoD to amend its decision and award the contract to MLS. The MoD and SCA oppose that application.

26. In *Mears v Leeds* (above), having considered the relevant authorities, Ramsey J set out the following guidance in such cases:

“[221] ... I consider that the court has a discretion as to the appropriate remedy. In a given case, in exercising that discretion, the court must pay regard to the need for the Regulations to be applied and to the availability for that purpose of the remedy to set aside the relevant action or decision, as well as the availability of damages. I do not consider that there is a presumption in favour of one remedy but rather the matter is a question of the exercise of discretion based on the facts and circumstances of the particular case. There is no doubt that an important remedy is injunctive relief in support of the Regulations but equally the availability of damages must be taken into account.

[222] In this case I have to balance the public interest in [the defendant] proceeding with the award of the contract and the private interest to [the claimant] of the harm of not having the chance to be included in the [next] stage of the tender.

...

[224] The remedy must be proportionate. There will obviously be cases at one end of the scale where the impact of the breach of the Regulations is so serious or obvious that it can only be met by setting aside a decision or action. At the other end of the scale there will be cases where the impact is less serious or obvious where damages will deal adequately with the breach. In between there will be many cases where the court must perform a balancing exercise of the various interests in deciding on the appropriate remedy.”

27. In *Woods Building Services v Milton Keynes Council* [2015] EWHC 2172 Coulson J considered whether, and in what circumstances, the court might grant an injunction requiring a public authority to enter into a contract with a named contractor following a successful procurement challenge. Although the relevant regulations were the Public Contracts Regulations 2006, the material terms concerning remedies were the same:

“[8] ... Regulation 47I of the Public Contracts Regulations 2006, which sets out the remedies available to the successful claimant where the underlying contract has not been entered into, provides three possible options, including the setting aside of the decision and amending the record, both of which I have ordered. The Regulation does not identify as a remedy the ordering of the contracting authority to enter into a contract with the successful claimant.

[9] Of course, Regulation 47I makes plain that it “does not prejudice any other powers of the Court”. Thus, in principle it might be open to the Court to order a mandatory injunction

requiring the Council to enter into a contract with Woods. But it is trite law that a mandatory injunction which would here require the Council to enter into a contract which would last for many years will only rarely be granted. This is for the four reasons set out by Lord Hoffmann in *Co-Operative Insurance Society Ltd v Argyll Stores Holdings Ltd* [1998] AC 1: the need for constant supervision, the expense of enforcement, the need for precision and the unjust enrichment of the claimant...

[10] There are related considerations. A mandatory injunction will never be granted to require an employee to carry out work under his contract of employment (see *Warren v Mendy* [1989] 3 All ER 103); or to require an employer to employ someone in whom he no longer placed his trust and confidence (see *Page One Records Ltd v Britton* [1968] 1 WLR 157). It will not usually be granted to restrain an employer from terminating an employee's contract (see *Chappell v Times Newspapers* [1975] 1 WLR 482). Each of these propositions could be said to be at least potentially relevant to the situation in which these parties currently find themselves.

[11] Thus, by reference to the authorities dealing with mandatory injunctions, I conclude that requiring A to contract with B, in respect of a contract which might last for years, would be an exceptional order for the court to make... Whilst I do not suggest that a mandatory injunction of the type which they seek would never be granted in a procurement case, I am satisfied that it would only be granted in exceptional circumstances..."

28. In my judgment, MLS is entitled to a declaration that the MoD acted unlawfully in rejecting MLS's tender for the reasons set out in the liability judgment.
29. In considering whether MLS is entitled to orders setting aside the MoD's decision that SCA was the successful tenderer and/or requiring the MoD to award the contract to MLS, or whether MLS should be left to a remedy in damages, the following factors are relevant.
30. Firstly, there is a strong public interest in allowing the MoD to secure from one of the parties a contractual commitment to the supply of port agency services so as to meet the Royal Navy's operational requirements, without the delay and expense of a fresh procurement exercise. That militates against a remedy that would invalidate the whole of the procurement process.
31. Secondly, the MoD has indicated that in principle it is content to enter into such a contract with either MLS or SCA, subject to the Court deciding that either course would be lawful.
32. Thirdly, MLS has a strong private interest in having the opportunity to negotiate with the MoD a contract for the port agency services, based on the MoD's evaluation of its tender as the most economically advantageous tender, absent the unlawful consideration of criteria not included as such in the ITT.

33. Fourthly, the impact of the breach of the Regulations is both serious and obvious. The contract is very high value. The only reason that the MoD decided that MLS's tender should be rejected and SCA was the successful tenderer was the unlawful application of the answer to Question 6.3 as a threshold criterion. MLS achieved higher scores in respect of the financial and technical requirements identified in the ITT.
34. Fifthly, as a matter of principle, damages might be an adequate remedy for MLS but it would be very difficult to assess the quantum of such loss. Further, it would have a disproportionately adverse impact on the MoD, who would be required to use public funds for both the procurement of the services and compensation for loss of the contract in respect of a very high value, long-term contract.
35. Sixthly, although SCA has a private interest in holding onto the MoD's decision that it was the successful tenderer, it would suffer little, or no, prejudice if the decision were set aside. On the published criteria in the ITT, SCA was not the winning tender. SCA has not taken steps or incurred expenditure in performance of the contract, in reliance on the decision, by reason of the automatic suspension on MLS's procurement challenge. Indeed, MLS has continued to supply the port agency services to the MoD pending the resolution of these proceedings.
36. Finally, applying the principles set out by Coulson J in *Woods v Milton Keynes* (above), although it is open to the Court to require the MoD to enter into a contract with MLS or SCA, such an order will be granted only in exceptional circumstances. In this case, such an order would place the contractor in a better position than they would be under the procurement exercise. In the ITT, the MoD reserved the right to withdraw the ITT at any time, or to re-invite tenders on the same or any alternative basis, and to choose not to award any contract as a result of the procurement process. The contract is long term and high value. It would be very difficult for the Court to supervise the negotiations or due diligence exercises. There are no exceptional circumstances that would justify the Court overriding the MoD's reservation of rights and making such an order in this case.
37. Based on a consideration of the above factors, I conclude that the appropriate orders to make are that the decision to award the contract to SCA should be set aside and the Court should grant a declaration that it would be lawful for the MoD to award the contract to MLS.

Costs

38. MLS and the MoD have agreed the appropriate costs order arising out of the liability trial.
39. I have rejected SCA's submissions on remedies. It was necessary for MLS and the MoD to make submissions on the appropriate orders to make following the judgment on liability, regardless of SCA's objections. The initial submissions shall be treated as costs in the case. I shall order SCA to pay the costs of the supplementary submissions, subject to any submissions in opposition to the costs orders within 14 days.