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IN THE HIGH COURT OF JUSTICE — No. HT-2021-000306

BUSINESS AND PROPERTY COURTS

OF ENGLAND & WALES — HT-2021-000307

TECHNOLOGY & CONSTRUCTION COURT (QBD) — HT-2021-000308

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 17 September 2021

Before:

MR JUSTICE PEPPERALL

B E T W E E N :

CMAC GROUP UK LTD — Claimant

- and -

ABELLIO TRANDPORT HOLDING LTD
& Ors. — Defendants

MR J. BARRETT appeared on behalf of the Claimant.

MR N. GIFFIN QC (instructed by Stephenson Harwood) appeared on behalf of the Defendants.

J U D G M E N T

MR JUSTICE PEPPERALL:

1 This case concerns the lawfulness of invitations to tender and negotiate issued by or on behalf of a number of rail operating companies for replacement bus and taxi services. Such replacement services are required for use in the case of disruption to the rail network, whether planned disruption during maintenance works or on an emergency basis.

BACKGROUND

2 On 16 July 2021, West Midlands Trains published its invitation to tender and negotiate in respect of its replacement rail services. Such tenders were sought on the assumption that Abellio Transport Holdings Ltd would be successful in being awarded the national rail contract for West Midlands Trains. On the same day, Abellio East Anglia Ltd published an invitation to tender in respect of services run under its trading name, Greater Anglia. On 2 August 2021, Abellio Transport Holdings Ltd published its own invitation to tender in respect of train services operated by Abellio East Midlands Limited trading as East Midlands Railway. Each of the invitations stated as follows:-

> "The *Utilities Contracts Regulations 2016* … do not in accordance with their terms apply to the Emergency Ad-hoc and Planned Rail Replacement Buses and Taxi Management Services ... Neither the issue of this ITN nor the selection of any Bidder, nor any other document, contact or conduct in connection with this ITN constitutes any acceptance by [Abellio] that the Regulations apply to the Project covered by this ITN, or an agreement by [Abellio] to abide by those Regulations. The ITN Process and any subsequent contact awarded will be subject to English law and the exclusive jurisdiction of the English courts. By participating in the ITN Process, a Bidder agrees to be bound by the above conditions and limitations…"

3 Having expressed its interest in providing such replacement rail services, CMAC Group UK Ltd was invited to tender for the contracts for the West Midlands, East Midlands and Greater Anglia regions. CMAC does not, however, accept that the rail companies are right in their assertion that these procurement exercises are not governed by the 2016 regulations. CMAC argues that the operators are "utilities" within the meaning of the regulations and that, accordingly, the rail operating companies are conducting the procurements unlawfully

4 In pre-action correspondence, CMAC pressed the point that the regulations were applicable and, secondly, sought assurances as to whether or not the rail companies would take any time point in the event that they did not issue immediate proceedings. The rail companies in turn reasserted their view that the regulations were not applicable, but nevertheless indicated that it was their intention, notwithstanding the alleged lack of legal obligation, to conduct the procurements in accordance with the principles of the regulations. No assurance was given as to the limitation position.

5 In those circumstances, CMAC issued these three claims on 13 August 2021. Claim HT-2021-000306 challenges the lawfulness of the East Midlands procurement exercise. Claim 307 makes a like challenge in respect of the West Midlands procurement, while claim 308 relates to the Greater Anglia procurement. All three claim forms were served on 20 August.

6 By application notices issued on 10 September 2021, CMAC now seeks orders consolidating the three claims, and then staying proceedings until the earlier of the date of the contract award decisions in each procurement or the expiry of five working days' notice given by CMAC. I have not yet been addressed on the question of consolidation but will briefly hear the parties after giving judgment on the principal matter before me today.

7 By an open letter dated 15 September 2021, Stephenson Harwood, the solicitors for the rail companies, proposed terms on which they would agree to a stay. Terms were not, however, agreed and the rail companies' primary position before me is that no stay should be ordered.

THE ARGUMENT

8 Joseph Barrett, who appears for CMAC, argues that the company was forced to issue proceedings protectively because the time for bringing a procurement challenge ran from the date when it became clear that the rail companies denied their obligation to comply with the 2016 regulations and required bidders to accept such state of affairs. He asserts that this is not simply a case of anticipatory breach, but that including a stipulation requiring the bidders' agreement that they should contract out of the 2016 regulations was, itself, an actual breach of procurement law. Since, however, it remains possible that CMAC might be successful in its bids for one or more of the procurement exercises, such that it would not, in fact, suffer any loss or damage, Mr Barrett argues that the appropriate and proportionate course is to stay the proceedings.

9 Nigel Giffin QC, who appears for the rail companies, stresses the importance of hearing public procurement challenges rapidly. He complains about the three-week delay between the issue of the procurement challenges and the issue of these applications. He argues that an economic operator who chooses to issue a procurement challenge must properly particularise its claim and be prepared to get on with it. There is, he argues, no place for protective claims. Here, he complains that CMAC simply asserts that the rail companies have refused to accept any legal obligation to comply with the 2016 regulations, but that it does not assert any way in which, as a matter of fact, the companies' conduct has departed from the statutory regime. He argues that if CMAC contends that there is some existing or anticipated breach of the regulations, such claim needs to be properly particularised and resolved speedily.

10 Mr Giffin complains that no proper particulars have been pleaded of the assertion at paragraph 13 of the Particulars of Claim in each case that the defendants have acted in breach of procurement law. He submits that, on a true reading of the pleadings, no actual breach is alleged. He accepts that the real gravamen of CMAC's case appears to be what then follows in paragraph 13, namely the assertion that the defendants, by their actions and statements, have indicated an intention to conduct the procurement on the basis they did not owe the claimant a duty to comply with procurement law and that that itself gave rise to a risk that the clamant might suffer loss or damage. Mr Giffin argues that in this case, and unlike the position in *Jobsin.Co.UK Plc (t/a Internet Recruitment Solutions) v Department of Health* [2001] EWCA Civ 1241, [2002] 1 CMLR 44, there is no actual breach.

11 Further, Mr Giffin cites *R (Risk Management Partners Ltd) v Brent London Borough Council* [2009] EWCA Civ 490, [2010] PTSR 349, for the proposition that one can in law bring either an anticipatory claim in respect of an anticipated breach of procurement law, or alternatively, an action in respect of an actual breach. By reference to the dicta of Moore-Bick LJ at [242]-[252] and Hughes LJ (as he then was) at [255], he asserts that time may run in respect of an anticipatory claim from the date of the anticipated breach that gives rise, in principle, to a claim for *quia timet* injunctive relief. If, however, there is thereafter some actual breach, he submits that a separate cause of action accrues at a later point at the date of the actual breach.

12 Mr Giffin complains that this case is neither fish nor fowl. He submits that there is no proper pleading of actual breach, nor, albeit it is suggested there was some anticipatory breach, is there any claim being pressed now before the court for *quia timet* injunctive relief.

DISCUSSION

13 Regulation 106(1) of the *Utilities Contract Regulations 2016* provides:

"A breach of the duty owed in accordance with Regulation 104 or 105 is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage."

14 The similarly worded provision in the *Public Service Contracts Regulations 1993* was considered by the Court of Appeal in *Jobsin*. In that case, an economic operator claimed that, in breach of the 1993 regulations, the Department of Health had failed to make clear the basis on which it would assess the most economically advantageous bid. The claimant made no immediate challenge but rather issued proceedings after its tender was rejected. The Court of Appeal held that its claim was out of time. Lord Dyson MR explained, at [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 regulation 21(3) … 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 the 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."

15 By parity of reasoning, I accept for present purposes that CMAC's cause of action to challenge the rail companies' assertion that they were not bound by the 2016 regulations and their

requirement that economic operators should accept such state of affairs, arose upon the issue of the invitation to tender. Indeed, Mr Giffin reserves the right to argue that it arose at an earlier point in time.

16 The rail companies' insistence that they were not bound gave rise to a risk that CMAC might, thereby, suffer loss and damage. Faced with that dilemma and in view of the rail companies' refusal either to confirm that the 2016 regulations applied, or that no point would be taken as to limitation, the claimants took the decision to issue proceedings.

17 In a case where proceedings are already on foot but the procurement exercise has not yet run its course, such that one does not yet know whether or not there will be actual loss, there is some authority for the suggestion that the appropriate course might be to stay proceedings in order to see whether the loss will crystalise. The point was considered in *Joseph Gleave & Son Ltd v Secretary of State for Defence* [2017] EWHC 238 (TCC), [2017] PTSR 607. In that case, the Ministry of Defence conducted a procurement exercise. The claimant company sought to challenge the lawfulness of the tender documents on the ground that the use of manufacturers' part numbers could not be justified and had created an unlawful obstacle to opening up the procurement to competition. At a case management conference heard before the award of the contract, the claimant sought an order for expedition of the trial of its claim, contending that there was a presumption in favour of expedition in such cases. The Secretary of State successfully resisted expedition and obtained a stay of proceedings. In considering the stay, Coulson J (as he then was) observed, at [52]:

> "It seems to me that the more fundamental questions are these: (a) Is a stay in accordance with the overriding objective? (b) Is the potential detriment to the claimant caused by delay outweighed by the benefits of a stay to one or both parties and/or to the other users of the court?"

18 His analysis in the case before him is instructive. Coulson J observed, at [54], that that was a case where the challenge was to the tender documents rather than to the contract award. It was a case where the loss would not crystalise until the contract was awarded. He stressed that he did not suggest that in all such cases a stay would be appropriate, but that it was, nevertheless, a relevant factor. Secondly, he observed, at [55], that the two-month stay sought in that case was a short one. He thought that also relevant. At [56], he turned to the question of detriment and observed:

> "It is difficult to see what real detriment a delay of two months is going to cause the claimant, whilst the benefits to the defendant and to the other users of the TCC are plain and obvious. Moreover, because the proceedings may not continue if the claimant is awarded the contract it is not possible to say that the delay, and the concomitant saving of cost, may not benefit the claimant as well."

19 I follow the approach suggested by Coulson J. I consider, first, whether or not a stay is in accordance with the overriding objective in this case and, secondly, I consider the question of detriment.

20 Here, the boot is on the other foot. It is the economic operator who suggests that there should be a stay rather than the public body in the *Gleave* case. Nevertheless, I observe that this case, like *Gleave,* also involves a challenge to the tender documents rather than to the contract award. It is sterile for these purposes, it seems to me, to inquire further as to whether or not Mr Giffin is right to assert that this is not an actual breach case, rather than one simply of anticipatory breach. The challenge is to the tender documents.

21 Secondly, this is a case where no loss may in fact flow. It is not yet clear who will be awarded these contracts and any loss will not crystalise until such awards are made. Thirdly, this is a case where the stay sought is particularly short; indeed, it is significantly shorter than in the *Gleave* case since CMAC seeks a stay simply until the contract award decisions in each procurement and, even then, proposes that the stay might be terminable upon earlier notice.

22 I turn then to the question of detriment. In the course of his submissions, Mr Giffin was initially concerned that the mere fact of these claims might mean that there would be an automatic suspension pursuant to regulation 110(1)(a) following the eventual decision to award contracts. In my judgment, such concern was misplaced because, on a proper reading of regulation 110, such suspension only arises where the claim form itself has been issued in respect of a utility's decision to award a contract. Indeed, Mr Barrett confirmed that his client took no point that there would be an automatic suspension in this case.

23 Mr Giffin's remaining concern was one of delay. He pointed to a recent experience where a procurement case had been listed after a fairly significant delay. He is particularly concerned that these proceedings, and any enlarged proceedings should the claimant be unsuccessful in its bids, should not affect the defendants' ability to award contacts so that they are in place by March 2022. I acknowledge the importance of proceeding rapidly with a procurement challenge, but at this stage it is not clear that any loss will crystallise. Furthermore, whatever order I make today cannot prevent the claimant or, indeed, any other unsuccessful party from bringing a challenge to the actual decision to award the contract in due course. Accordingly, the question of delay is not a matter which, in my judgment, weighs heavily against staying these proceedings, at least until the point where the contract awards are made.

24 I am therefore content that the proper order is that there should be a stay in each case until the award of the contract. I have not been expressly addressed upon whether or not there ought also to be a right in the claimant to seek to terminate the stay earlier upon five days' notice, but it would seem to be inconsistent with Mr Giffin's submissions for him to have a concern about the possibility of an earlier termination of the stay, and I am content also so to order.

25 I shall now hear the parties briefly on the question of consolidation. For their assistance, my preliminary view is that there is real difficulty with consolidation at this stage given that there are three different potential contract award dates. My initial view is that these cases should be case managed together, but the question for consolidation must be for another day.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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