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2018/88849

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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BETWEEN:

CSC COMPUTER SCIENCES LIMITED TRADING AS DXC TECHNOLOGY

Plaintiff

and

BUSINESS SERVICES ORGANISATION

ON BEHALF OF HEALTH AND SOCIAL CARE IN NORTHERN IRELAND AND BUSINESS SERVICES ORGANISATION PROCUREMENT AND LOGISTICS SERVICE

Defendants

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HORNER J

A. INTRODUCTION

[1] This is a claim brought by the plaintiff to set aside the defendant's decision not to invite the plaintiff to participate further in the second phase of the "Electronic Health and Social Care Record (Encompass) Procurement, reference 1626858" ("the Encompass Procurement") following the evaluation by the defendant of the tenderers' responses to the Selection Questionnaire ("SQ").

[2] It is claimed by the plaintiff that its exclusion is in breach of the Public Contracts Regulations 2015 ("the Regulations") and Directive 2014/24/EU, in breach of enforceable and fundamental principles of EU law, is irrational, unreasonable and infected by manifest error and in breach of an implied contract. The court is asked in the Writ of Summons for, inter alia, an interim order suspending the award of a contract for the Encompass Procurement, a final injunction stopping the process and/or damages.

[3] This matter came on before this court by way of an interlocutory application for an injunction by the plaintiff to stop the Encompass Procurement proceeding further. The application was opposed vigorously by the defendants on a number of different grounds.

[4] Mr Richard Coghlin appeared for the plaintiff and Mr David Dunlop for the defendants. I am indebted to both of them for their well-marshalled arguments, both written and oral, in this application. I do not intend to rehearse each one of the arguments which has been addressed to the court but I can confirm that I have taken them all into account when reaching my conclusion.

B. BACKGROUND FACTS

[5] The plaintiff is one of the world's largest business transformation companies. It was formed following the merger of Computer Services Corporation and the Enterprise Services business of Hewlett Packard Enterprise Company. It serves some 6,000 private and public sector enterprises across 70 countries by providing and managing powerful end–to–end next generation IT services and solutions. The combined entity is expected to generate income of approximately $25 billion in the next year. It is well-established both north and south of the border in Ireland and has existing relationships with the public health services in both jurisdictions.

[6] The procurement exercise which lies at the heart of these proceedings was to identify a partner to work with Health and Social Care Northern Ireland to deliver and implement an Electronic Health Care Record ("EHCR") across health and social care services throughout Northern Ireland. This is described without objection as a vital and strategically important part of the process to modernise and improve the health service within Northern Ireland. This is likely to be a substantial and complex operation. Unfortunately, I am going to have to set out in some detail the nature of the Encompass Procurement process. It is necessary to understand all that has happened in the period between the plaintiff's exclusion, its subsequent decision to embark on litigation, what has happened to date and what is still to take place.

[7] There was initially a market management exercise which involved a supplier workshop on 28 June 2017. The defendant then published a prior information notice on 25 May 2018 indicating that it was its intention to commence a tender process in relation to an EHCR. Interested parties were invited to a Supplier Information Day on 25 June 2018.

[8] A contract notice was published by the defendant on 26 June 2018 indicating the procurement process had been commenced for the delivery, implementation and ongoing support and development of a fully integrated electronic health and care record solution across acute, community, social and primary care settings in Northern Ireland. The aim was to ensure that every citizen in Northern Ireland had a single health and social care record. The contract was expected to last 10 years with the option of a further extension for 5 years. The procurement process was to

be conducted using the competitive dialogue procedure and in accordance with the 2015 Regulations.

[9] At present there are a number of different organisations, which include the Health and Social Care Board and the five Trusts, who work together to plan, deliver and monitor social care throughout Northern Ireland. There is a sixth Trust, the Northern Ireland Ambulance Service, which operates a single ambulance service throughout Northern Ireland. There are a further 350 GP practices and 17 Integrated Care Partnerships.

[10] The goal of the Encompass Procurement was ultimately to transform patient and service user experiences, care provision and information flows across the whole of the sector by developing a fully integrated, regional IT solution for the management of health care data and information, that is the EHCR. The new system would combine numerous existing and disparate systems and add "core functionality" which would allow patients to access their care record, manage their appointments, communicate with care professionals and complete pre-treatment forms. The result would be a single, integrated electronic patient record for all health and care professionals throughout Northern Ireland.

[11] An SQ had to be completed by economic operators who wanted to participate in the procurement process for the new solution. The plaintiff submitted its response by 30 July 2018. On 21 August 2018 the plaintiff was advised that it had scored 39 points out of a possible 85 marks, that it had come fifth out of 12 candidates and that it could not go through to the next stage as only the first four candidates qualified. Accordingly, the plaintiff was excluded from any further involvement in the Encompass Procurement.

[12] There is no doubt that the plaintiff, which has considerable experience in this type of project, was extremely disappointed that it had been eliminated. On 23 August 2018 the plaintiff sought a face-to-face meeting to obtain feedback from the defendant. This was followed up on 29 August 2018 by a complaint about the limited feedback received and in particular the apparent failure of the defendant to consider a project example provided in the SQ Response as being relevant. The defendant produced a further additional memorandum on 3 September 2018 which the plaintiff regards as being "wholly insufficient".

[13] On 18 September 2018 the plaintiff wrote to the defendant setting out its substantive concerns and complaints about its exclusion from the continuing procurement process and the various faults it identified in that process. The plaintiff then followed this letter by issuing a Writ of Summons the following day that is 19 September 2018. There was a response from the defendant on 20 September 2018 which the plaintiff regarded as unsatisfactory but which the defendant claims went far beyond any obligation it might owe to an unsuccessful tenderer at this stage of the process. In addition, the defendant made it clear that the process was not going to be suspended in the interim.

[14] On 15 October 2018 the plaintiff's solicitors, Eversheds Sutherland, wrote again inviting the defendant to address various issues and to suspend either the tender process or at least the implementation of its decision to eliminate the plaintiff from the competition. There has been no substantial response to this letter.

[15] On 1 October 2018 the deadline passed for receipt of the Outline Solution Submission from the successful tenderers. In the meantime the defendant had undertaken training of the Outline Submission Evaluation Team between 5 October 2018 and 10 October 2018. This involved three teams totalling 15 people, including two Consultant Doctors, two Clinical Pharmacists, one Nurse, two representatives of the HSCB, six Trusts representatives, together with a Programme Representative and the Programme Director. All of these people were involved in evaluation of the ISOS OBS written submissions. These have been evaluated during the period up to 22 October 2018.

[16] On 17 October 2018 the defendant undertook evaluation training for a patient portal scenario demonstration Evaluation Team. This involved a group of approximately 50 people made up of health care professionals, service users, patients and carers. On the same date the defendant held its first meeting of a digital care forum. This was attended by approximately 150 HSC clinical and care professionals, all of whom were released by their various employers to attend the event. It is this group which will form the pool from which representatives will be drawn to be involved in the design, configuration and implementation of clinical and care workflow aspects of the solution following the award of the contract.

[17] Between 23 October 2018 and 26 October 2018 the Encompass Procurement Team held a one day technical clarification meeting with each of the four shortlisted suppliers. This was to discuss technical architecture, technical dependencies and operating environment of the outline solutions submitted by the four successful tenderers in response to the ISOS OBS and to discuss implementation plans including requirements for HSCNI staff resourcing. This was then followed by consensus meetings between 5 November 2018 and 8 November 2018. Supplier demonstrations followed between 12 November 2018 and 16 November 2018 and evaluation training for approximately 220 health care staff took place on 12 November 2018.

[18] The four tenderers who had been successful in the first stage demonstrated their solutions against nine scripted scenarios in parallel across the whole week. The defendant estimates that over 250 HSC professionals, service users, patients and carers were involved in the evaluation of the scenario demonstrations. The defendant claims that the cost of running this was approximately £138,000 and this included the need to back fill clinical staff released from front line services in order to perform the evaluation role.

[19] On 22 November 2018 the Encompass Programme Board considered the ISOS Evaluation Report and accepted the recommendations to select two candidates from

the four remaining bidders who would then be brought through to dialogue meetings. An indicative timetable for dialogue meetings and the remainder of the procurement was issued to the two shortlisted bidders. This was to be the final stage of the Encompass Procurement Process. On 4 December 2018 the invitations to participate in dialogue documents were issued to the remaining two bidders which invited them to a series of dialogue meetings. Draft contract and key commercial principles were provided and the two remaining successful bidders left in the competition were required to submit their response to these by 20 December 2018. Those responses had been received by the Encompass Team in advance of the dialogue meetings proposed for January 2019. Each shortlisted bidder was also provided with an issues list for discussion at functional dialogue meetings which were due to take place during the week commencing 10 November 2018. This issues list was based on issues arising from evaluation of the ISOS written submissions and evaluation of the scenario demonstrations. The two remaining bidders also attended a one day due diligence visit with an HSC Trust between 10 and 12 December 2018. The purpose of this was to give the bidders an insight into the current functional and clinical "as is" situation in the HSCNI and also to witness a range of HSC professionals carrying out their daily duties. During the week commencing 10 December 2018 each shortlisted bidder participated in two days of functional dialogue meetings with a dialogue team of 12 people drawn from the Encompass Team and clinical, pharmacy and operational HSCNI staff. Following these meetings the shortlisted bidders were issued with requests to submit revised functional specifications and revised financial sheets. Further, the defendant has established a digital business support forum which 225 business support staff attended on 6 December 2018.

[20] On 17 and 18 December 2018 a team of seven representatives of the Encompass Team took part in a one day visit to a UK NHS reference site of each of the bidders in order to view the respective bidders' solutions in operation.

[21] During January further technical dialogue meetings took place and those meetings were then followed by commercial dialogue meetings. The conclusion of the dialogue process is intended to be achieved by 11 February 2019 when the defendants will issue invitations to submit final tenders which are to be returned by 4 March 2019. These will then be evaluated with any award expected by 18 March 2019.

[22] It is against this background that the plaintiff moved on 28 November 2018, that is just over three months after it was initially told it had been unsuccessful and that it was not going through to the second round, to, inter alia, seek to restrain the defendant from awarding any contract or contracts pursuant to the procurement process. The plaintiff blames at least part of the delay on the defendant and its failure to respond adequately or at all to their letters of 18 September 2018 and 15 October 2018. It claims that the defendant failed to respond to its suggestion that the competition be suspended and claims that its delay in applying for interim relief was "due to the considerable efforts made in good faith, and as a responsible

litigant, to understand the position that the defendant had taken in respect of its tender submission and to enable the defendant to understand the plaintiff's concerns and to try and plot a way forward". The application for interlocutory interim relief came on before me in January 2019.

C. THE PRESENT APPLICATION

[23] In Eircom UK Ltd v Department for Finance and British Telecommunications Plc [2018] NIQB 75 I set out at paragraphs [14]-[19] what I consider to be the proper approach the court should take to applications for an injunction in these procurement cases. I can do no better than to set out what O'Farrell J said in DHL Supply Chain Limited v Secretary of State for Health and Social Care [2018] EWHC 2213 (TCC). He said:

> "The Court must consider the following issues:
>
> (i) Is there a serious issue to be tried?
>
> (ii) If so, would damages be an adequate remedy for (the claimant) if the suspension were lifted and it succeeded at trial?
>
> (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 or both 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?"

Serious Issue

[24] In this case the defendant has conceded there is a serious issue to be tried and this has saved the court an immense amount of time in trying to decide "liability" issues. It is an approach which, in procurement proceedings, has much to commend it. But it has meant that there has been no serious attempt to look at the strength and weaknesses of liability on either side. As Coulson J said in Sysmex (UK Ltd) v Imperial College Health Care Trust [2017] EWHC 1824 (TCC) at [19]:

> "It is not appropriate to have a mini-trial in a complex procurement dispute like this. Where, as here, it is accepted that there is a serious issue to be tried, then (save in exceptional circumstances) both sides should resist any further temptation to argue about the merits."

[25] In this application neither side has seriously pressed the strengths of its case or the weaknesses of the opponents. I am therefore not in a position to make any judgement as to the relative strength and weaknesses of the respective cases of the plaintiff and the defendant.

Damages – An adequate remedy for either side?

[26] Therefore, the first issue to be addressed is whether damages would represent an adequate remedy to the plaintiff if it succeeded. Or as Jackson LJ said in Araci v Fallon [2011] EWCA Civ 668 the question is "Whether it is just in all the circumstances that the claimant should be confined to his remedy in damages." In looking at this issue the court should approach the submission that damages would not represent an adequate remedy against the background of courts day and daily having to assess "loss" and "damage" in all sorts of difficult situations, including those involving loss of a chance. This is a matter to which I referred to in Allpay Limited v NIHE [2015] NIQB 54 at paragraph [39].

[27] The relevant principles concerning the adequacy of damages are set out in paragraph [48] of Coulson J's judgment in Covanta Energy Limited v Mersey Side Waste Disposal Authority [2013] EWHC 2922 (TCC). He said:

> "Accordingly, I would summarise the relevant principles concerning adequacy of damages as follows:
>
> (a) If damages are an adequate remedy, that will normally be sufficient to defeat an application for an interim injunction, but that will not always be so (*American Cyanamid, Fellows, National Bank*).
>
> (b) In more recent times, the simple concept of the adequacy of damages has been modified at least to an extent, so that the court must assess whether it is just, in all the circumstances, that a claimant be confined to his remedy in damages (as in *Evans Marshall* and the passage from Chitty).
>
> (c) If damages are difficult to assess, or if they involve a speculative ascertainment of the value of a loss of a chance, then they **may** not be sufficient to prevent an interim injunction (*Araci*).
>
> (d) In procurement cases, the availability of a remedy of a review before the contract was entered into, is not relevant to the issue as to the adequacy of

damages, although it is relevant to the balance of convenience (*Morrisons*).

(e) There are a number of procurement cases in which the difficulty of assessing damages based on the loss of a chance and the speculative or "discounted" nature of the ascertainment, has been a factor which the court has taken into account in concluding that damages would not be an adequate remedy (*Letting International, Morrisons, Alstom, Indigo Services* and *Metropolitan Resources*). There are also cases where, on the facts, damages have been held to be an adequate remedy and the injunction therefore refused (*European Dynamics, Exel*).

[28] It is also claimed in this case that there is a risk of unquantifiable reputational damage to the plaintiff as a result of not even making the first sift and that accordingly damages are not an adequate remedy. But in order to succeed in such a claim the excluded party must adduce cogent evidence of the risk of such damage. This matter was considered in some detail by Stuart-Smith J in <u>Open View Security solutions Ltd v The London Borough of Merton Council</u> [2015] EWHC 2694 (TCC) at paragraphs [33]-[40]. At paragraph [39] he said:

> "What then are the criteria to be applied before a court accepts that "loss of reputation" is a good reason for holding that damages which would otherwise be adequate are an inadequate remedy for *American Cyanamid* purposes? In the absence of prior authority directly in point (none having been cited by the parties) but with an eye to the approach adopted by the Court in *Alstom*, *DWF* and *NATS* I suggest the following:
>
> (i) Loss of reputation is unlikely to be of consequence when considering the adequacy of damages unless the Court is left with a reasonable degree of confidence that a failure to impose interim relief will lead to financial losses that would be significant and irrecoverable as damages;
>
> (ii) It follows that the burden of proof lies upon the party supporting the continuance of the automatic suspension and the standard of proof is that there is (at least) a real prospect of loss that would retrospectively be identifiable as being attributable

to the loss of the contract at issue but not recoverable in damages;

(iii) The relevant person who must generally be shown to be affected by the loss of reputation is the future provider of profitable work."

[29] I also agree with the comments of Wakesman J in Central Surrey Health Limited v NHS Surrey Downs CCG [2018] EWHC 3499 (TCC) where he said at paragraphs [33] and [34] in respect of loss of reputation:

> "[33] It follows the burden of proof lies upon the party seeking the continuation of the suspension to show that a real prospect at least of loss that would retrospectively be identifiable as being attributable to the loss of the contract but not recoverable. The relevant person who must generally be shown to be affected is the future provider of profitable work but, as he said in para 40 these were general criteria needing to be reviewed and considered in the light of the facts of each case. There is more to be said on the subject and the suggested principles should not be applied by rote.
>
> [34] The last observation is important. Cases in this area are, in my judgment, **highly fact-sensitive and it is very difficult to be prescriptive about the weight which should or should not generally be given to a particular factor, like reputation, in the abstract.**" (emphasis added)

[30] There can be no doubt that even adopting a robust approach it would be difficult to quantify the plaintiff's financial loss. This is in part because of the way this particular procurement process operates. The plaintiff has been excluded at the initial sift when the plaintiff was advised that it had not been admitted to the dialogue phase of the procurement competition. Four tenderers were successful. There was then the ISOS OBS stage which has produced two final bidders for the shortlist. It is now a head to head contest with the procurement process set to produce an outright winner by 18 March 2019 if this application does not intervene.

[31] A court will have to assess the chance of the plaintiff making the first sift, then the second sift and finally overcoming the remaining bidder in the final head-to-head. This is bound to involve a speculative assessment of a chance heaped upon a chance and another chance. It does seem to me that an award of damages in these circumstances would inevitably involve too much speculation and too little science. Such an award is likely to be unfair to one or other of the parties.

[32] On the issue of reputational damages, I am not satisfied from the evidence that these should weigh heavily in the balance. This is a multi-national company excluded from what must be, by its terms, a comparatively modest contract in Northern Ireland. There is no cogent evidence that the plaintiff will suffer any damage to its reputation if it is denied this contract.

[33] I am also not satisfied that damages would represent an adequate remedy to the defendant. I intend to discuss the benefits this contract will bring to the public in a little more detail in the following paragraphs but it does not seem possible to quantify the loss which the defendant will suffer if it is unable to roll out the EHCR for the great benefit of all the inhabitants of Northern Ireland. The defendant is not a profit driven enterprise. It is in the business of improving the health and welfare of citizens of Northern Ireland. Of course substantial costs have been incurred which can be calculated and quantified. But the cost of putting this scheme back six months at a minimum gives rise to a loss that will be extremely difficult to calculate. Also it cannot be assumed that if the competition is to be run again (and I consider this to be highly likely for the reasons which I set out below) that the same tenderers will re-enter the competition or, if they do, that the prices or services offered will be on the same terms as before.

[34] Regardless of whether the plaintiff or the defendant ultimately succeeds when this case goes to a full hearing, it must surely be an undeniable fact that damages in this procurement process are unlikely to represent an adequate remedy to the successful party.

Balance of Convenience

[35] There can be no dispute that there is considerable public benefit in providing a health and welfare system which integrates all the disparate elements of the health service on a province wide basis. In this case, just as in the Sisk case already referred to, there is very considerable benefit to Northern Ireland citizens from having an operative EHCR. While of course there is public benefit in ensuring that a proper and lawful process is followed in awarding a contract such as this, that is a matter which can only be determined after a full trial. I am not equipped to make any determination at this time on the relative strengths of either side's case because there has been no argument as to the merits of the plaintiff's claim addressed to this court.

[36] It seems to me that there is considerable force in the claim of the defendant that if an injunction is granted the whole process will have to be run again. If the competition is not rerun then there could be all sorts of problems as the defendant has emphasised. It would not make sense for the plaintiff to go through to the final stage when 2 other bidders have been excluded and the plaintiff has not been involved at all in the various procedures set out above. There would inevitably be a challenge by these disgruntled tenderers who should be able to argue that they were expected to compete with the plaintiff in circumstances where the relevant information concerning the approach and methodology adopted by the other

bidders in putting forward their submissions last year is likely to be available within the wider market. The defendant makes the case that it would result in an inevitable challenge and points to the case of T-299/11 European Dynamics EY v Office for Harmonisation in the Internal Market (7 October 2015) where the principles of equal treatment were dealt with at paragraph 44 which states:

> "It must be recalled that, in accordance with the principle of equal treatment, the contracting authority is required to ensure, at each stage of a tendering procedure, that equal treatment is observed and, in consequence, that all tenderers enjoy equal opportunities. Similarly, the principle of equal treatment means that tenderers must be on equal footing both when they prepare their tenders and **when those tenders are evaluated by the contracting authority**." (Emphasis added)

[37] Further, as the defendant has said stringent policies have had to be put in place to ensure evaluation is undertaken without risk of cross-contamination. Thus, in many cases the Evaluation Panel assessing quality will not be permitted to see price. The idea that evaluation would be undertaken in respect of one cohort of tenderers who would be ranked and then, at some later date, another tenderer would be assessed under different circumstances where the Evaluation Panel would be aware of the earlier outcome gives rise to all sorts of difficulty. Quite frankly, I do not see any alternative other than a rerun of the entire competition. This is unlikely to be completed before September 2019 at the very earliest.

[38] In determining the balance of convenience it is necessary to weigh into the balance a number of different factors. These will include in a case such as this one, the public interest in Alstom Transport v Eurostar International Siemens Plc [2010] EWHC 2747 (Ch) Vos J said at paragraph [80]:

> "An issue arose in the course of arguments as to whether the public interest could be taken into account in determining the balance of convenience when an interim injunction is sought under the 2006 Regulations. It seems to me to be self-evident, not only that it can, but that it should be. The main objectives of the Utilities Directive and the 2006 Regulations included opening up utility procurement to EU completion, as well as ensuring transparency and non-discrimination in the award of utilities' procurement contracts in the public interest. It would be entirely wrong to ignore the public interest when considering whether or not to grant interim measures, that is made expressly clear by Article 2.5 of the Utilities Directive itself, which provides that **The Member States may provide that when considering**

> **whether to order interim measures the body responsible may take into account the probable consequences of the measures for interest slightly harmed, as well as the public interest, may decide not to grant such measures whether negative consequences could exceed the benefits** …"

[39] In the transposition to the 2006 Regulations, Article 2.4 was not entirely reproduced. The Court of Appeal has recently held, as has been the case in other areas, that the public procurement Regulations should be construed in accordance with the meaning of the Directive.

[40] I have already concluded that it is in the public interest to provide an EHCR which integrates all of the disparate elements of the health service on a province wide basis as is envisaged by the Encompass programme.

[41] This is a case in which the issue of delay has loomed large. A number of explanations have been offered as to why the plaintiff did not proceed promptly. These include the failure of the defendant to respond promptly to correspondence and the need to ensure there was a proper case to be made before embarking on litigation. Neither of these explanations has been made out to the satisfaction of the court. I still do not understand why the plaintiff waited 3 months from the issue of the Writ of Summons before seeking an injunction. The consequences, as I have pointed out, is that we are now well into the procurement process. As I have said, it is highly likely that if an injunction is granted then the procurement process will have to be re-run.

[42] Arguments were made to the court about the court refusing relief because of laches and acquiescence. Laches is an equitable doctrine which bars the right to equitable relief. It applies both to an interlocutory and to a final injunction. It is concerned with delay, and whether as a consequence of that delay it would be "practically unjust" to give the remedy sought: see Gee on Commercial Injunctions at 2-040.

[43] Acquiescence arises in the following circumstances:

> "If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This … is the proper sense of the term 'acquiesce'." Per Thesiger LJ in *De Bussche v Alt* [1878] 8 Ch D 286 at 314.

[44] Bean on Injunctions (13th Edition) at 2.17 states:

> "A claimant who has acquiesced is only debarred from relief altogether where it would be dishonest or unconscionable for him, after the delay, to seek to enforce his rights. However, even if seeking an injunction after acquiescence falls short of being dishonest or unconscionable, the court still has a discretion to refuse an injunction and award damages in lieu."

[45] As Lord Neuberger observed in Fisher v Brooker [2009] 1 WLR 1764, that where the court is satisfied that it would be oppressive to grant an injunction in the particular circumstances because of prejudicial delay, then the court may simply refuse an injunction and leave the plaintiff to his remedy in damages. I consider that there has been prejudicial delay here.

[46] I do not think the issue of whether or not there is laches or acquiescence in the present interlocutory application is one that the court need consider at great length. I am not satisfied on the material before me that either case is made out. There would need to be an investigation of the facts, which of course has not taken place before me because there has been no discussion about the merits of either side's case.

[47] However, the court is concerned about delay in this case and it is entitled to take it into account. As Gee on Commercial Injunctions (6th Edition) states at 2-022:

> "Delay in the claimant applying for an interim injunction is relevant because it is liable to affect the practical doing of justice in the application, and whether the claimant has acted fairly. It raises questions about whether the claimant really needs an injunction pending trial, the quality of the claimant's case and whether the delay has affected the defendant."

[48] The strengths and weaknesses of the plaintiff's case have not been explored in this application but for the reasons given the delay has affected the defendant. It seems to me that on the facts of this particular case the delay of the plaintiff severely impedes the court in the practical act of doing justice on this application. In a procurement case such as this, delay will mean that substantial benefits are denied to the public for a period of time, 6 months at a minimum, which will have adverse public interest consequences, which I have discussed above. The court is entitled to take this delay into account, and who is responsible for that delay in determining whether to grant an interim injunction. In this case the court has concluded that the majority of the delay was occasioned by the plaintiff and that the consequences for this delay must be borne by the plaintiff. In the court's view the public interest is the decisive factor in considering "the balance of doing an injustice". There is considerable public interest in ensuring the procurement process is completed as

soon as possible so that the citizens of Northern Ireland can enjoy the benefits that the EHCR will bring. In this case the effect on the public interest has been magnified by the time the plaintiff has taken to bring this application to the court's attention. While the defendant cannot escape some criticism for failing to respond promptly to correspondence, the plaintiff had control of these proceedings. The suggestion that the defendant should have stopped the procurement process on receipt of the Writ of Summons is without merit. It was the responsibility of the plaintiff to bring this application to the attention of the court as soon as reasonably possible. All counsel and solicitors who operate in the Commercial List should know that procurement cases will be fast tracked and will receive an early hearing. The plaintiff has not provided a satisfactory explanation for its delay.

[49] In the circumstances, and for the reasons given, I consider that the balance of convenience and more properly "the balance of doing injustice" strongly favours refusing an injunction and allowing the procurement process to continue. The plaintiff will be left to its claim for damages though those may be difficult to calculate

CONCLUSION

[50] For the reasons I have set out, I decline to award an injunction and stop the procurement process. I will hear the parties on the issue of costs.