HENDERSON CHAMBERS

17 March 2015

Group M UK Ltd v Cabinet Office[1]

By Jonathan Lewis

The Technology and Construction Court has reiterated that, in considering whether to lift the statutory suspension of the placing of a public contract following a challenge by an unsuccessful tenderer, it will apply the *American Cyanamid* principles, as those principles are consistent with the requirements of Directive 2007/66/EC on the award of public contracts.

INTRODUCTION

1. Group M UK Ltd ("**Group M**") tendered in respect of a proposed single supplier framework agreement for media planning and buying services (the "**Media Services**"). This contract concerned the government's provision of non-party political information to the public at large (about such matters as armed forces recruitment or campaigns for submissions of tax returns) by a variety of different sorts of media (television, radio, billboards and so on).

2. Group M had been the incumbent provider of Media Services. However, when the contract was put out to tender in March 2014, it lost the contract to Carat, which

[1] [2014] EWHC 3659 (TCC). The TCC considered the approaches taken in an earlier line of authorities: see *Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust* [2010] EWHC 3332 (TCC), 134 Con LR 102 (TCC); *Alstom Transport v Eurostar International Ltd* [2010] EWHC 2747 (Ch); *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922 (TCC), 151 Con LR 146, and *NATS (Services) Ltd v Gatwick Ltd* [2014] EWHC 3133 (TCC), 156 Con LR 177.

secured it primarily on the basis of its (slightly) lower pricing. In September 2014, shortly after notification that it had failed to secure the contract, Group M issued proceedings in the Technology and Construction Court for a declaration that the procurement as undertaken by the Cabinet Office and the subsequent decision to award the contract to Carat was unlawful, and sought an order that the award decision should be set aside and/or damages. It also brought an unsuccessful application for specific disclosure against the Cabinet Office.[2]

3. Group M contended that the Cabinet Office had made it clear in its invitation to tender that sustainability of pricing was important to it and that this was to be reviewed and a discretion retained to disallow tenders which contained unsustainable pricing. It noted that the successful tenderer's pricing must have been unsustainable and alleged breaches of various statutory duties.[3] It claimed that, but for those breaches, it would have been awarded the contract.

4. As explained below, by issuing the claim and the Cabinet Office becoming aware of it, the placing of the contract became suspended by statute. The Cabinet Office later applied, as the contracting authority, to lift the statutory suspension so that it could place the contract with Carat. Akenhead J reviewed the principles which he was to apply in deciding the application (calling this the "threshold issue").

THE RESULT

5. Group M argued that the Council Directive (EC) 2007 / 66 (the "**Directive**") provides only for a balance of interests test and does not provide for a separate

[2] [2014] EWHC 3401 (TCC).
[3] Such as to treat tenderers "equally and in a non-discriminatory way", to act in a transparent way, to conduct the procurement in a manner free from any manifest error, to comply with principles of good administration and to evaluate all tenders fairly and objectively.

assessment of whether damages are an adequate remedy and does not require the provision of cross undertakings in damages. It relied upon the reference to the "interests involved" in Article 2(5) of the Directive (set out below) and argued that the Directive is paramount and that the *American Cyanamid* ("**AC**") principles run counter to it (at [15]).

6. Akenhead J rejected this argument and favoured the *AC* approach. Applying those principles, he lifted the suspension because:

   (a) Group M had failed to raise a serious issue to be tried about the "unsustainability" of the prices bid by Carat. In particular, the tender documents did not indicate that the evaluation body should have conducted a different audit and verification process for the prices quoted. There was a very strong case for saying that the tenderers could not reasonably have expected that their prices would be subject to the sort of analysis which Group M suggested, because nothing in the invitation suggested that that would be done (at [20] - [26]).

   (b) In any event, damages (for lost profits, head office overhead contributions and wasted tendering costs) would be an adequate remedy (at [32]).

   (c) The balance of convenience was in favour of allowing the Cabinet Office to award the framework agreement. This was particularly because of the claim's weakness (at [36]) and the public interest in the suspension being lifted (continued suspension could result in there being for some time no contract for disseminating public service information (at [37]).

7. It should also be noted that, due to its unsuccessful attempt to resist the application, Group M was ordered to pay the Cabinet Office's costs.[4]

[4] [2014] EWHC 3863 (TCC).

THE DIRECTIVE AND REGULATIONS

8. The Directive was introduced to improve the effectiveness of the review of procedures concerning the award of public contracts. As far as is relevant, article 2 (as amended) provides (emphasis added):

> 1. Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:
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> (a) take, at the earliest opportunity and by way of interlocutory procedures, **interim measures** with the aim of **correcting the alleged infringement or preventing further damage to the interests** concerned, including **measures to suspend or to ensure the suspension of the procedure for the award of a public contract** or the implementation of any decision taken by the contracting authority;
>
> (b) either set aside or…
>
> 2. …
>
> 3. When a body of first instance, which is independent of the contracting authority, reviews a contract award decision, Member States shall **ensure that the contracting authority cannot conclude the contract before the review body has made a decision on the application either for interim measures** or for review. The suspension shall end no earlier than the expiry of the standstill period referred to in Article 2a(2) and Article 2d(4) and (5).
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> 4. Except where provided for in paragraph 3 and 1(5), review procedures need **not necessarily have an automatic suspensive effect on the contract award procedures** to which they relate.
>
> **5. Member States may provide that the body responsible for review procedures may take into account the probable consequences of interim measures for all interests likely to be harmed, as well as the public interest, and may decide not to grant such measures when their negative consequences could exceed their benefits.**

9. The Public Contracts Regulations 2006 (the "**Regulations**") were made in order to implement the Directive. Regulation 47G provides that where a claim form is

issued in respect of a contracting authority's decision to award the contract and the contracting authority becomes aware of the claim (and that it relates to that decision) and the contract has not been entered into, the contracting authority is required to refrain from entering into the contract. This suspension continues until the court brings it to an end by way of an interim order under regulation 47H (reg. 47G(2)(a)) or the proceedings are determined.

10. In other words, under regulation 47G, where a challenge is brought to a tender exercise, the government is automatically injuncted from entering into the contract concerned but the courts can lift the automatic injunction (under reg.47H).

11. Regulation 47H provides that, in determining whether or not to make the interim order lifting the suspension, it must consider whether, if regulation 47G were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and only if the it considers that it would not be appropriate to make such an interim order may it lift the suspension (regulation 47H(2)).

THE PRINCIPLES TO BE APPLIED

12. Akenhead J held that there is nothing in Article 2 of the Directive which is inconsistent with the *AC* principles (applying *NATS (Services) Ltd v Gatwick Airport Ltd*)[5] (at [16]). Relying on *NATS*, he reasoned that it was pragmatic to ask in the first instance whether the proceedings raised serious issues to be tried. This is because the Directive could hardly have been intended to be used to disrupt public procurements with unsustainable challenges.

[5] [2014] EWHC 3133 (TCC), [2014] B.L.R. 697.

13. Following Ramsey J's reasoning in NATS, Akenhead J noted how Article 2(5), which provides for the court to lift or continue the suspension, was *permissive,* importing an element of discretion, which was akin to that inherent in the *AC* principles (at [16]). It did not mandate a particular test for lifting an automatic injunction.

14. Article 2 requires the court to have regard to "*all interests likely to be harmed*". Akenhead J considered that this phrase was broad enough to encompass all the limbs of the *AC* test (this interpretation is not inconsistent with *European Commission v Ireland*).[6] In other words, when the Court is considering all the interests likely to be harmed by the automatic injunction, it is legitimate to have regard to whether, if the suspension was lifted, the complaining tenderer still had an *effective* remedy. Article 2(1)(c) required that the review procedures provided power to award damages.

CONCLUSION

15. There are at least two important lessons to be the learnt from this litigation. First, by endorsing the *AC* approach, the court has made it easier for contracting authorities to argue in favour of the injunction being discharged. This is because courts will no doubt go expressly through each of the *AC* criteria.

16. The second lesson relates to a separate decision on costs[7] in which Akenhead J decided that a successful tenderer should, in principle, be awarded its costs of participating in a hearing in support of the contracting authority's successful

[6] (C-455/08) [2009] E.C.R. I-225.
[7] [2014] EWHC 3863 (TCC).

application for the automatic suspension to be lifted. This is because the successful tenderer had a very serious and fundamental interest in the outcome of the proceedings.

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