# TCC decides that new trains for the Piccadilly Line cannot be held up by procurement dispute (Bombardier Transportation UK Ltd v Hitachi Rail Europe Ltd)

12/11/2018

**Public Law analysis: This case somewhat starkly makes clear that where the automatic suspension of a public procurement process is preventing the putting in place of a key public service, it is very unlikely that the court will refuse to lift the suspension on American Cyanamid principles (ACPs). The case also makes clear that challengers cannot assume that commercial confidentiality will be enforced by way of private hearings in public procurement disputes. Written by Adam Heppinstall, barrister at Henderson Chambers.**

*Bombardier Transportation UK Ltd v Hitachi Rail Europe Ltd and other companies* [2018] EWHC 2926 (TCC)

### What are the practical implications of this case?

It is always very unlikely that the court will hold up a key public service affected by the automatic suspension which halts a public procurement process when a court challenge is made. Parties making such challenges should think long and hard before refusing to consent to the lifting of the suspension. The court is most unlikely to prefer the commercial interests of the challengers over the tube-riding public, having been waiting for new trains on the Piccadilly Line for many years. This case also makes clear that claimants cannot expect commercial confidentiality to be enforced by way of private hearings and should bear that in mind before issuing a public procurement challenge.

### What was the background?

The public private partnership (PPP) which was running, maintaining, and refurbishing the deep tube lines collapsed and therefore London Underground Limited (LUL) had to re-tender. The Utilities Contracts Regulations 2006 (UCR 2006), SI 2006/6 applied at the time. The successful tenderer was Siemens. Its competitors, Hitachi, Bombadier, and Alstom all challenged the award of the contract and issued proceedings which caused the statutory automatic suspension of the procurement process under the UCR 2006 (SI 2006/6, reg 45G).

In this judgment, O'Farrell J had to decide whether to lift the automatic suspension. She also had to decide whether to hear the application in private. It is now well-established that the decision to lift the automatic suspension is decided on the same principles as if the party seeking to maintain the automatic suspension had applied for an interim injunction; hence these applications turn on ACPs (for the authorities which confirm this, see: *Bombardier* [2018] EWHC 2926 (TCC) at para [37]).

### What did the court decide?

LUL conceded that there was a serious issue to be tried (which is the first ACP). The second ACP, that damages are not an adequate remedy, was determined in favour of the claimants, as the judge held that the loss of such a high-profile competition would damage the losing parties in a way which could not be compensated fully in damages (because it was commercial reputational damage). This is often the case in these circumstances because of the Supreme Court decision in *Nuclear Decommissioning Agency v Energy Solutions EU Ltd* [2017] UKSC 34, which now makes it more difficult to obtain damages in procurement cases.

The court also held, however, that given that the ongoing automatic suspension would mean a significant delay in the supply of new trains for the Piccadilly Line. The cross-undertaking in damages which would need to be given by the claimants to LUL if the automatic suspension was to be maintained would not be adequate to compensate LUL. This fed into the decision under the final and usually crucial ACP—the balance of convenience. Faced with the public continuing to suffer bad

service and 1970s rolling stock on the deep tube lines for longer than necessary if the automatic suspension was maintained, the court was bound to lift it:

> 'The evidence produced by LUL establishes that there is a strong public interest in introducing the new trains as soon as possible and decommissioning the old stock. Maintaining the suspension is likely to cause years of delay to the works. The public benefit has already been deferred as a result of the collapse of the PPP. Further delay is not justified in this case.' (see: *Bombardier* [2018] EWHC 2926 (TCC), at para [96]).

The judge also determined that she would not sit in private to hear parts of the application which were concerned with the commercially sensitive property and information of the commercial rivals concerned. Instead counsel were expected to make submissions in public elliptically referring to the confidential material, but without revealing it. This is the new standard approach to applications to sit in private in these sorts of cases and there should not be an expectation that the court will override the principle of open justice and sit in private to protect commercially confidential material:

> 'In my judgment, it was not necessary for the public, or any of the parties, to be excluded from this hearing. The court had the benefit of unredacted versions of full written submissions, pleadings and evidence. Counsel were entitled to refer to the redacted sections of the documents to develop their submissions and properly put the case of their clients. That was achieved by counsel drawing attention to the relevant parts on which they wished to rely without quoting from them in open court. The arguments made by Mr Coppel did not justify overriding the principle of open justice. For those reasons the application was refused.'

**Case details:**

- Court: High Court, Queen's Bench Division, Technology and Construction Court
- Judge: O'Farrell J
- Date of judgment: 2 November 2018

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