

Neutral Citation Number: [2010] EWHC 51 (QB)

Case No: IHQ/09/1153

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/01/2010

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

B2NET LIMITED

Claimant

- and -

HM TREASURY
(sued as BUYING SOLUTIONS)

Defendant

Mr Choudhury (instructed by **Taylor Vinters**) for the Claimant
Mr Bowsher QC and Mr Palmer (instructed by **Treasury Solicitors**) for the Defendant

Hearing dates: 13 January 2010

Judgment

Mr Justice Tugendhat :

1. The Claimant, B2Net Limited, applies for an interim order to prevent the Defendant from continuing with a procurement exercise leading to the award of framework agreements for the provision of IT goods and services to government. It does so on the basis of a challenge to a single question contained in the Defendant's Pre-Qualification Questionnaire (PQQ), the responses to which determined which suppliers would be invited to tender in respect of a framework agreement.
2. The Defendant is the executive agency within HM Treasury tasked with providing certain services relating to procurement for the public sector. In particular, the Defendant facilitates framework agreements for a variety of products and services.
3. The Claimant contends that a procurement exercise being conducted by the Defendant is in breach of the requirements of the *Public Contracts Regulations 2006* ("the Regulations"), the relevant EC Directive (The Regulations implement Directive 2004/18/EC on the Co-ordination of procedures for the award of public works contracts) and general EC principles of non-discrimination and transparency. The breach means that the Claimant is excluded from proceeding to the tender stage of the procurement exercise despite having scored the maximum available marks in almost all categories in the PQQ. An interim order to suspend the exercise is one that is provided for by reg 47(8) where a breach of the duties owed to a person such as the claimant is alleged.

THE TEST TO BE APPLIED

4. Mr Choudhury for the Claimant submits that the considerations governing an application for interim relief under reg 47(8)(a) are so similar to those which arise in an ordinary application for an interim injunction (see *American Cyanamid*) that it is appropriate to apply the same principles in determining whether such relief is appropriate: *Lettings International Ltd v London Borough of Newham* [2007] EWCA Civ 1522 at para 12. Accordingly, the Court must consider the following questions:
 - a. Is there a serious issue to be tried? If so,
 - b. Would damages be an adequate remedy; and
 - c. Does the balance of convenience favour maintaining the status quo?
5. Mr Bowsher QC for the Defendant does not dissent from this submission. But the position of the Defendant in these proceedings is not easily comparable to that of a defendant against whom interim relief is sought in private law proceedings. Mr Bowsher submits that the true nature of the applicable principles is better derived from the recent statement of Lord Hoffmann in *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd* [2009] UKPC 16; [2009] 1 WLR 1405:

"16 ... It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have

consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:

"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."

18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.

19. There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory... What is required in each case is to examine what on the particular facts of the case the consequences of granting

or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irreparable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, ... "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."

6. In his submissions Mr Bowsher addressed first the question whether an interim injunction should be made simply on the basis that damages would be a more than adequate remedy for the Claimant and, on the other hand, serious losses will be suffered by a range of other parties and there can be little certainty that all these losses will be adequately met. It not easy to identify who might be the other parties who might suffer if an interim injunction were granted and the Claimant failed at trial. There is evidence that the Defendant would suffer financially from the grant of an interim injunction, but Mr Bowsher does not advance that as a consideration (as a defendant in private law proceedings would). Rather, the losers will be: others who have submitted applications in competition with the Claimant; the public authorities for whose benefit the exercise is being held, and ultimately the public at large, as taxpayers and recipients of the services of the public authorities.
7. While bearing in mind that that is the main point advanced by Mr Bowsher, I shall (after first reciting the background) consider the issues in the order submitted by Mr Choudhury.

BACKGROUND

8. The Claimant is an IT storage company. It provides companies with both hardware and software to improve IT performance, management and storage.
9. On 28 July 2009, by an OJEU notice, the Defendant commenced the competitive public procurement to establish a framework agreement for the provision of IT goods and services. The envisaged number of successful operators was 15 at that time. The framework agreement comprises three lots:
 - a. Lot 1 – Desktop hardware;
 - b. Lot 2 – IT infrastructure hardware; and
 - c. Lot 3 – Specialist channel partners for software.
10. Responses to the PQQ in respect of the procurement were required to be submitted by 28 August 2009.
11. The PQQ was in three sections:
 - A General Capability – 5 questions with an overall weighting of 20%;
 - B Lot Specific Capability - 20 questions with an overall weighting of 50%; and

C Previous Experience - 6 questions with an overall weighting of 30%. Of that 30%, the impugned question 6 Breadth of Experience had an overall weighting of 7.5%.

12. The Claimant submitted its response to the PQQ by the required date with a view to being selected for an invitation to tender (“ITT”) in respect of Lot 2 of the framework agreement.
13. On 1 October 2009, the Claimant was informed that the Defendant’s evaluation of the responses to the PQQ had been completed and that the Claimant had been unsuccessful.
14. From the information provided by the Defendant in a revised debrief document dated 3 December, it was apparent that:
 - i) 20 out of 84 competing suppliers had been successful at the PQQ stage and would be invited to tender for Lot 2;
 - ii) The range of scores of successful suppliers was 935.71 to 970.00 out of an available maximum of 970.00. The original maximum of 1000 points was reduced to 970 following the withdrawal by the Defendant of one of the questions on the PQQ as a result of a number of challenges brought by bidders;
 - iii) The Claimant’s score was 922 out of 970. It had therefore failed to be shortlisted by a margin of only 13.71 points (1.4%);
 - iv) The Claimant had scored the maximum available points in respect of all but two of the questions set out in the PQQ. These two were:
 - a) Question A5 (Quality Management System) - The Claimant scored 12 out of 30 for this question because its ISO 9001 accreditation was still pending. The Claimant does not take issue with this criterion or the score awarded;
 - b) Question L2 C6 (Breadth of Experience) – The Claimant scored 45 out of 75 for this question.
15. Section C of the PQQ, entitled “Previous Experience” required the Claimant to provide five example contracts from the last three years relevant to Lot 2. Points were awarded in respect of each such contract based on its relevance to the Lot being applied for. The Claimant scored the maximum in respect of each of the contract examples submitted.
16. In the same section of the PQQ, question L2 C6 was in the following terms:

“[L1to3 C6 Breadth of Experience]

Separately to the above, marks will be awarded for demonstrating a breadth of experience across the full range of products and services relevant to each Lot. If all 5 examples

provided for each Lot are relevant, they will be considered together and an additional mark awarded as below:

1. Each of the 5 examples was awarded directly to the bidding organisation
2. Each of the 5 examples are drawn from different customers ...
3. The 5 examples overall demonstrate capability across the full range of products and services relevant to each Lot.

The marking scheme is as follows:

- 0 Not all of the 5 examples are relevant or neither criteria are met
- 1 All 5 examples are relevant and one of the criteria is met
- 3 All 5 examples are relevant and two of the criteria are met
- 5 All 5 examples are relevant and three of the criteria are met

Please note, no response to this question is required.
[Emphasis Added by the Claimant]

17. This was the only question in the PQQ deemed to be optional. I have been unable to see any significance in this point.
18. The questions asked by the Defendant included:

“Confirm the contract was placed direct with your organisation or name the prime contractor concerned”
19. The answer given by the Claimant in respect of four of the five examples was in two parts which I have numbered:

“[1] Prime Contractor DSGI

[2] All client engagement has been managed directly between B2Net and the customer with DSGI facilitating the purchase through the existing catalyst framework. The contract was held between B2Net and the end user”.
20. I shall refer to part [2] of the answers as the Explanation.
21. Upon receipt of the Defendant’s notification that it had been unsuccessful, the Claimant sought further information as to the reason for its failure to score the maximum points under section C of the PQQ.

22. On 13 October 2009, the Defendant responded as follows:

“B2Net were awarded 3 marks for L2C6 as all 5 examples provided were relevant and two of the criteria were met. Four of the contract examples were not awarded directly to the bidding organisation. The response provided states that DSGI was the prime contractor in each of those examples. Therefore point 1 above [i.e. the criterion that each of 5 examples was awarded directly to the bidding organisation] was not met.

We are satisfied that the scoring of this question is correct and consistent with the instructions provided within the PQQ.”

23. On 14 October the Claimant replied stating that the writer had anticipated that this would be the area where the Claimant failed to score full marks. The letter continued:

“During the PQQ stage ... the following question was asked [by another bidder] and answered [by the Defendant in a form communicated to the other bidders]

Q72 With regards to the scoring scheme for example contracts, where a contract was placed directly, owned and driven by the reseller, but a 3rd party was used purely as an invoicing mechanism, will this be scored in line with the 2 point criteria rather than the 5 point criteria...[?]

A72 Such an arrangement would not preclude the Example Contract from scoring 5 points so long as the contract was between the customer and the bidding organisation and not with the 3rd party organisation supplying the invoicing mechanism

With all the examples offered by B2Net the customer’s contract was always delivered by B2Net. The fact that most public sector organisations require to use OGC as a procurement framework means the requirement for a ‘direct contract’ is very difficult to provide simply due to the frameworks already in place.

DSGI are a partner to use simply as a transactional partner in these instances and are literally only an invoicing mechanism to satisfy procurement rules.

The contract, the delivery and the ongoing support of the solutions we deploy are entirely between B2Net and the end user customer”.

24. That is the gist of the challenge by the Claimant in these proceedings. The Claimant says that the omission to give full marks to a bidder who failed to give an example in which he had been a prime contractor was in breach of the Regulations.

25. The Defendant responded on 23 October 2009 confirming that it was satisfied that the scoring was correct.
26. On 12 November 2009, the Defendant wrote to all bidders stating that question A4 “Growth of Business” in the PQQ had been challenged on the grounds of validity and had been removed. Revised results were subsequently issued to all suppliers on 10 December 2009. In the course of revising the results, the Defendant also increased the number of successful suppliers that would proceed to the ITT stage. In the course of this revision, the Defendant drew the line between successful and unsuccessful bidders for Lot 2 immediately above the Claimant’s score. This meant that it was not until 10 December 2009 that final confirmation was received as to the successful bidders.
27. On 3 December 2009, the Claimant’s solicitors gave notice to the Defendant that the scores awarded to the Claimant in the PQQ would be subject to challenge and invited the Defendant to defer any further decision-making in the meantime. The grounds of the Claimant’s challenge were set out in a further letter dated 16 December 2009. In particular, it was asserted that question L2C6 was invalid and the grounds for that assertion were set out. The Defendant was once again invited to revisit the scoring process and to confirm that the Claimant would be invited to tender, failing which the Claimant would make a formal challenge under the 2006 Regulations.
28. By a letter dated 17 December 2009, the Defendant responded to the Claimant’s notice by stating that it did not understand why question L2C6 is considered to be invalid and seeking further explanation from the Claimant. The Defendant further confirmed that the procurement timetable had been adjusted in that invitations to submit tenders were sent to selected suppliers on 11 December 2009 and that the deadline for the receipt of tenders is now 26 January 2010. However, although tenders would now be received about 10 weeks after the original deadline of 11 November 2009, the Defendant only moved the contract issue date by 4 weeks. The marketing launch date of 1 March 2010 remains the same.
29. The Claimant’s Application Notice was issued on 23 December 2009 with notice of hearing on 7 January 2010. The first response to the Application Notice was not received until 4 January 2010. The Defendant’s evidence in response was served shortly before 1.00pm on 6 January 2010.
30. It is common ground that the provisions under which Q72 was asked and answered would have permitted the Claimant to ask a corresponding question about what it states was its relationship between DSGI and the customers in the examples which it gave. The Claimant did not take this opportunity, but raised the issue for the first time as set out above.

THE LAW APPLICABLE TO THE PROCUREMENT PROCESS

31. There is no dispute as to the requirements of the Regulations. They are summarised by Mr Choudhury as follows.
32. The Defendant is required to conduct procurement exercises in accordance with the Regulations, the Directive 2004/18/EC and general principles of EC Law.

33. In particular, the Defendant is required to treat the Claimant equally with other economic operators and in a non-discriminatory way; and to act in a transparent way: Reg. 4(3)
34. In respect of any procurement conducted in accordance with the restricted procedure set out in reg 16 of the Regulations, the Defendant is required to make its evaluation of economic operators in accordance with regs 23, 24, 25 and 26, and may exclude an economic operator from those economic operators from which it will make the selection of economic operators to be invited to tender only if the economic operator:
 - i) may be treated as ineligible to tender on a ground specified in Regulation 23; or
 - ii) fails to satisfy the minimum standards required of economic operators by the Defendant of:
 - a) Economic and financial standing; or
 - b) Technical or professional ability: Reg 16(7)
35. In assessing whether an economic operator meets any such minimum standards of technical or professional ability, the Defendant may have regard to any means listed in reg 25(2) of the Regulations according to the purpose, nature, quantity or importance of the contract. Those means include, in the case of a public services contract, a public works contract or a public supply contract requiring the siting or installation of work, the economic operator's technical ability, taking into account in particular that economic operator's skills, efficiency, experience and reliability.
36. The Regulations do not mention the economic operator's status, i.e. whether as a contractor, sub-contractor or as part of a consortium, in acquiring or otherwise evidencing such technical or professional ability.
37. The Defendant is also entitled to limit the number of economic operators which it intends to invite to tender, provided that the contract notice specifies the objective and non-discriminatory criteria to be applied in order to limit the number of such operators: Reg 16(9).
38. Reg 47 provides that breach of the Regulations is actionable by any economic operator which, in consequence, suffers or risks suffering loss or damage and those proceedings shall be brought in the High Court.
39. In *Lion Apparel Systems Limited v Firebuy Limited* [2007] EWHC 2179 (Ch), [2008] EuLR 191 Morgan J set out the legal principles applicable to the procurement processes such as the one here in question. These included:

“35. The court must carry out its review with the appropriate degree of scrutiny to ensure that the above principles for public procurement have been complied with, that the facts relied upon by the Authority are correct and that there is no manifest error of assessment or misuse of power.

36. If the Authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for the Authority to have a "margin of appreciation" as to the extent to which it will, or will not, comply with its obligations.

37. In relation to matters of judgment, or assessment, the Authority does have a margin of appreciation so that the court should only disturb the Authority's decision where it has committed a "manifest error".

38. When referring to "manifest" error, the word "manifest" does not require any exaggerated description of obviousness. A case of "manifest error" is a case where an error has clearly been made.

39. I take the above principles from the decision of the Supreme Court of Ireland in *Siac Construction v Mayo County Council* [2003] EuLR 1, and the decision of the Court of First Instance in *Evropaiki Dynamiki v Commission* 12th July 2007 at [89]".

40. It follows that I have to consider whether the Claimant has raised a serious issue to be tried as to whether the Defendant has breached any obligation under the Regulations or, in assessing the Claimant's response to PQQ, made a manifest error.

IS THERE AN ISSUE TO BE TRIED?

41. The most important submissions advanced are in my view the following.
42. Mr Choudhury's first submission is that in the first 5 questions in Section C one of the factors identified in PQQ was whether the contract given as an example was placed directly with the applying organisation. The Claimant got full marks on that section, notwithstanding that in four out of its five examples it was a sub-contractor. Mr Choudhury submits that this raises issues of consistency and transparency: why should the Claimant not have got full marks for the sixth question?
43. Mr Bowsher submits that there is no direct comparison between the two sets of questions. The first five questions are so framed that it is clear from PQQ that it is possible for a sub-contractor to score full marks on those questions.
44. It appears to me that as a matter of construction the Claimant's case is weak on this point.
45. Next Mr Choudhury submitted that there is no rational explanation for marking down a sub-contractor, because a sub-contractor may have, and in this case the Explanation shows that the Claimant did have, all the relevant experience required. It is said that the Claimant had actually done the work under the contracts given as examples. In such cases the prime contractor will have less experience than the sub-contractor, and yet the PQQ system of marking gives the prime contractor a preference.

46. There has been no evidence before me, in these interim proceedings, of the meaning of Q72 and A72 (set out in the Claimant's letter of 14 October 2009), and no investigation into the facts of the relationship between the Claimant and DSGI and the customers of DSGI and/or the Claimant in the examples given. It is in issue whether the Explanation that the Claimant gave is either (a) comparable to the facts described in Q72, or (b) such that the Claimant's experience is to be regarded as in all respects similar to that of a prime contractor. These will, or might, be issues for consideration at trial.
47. Mr Bowsher submits that if the other questions in PQQ are considered, a prime contractor who has employed a sub-contractor will be identified by his responses to other questions, and so will lose marks at that point, and not, in the end, be accorded a preference over sub-contractors merely as a result of his status as a prime contractor.
48. Mr Bowsher submits that the relative marking of prime contractors and sub-contractors is a matter within the margin of appreciation allowed to the Defendant.
49. Further, Mr Bowsher submits that it would not have been open to the Defendant to give the Claimant marks for the Explanation, since there had been no publication to others that that might be done. It might have been otherwise if the Claimant had asked, and been given a public answer, to a question corresponding to Q72. But in any event, the Explanation raises, or might raise further questions.
50. There are a number of other ways in which Mr Choudhury advances this, or a similar point. He submits that the Defendant has given preference to form over substance, and that there is no satisfactory explanation for the marking down of sub-contractors given in the evidence. And in so far as any explanation is given in the evidence, then it raises an issue of transparency: the explanation should have been given in PQQ.
51. This is a point on which the court is not well placed to form a view at this stage of the proceedings. My preliminary view is that there is likely to be a material and objectively justifiable difference between a prime and a sub contractor from the point of view of the Defendant. My preliminary view is that the letter of 14 October by the Claimant is unconvincing in seeking to assimilate the two, even where the sub-contractor has in effect done all the work. In so far as I am able to form a view of the strength of this point, it appears to me that on this point too the Claimant's case is weak.
52. Given the approach of Mr Bowsher, I am prepared to assume that the Claimant may have raised a serious issue to be tried, but I cannot say that I consider it to be a strong case. On this basis I do not need to consider the merits of the claim further.

ADEQUACY OF DAMAGES FOR THE CLAIMANT

53. In his first witness statement for the Claimant Mr Thompson stated that if an injunction is not granted the Claimant will not be able to participate in the process at all and that there would be no prospect whatsoever of being a party to the framework agreement. He goes on to say that "In these circumstances, damages would clearly be a wholly inadequate remedy". He gives no explanation for this conclusion.

54. This was pointed out for the Defendant by Mr Cliffe. He stated that the Claimant was not on the existing framework, but had done business as a sub-contractor to a prime contractor who was on the existing framework. There was no evidence to explain why it should not continue to do so.
55. Mr Thompson made a second witness statement. He said that being on the new framework would enhance the Claimant's reputation. By this I understand him to mean that the fact that the Claimant was on the framework would give rise to a chance of it obtaining work (whether under or outside the framework) which it would not have if it fails in these proceedings. It would also increase its margin, in that there would be none for the prime contractor. He estimated the increase would be a percentage which he specified. Moreover, DSGI, which was the prime contractor through which it had dealt under the existing framework, was not amongst the 20 selected to tender for the new framework. Accordingly, the Claimant would have to deal through a substitute prime contractor, quite possibly on less favourable terms as to margin.
56. Mr Bowsher submits that (assuming no interim relief is granted, but the Claimant succeeds on liability), at the time when this claim would come to the assessment of damages, the new framework will have been in operation for some time, and there will be data from which margins and other relevant figures can be found for the purposes of assessing damages. He accepts that the damages may not be as good a remedy as an injunction, but submits that they will be adequate.
57. As to the law, Mr Choudhury submits that the court should take care not to set too high a standard, since that would be to deprive claimants of the effective remedy which reg 47 is intended to provide.
58. In response to that Mr Bowsher notes that a higher test for interim relief has been applied in the Court of First Instance in Case T-511/08R, *Unity OSG FZE v Council of the European Union* (Order of 23 January 2009), and so that there a test which applies any similar or lower threshold would not be unlawful. In that case the court said:
- “It must be noted that the urgency of an application for interim measures must be assessed in relation to the necessity for an interim order in order to prevent serious and irreparable damage to the party applying for those measures. It is for that party to prove that it cannot wait for the outcome of the main proceedings without suffering damage of that kind....”
59. Applying the test in *Cyanamid*, and accepting the evidence of Mr Thompson, there is nothing upon which I should find that damages would not be an adequate remedy in this case. On the contrary, the evidence suggests that damages would be an adequate remedy, and more readily capable of calculation than many claims for damages for loss of business that come before the courts. The longer any assessment of damages is deferred into the term of the new framework, the more evidence there will be.
60. I turn to consider the possible injustice if an interim injunction is granted, but the Claimant fails to establish his case at trial.

61. Mr Bowsher submits that an interim injunction would cause significant losses and other prejudice to a large number of entities, both private and public. Given the extensive range of public purchasers that are expected to use this framework (not least because they used the framework agreement which this replaces), it has not been possible to gather comprehensive evidence regarding the impact of delay in implementation of this framework. But there is some evidence from Mr Cliffe. He states that the Defendant facilitates the buying process in a vast and highly complex marketplace providing access to over 500,000 products and services through more than 600 suppliers. The customer base spans the biggest central government departments, NHS Trusts and local councils, through to the smallest schools. I understand that evidence to relate to its activities generally. In relation to the existing framework (due to expire on 30 April 2010) there were orders from customers of £353m between April and September 2009, which he states represents savings of some £23.9m to the UK public sector. There might also be losses suffered by other bidders in respect of the delay to the current procedure that would follow from the grant of an interim injunction.
62. It seems to me very unclear how any losses that might be suffered by public sector buyers or by other bidders could be advanced in a claim on any cross-undertaking in damages. But that does not mean that there would be no damage done by the grant of an injunction. The disruption must inevitably be damaging, or so it seems to me. The remedy under a cross-undertaking, however framed, does not appear to me to be one that would be adequate to prevent injustice. That will not of itself preclude the grant of an injunction, for which the Regulations make specific provision. But it is a factor to be considered.
63. There was some debate between the parties as to the time for which any suspension of the procedure would be likely to last, when a trial of this action might take place, and whether or how the existing framework could be extended to cover that period. I do not need to consider this point in detail. It is difficult to predict what the issues might be in the trial. It might be tried substantially on the documents before me, or it might give rise to complicated disclosure and factual issues. It is impossible to predict when a trial might take place or the period for which the suspension would be required.
64. If I had formed the view that the Claimant's case on the merits was a strong one, then that might have weighed in the balance in its favour. But that is not this case.
65. Accordingly I dismiss this application on the ground that damages would be an adequate remedy for the Claimant, but not for the numerous other parties who would be affected by the suspension of the procedure which the Claimant seeks.

OTHER POINTS

66. Mr Bowsher advanced a number of other points on which I can state my conclusions very briefly. I would not have refused an injunction (if it were otherwise just to grant it) on the basis that the Claimant could not give an adequate cross-undertaking in damages. In this case that would not be a sufficiently significant factor.
67. Mr Bowsher takes no point on the three month limitation period (explaining that the judgment of the ECJ on this point in *Case C-406/08, Uniplex (UK) Ltd v NHS BSA* is expected to appear very shortly). Mr Bowsher does rely on the delay that has

occurred. The loss of marks to those with experience as sub-contractors was evident when the PQQ was published. The Claimant did not raise the point until October, and then delayed commencing proceedings until 23 December.

68. There is force in this point. Had I been otherwise undecided, this would have weighed significantly against the Claimant in my judgment. See especially *Jobsin Internet Services v Department of Health* [2001] EWCA Civ 1241, [2001] EuLR 685 paragraphs 33 & 38

CONCLUSION

69. For these reasons I dismiss this application.