

PROCUREMENT LAW

'INEFFECTIVENESS' OF AWARDED CONTRACTS

*ALSTOM TRANSPORT AND EUROSTAR INTERNATIONAL LIMITED
v SIEMENS PLC* [2011] EWHC 1828 (Ch)

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In the latest judgment in connection with the ongoing dispute between Alstom Transport (“Alstom”) and Eurostar International Limited (“Eurostar”) over the contract to upgrade Eurostar’s fleet of cross-Channel trains, the High Court has ruled for the first time on the availability of the new ‘ineffectiveness’ remedy under Regulation 45J Utilities Contracts Regulations 2006 (as amended) (“the Regulations”).

The dispute has arisen in connection with Eurostar’s decision to procure a replacement of its existing fleet of trains, in anticipation of access to the Channel tunnel being made available to competitors. In October 2010 it decided to award the contract to Siemens plc (“Siemens”), in preference to its previous supplier, Alstom. Alstom’s application for an interim injunction to prevent the award of the contract to Siemens failed in October 2010: *Alstom Transport v Eurostar International Limited & Siemens plc* [2010] EWHC 2747 (Ch). Eurostar proceeded to award the contract to Siemens on 3 December 2010. Following the contract’s conclusion, Alstom issued new proceedings seeking a declaration that the contract was ineffective, pursuant to Regulation 45J. Eurostar and Siemens applied to have the new claim for that remedy struck out.

Because this was a hearing of a strike out application, it proceeded on the basis of a number of assumptions, made only for the purposes of the hearing, in Alstom’s favour on otherwise contested points. The assumptions included: that the Regulations applied, in their amended form, and that the contract awarded was not the same as that envisaged in the invitation to tender – it was a “materially changed” contract in breach of the Regulations.

Mann J, nevertheless granted the strike out. He held that Alstom had not established that any of the “grounds for ineffectiveness” in Regulation 45K applied. In particular:

- (i) There was no failure to publish a prior notice ('the first ground'); and
- (ii) Alstom had not been deprived of its ability to commence proceedings before the contract was awarded ('the second ground')

The judge also held that the claim was time barred in any event.

(i) Prior notice: Regulation 45K(2)

Eurostar had carried out the procurement using a qualification system, as provided for by Regulations. Mann J rejected the argument that the first ground, outlined in Regulation 45K(2), was concerned only with a failure to issue a "contract notice" (as defined in Regulation 16(2)(b)) (paragraphs 30-32). However, he held that the "qualification notice" (as defined in Regulation 16(2)(a)(ii)) issued by Eurostar at the commencement of the competitive process was sufficient to provide Alstom with the requisite prior notice so as to exclude the first ground of ineffectiveness. It was decided the question of whether an operator has been given prior notice of the competitive process is a "mechanistic test" (paragraph 42) which was satisfied on the facts.

Alstom's arguments that the (assumed) material alterations to the scope of the contract rendered the original qualification notice irrelevant, such that a new notice was required and had not been given, bringing the dispute within Regulation 45K(2), were thus rejected.

(ii) Ability to commence proceedings: Regulation 45K(5)

Mann J. also held that the second ground could not be available, in view of Alstom's interim injunction application. The four criteria outlined in Regulation 45K(5) are cumulative (paragraph 44), and they include that the economic operator "*has deprived [Alstom] of the possibility of starting proceedings in respect of the breach*" of the Regulations because the standstill period was not observed (Regulation 45K(5)(c)). In this case, either there was no breach of the standstill period, or any breach that did occur did not prevent Alstom from initiating proceedings to raise the matters now complained of (paragraph 55). The judge stated in particular that "*To some extent the ineffectiveness provisions are obviously intended to operate only when anticipatory proceedings could not be brought...[a claim for ineffectiveness] should only be available when [an anticipatory claim] has not been possible because of the act of the utility in not holding its hand on contracting to the requisite extent.*"

No ruling was made on Alstom's argument that the (assumed) material alterations to the scope of the contract were such that a new tender process was required, and that any standstill period that Eurostar applied was not conducted under the correct provision in the Regulations. Mann J.

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held that even if that argument were right, it would not avail Alstom because in any event it had not been deprived of its ability to bring proceedings for the purposes of satisfying Regulation 45K(5)(c).

TIME LIMITS

In view of his conclusions as to whether the ineffectiveness remedy was available, Mann J. did not strictly have to decide the question of whether Alstom's new claim was time expired under Regulation 45E. He did however make findings on the issue, and rejected Alstom's arguments, applying the 30 day time limit in Regulation 45E(2)(a), rather than the 6 month period in Regulation 45E(2)(b).

The judge considered that:

- (a) When a contracting authority provides a summary of its reasons for awarding a contract to a particular economic operator (under Regulation 45E(5)(b)) it does not have to do so by any formal means, and in particular it does not have to do so in writing (paragraph 66), or on a single occasion/in a single document (paragraph 77);
- (b) Even if there has (as assumed) been a material variation in the contract to be awarded, a contracting authority can still validly provide a summary of its reasons for awarding a contract to a particular economic operator (under Regulation 45E(5)(b) and the definition of "relevant reasons" in Regulation 45E(6)). If that were not the case, it would lead to the "very curious result" that contracting authorities would be under no obligation (under Regulation 33) to provide reasons to unsuccessful tenderers in circumstances where they had departed from the invitation to tender (paragraphs 68-69);
- (c) As a matter of fact, the summary of reasons need only explain why the unsuccessful tenderer was unsuccessful, and the characteristics and relative advantages of the successful tenderer. In particular; *"The trigger is intended to be a clear and relatively short document or statement, in order to lessen commercial uncertainty. It is undesirable to have a period dependent on a long and potentially contentious document. Something shorter and easier to deal with is provided for"* (paragraphs 79-80).

At the time of writing it remains to be seen whether these issues, or any of them, will be the subject of an appeal.

*Michael Bowsher QC and Ewan West appeared for Eurostar
International Limited
Rob Williams appeared for Siemens PLC*