


BFS Group Ltd v Secretary of State for Defence and Purple Foodservice Ltd¹: Negotiations Break Down in Fantasystan

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1. Background

The claimant in this case had been an unsuccessful tenderer for a contract to supply food and bottled water to HM Armed Forces.

The award process, which had been conducted in 2005, was governed by the Public Supply Contracts Regulations 1995 (the “Regulations”), which implemented the previous EC Supply Directive.² The contracting authority had called for tenders under the negotiated procedure of the Regulations, awarding the contract on the basis of the most economically advantageous tender. Tenderers were required, as part of the evaluation, to make a presentation on how they would fulfil supply requirements as part of a fictitious assignment, Operation “Fantasystan”.

Three parties survived the pre-qualification stage of the procedure, one of which was BFS. At that stage, the contracting authority decided that it would not, as indicated in the original papers, select a preferred bidder with whom to negotiate the final award. Instead, it assessed initial bidders and invited parties to meetings to clarify certain aspects of their bids. BFS’s written invitation was sent on January 19, 2006.

Having conducted clarificatory meetings with each party, on May 8, 2006, the contracting authority, DLO, announced its intention to award the contract to Purple Foodstuffs Ltd (“Purple”). DLO then waited 10 days before concluding the contract with Purple pursuant to the Court of Justice’s standstill requirement laid down in *Alcatel*.³ On May 17, Purple notified BFS of its intention to challenge the award to Purple and to seek interim measures.

¹ [2006] EWHC 1513 (Ch).

² Council Directive 93/36 co-ordinating procedures for the award of public supply contracts, [1993] O.J. L199. The Regulations have now been repealed and replaced with effect from January 31, 2006 by the Public Contracts Regulations 2006, which implement Directive 2004/18 of the European Parliament and of the Council on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, [2004] O.J. L134/114.

³ Case C-81/98, *Alcatel Austria v Bundesministerium für Wissenschaft und Verkehr* [1999] E.C.R. I-7671.

2. Legal issues

BFS complained that the tender process was flawed because by failing to negotiate with each tenderer as indicated in the original tender documents, DLO had breached its statutory duty under the Regulations and BFS's legitimate expectation that the process be conducted in that way.

According to BFS, advertising a tender as being subject to the negotiated procedure was "a clear and unequivocal representation that negotiations are envisaged"^{3a} Where matters had commenced on that footing, it was unrealistic to expect bidders to "start off with their best and final offers" or that the initial offer would necessarily be the one that would "recommend itself to the contracting authority".^{3b}

Furthermore, it was argued that starting a process under the negotiated procedure gave rise to a duty on the authority that it would negotiate with each of those parties that had passed pre-qualification, regardless of whether or not it thought those bidders would ultimately succeed.

BFS also claimed that the authority's departure from the negotiated procedure in favour of a process which resembled the restricted procedure breached the transparency requirements incumbent on contracting authorities.

The Secretary of State argued that BFS's claims, in any event, were time-barred, given that the action had not been brought within three months of the relevant cause of action, as required by reg.29.

3. Court's judgment

In relation to BFS's alleged right to negotiate arising from the terms of the tender advertisement, the judge considered that the negotiated procedure contemplated that:

"subject to maintaining transparency and the even-handed treatment of other bidders, and subject also to the terms of the particular tender invitation, the contracting authority is entitled, *but not bound*, to negotiate with the bidders, for example with a view to eliminating some of the bidders or, which is much the same thing, with a view to selecting a preferred bidder to whom the contract may ultimately be awarded".⁴

The judge ultimately could not see how the:

"adoption of the negotiated procedure confer[red] on the bidder any right to put forward reviewed or improved terms once his tender [had] been submitted"^{4a}

Whereas there may, in other circumstances, be scope for arguing otherwise, the facts surrounding its own situation did not give BFS a specific right to negotiate with DLO for the contract.

The Secretary of State reminded the Court that pursuant to reg.29(2) any claimant needed to show that the breaches had led to its failure to win the contract in question. His advisers further argued that BFS was so far behind the other tenderers, it would not have been successful in any event.

^{3a} *ibid* at [53].

^{3b} *ibid*.

⁴ *ibid* at [56], emphasis added.

^{4a} *ibid*, emphasis in original.

The judge dismissed this causation argument. Had the claimant managed to prove the alleged breaches of duty, it would have been an open question whether the outcome of the tender process could have been different.

Although each of the breaches alleged by BFS had occurred more than three months prior to it bringing its claim, the Court considered that there was a good reason for extending the statutory time-limit in relation to those breaches of which BFS was unaware until a debriefing meeting with the authority. In relation to the claim against one of the other alleged breaches, the switch from the negotiated to the restricted procedure, the judge could not agree that time should be extended on the basis that BFS was not immediately aware that that was arguably an infringement of the Regulations.

The Court acknowledged that in the absence of the requested interim measures, Purple would be in a position to conclude the contract with DLO. However, to carry out the contract works in line with the requisite timetable, Purple needed to start putting in place supply arrangements with third parties straight away. Failure to adhere to that schedule presented the risk that Purple would not be able to take up the contract at all. On the other hand, the Court noted, BFS could give a “cross undertaking” to Purple (requiring it to pay damages to Purple in the event it was ultimately unsuccessful at trial).

Equally from BFS’s perspective, matters would be unsatisfactory if interim measures were not granted. DLO would then conclude the contract with Purple (which could not be set aside once executed) and BFS would lose any prospect of winning the tender. Whereas BFS could be compensated in damages if it could prove its case at trial, the judge acknowledged that that would not be an adequate remedy. Furthermore, to deny the application would risk allowing the contract to be awarded to a tender which was not the most economically advantageous on offer. That would be contrary to the purpose of the Regulations. Moreover, the availability of financial compensation was not a reason per se to reject the application for interim measures.

As is required by the Regulations, the Court ultimately undertook “a balance of convenience” in deciding whether or not to grant the applications. The following factors determined how the balance was swayed:

- the Court found “exceedingly weak”^{4b} the claimant’s arguments that DLO had breached its duties in relation to transparency and respecting BFS’s right to negotiate with DLO;
- there was no reason why BFS could not have taken action more quickly in relation to DLO’s failure to negotiate;
- the Court feared that the interim measures could have the effect of interrupting supplies to HM Armed Forces in the period between the expiry of the existing contract and the resolution of the award of the new contract. The Court’s fears were not allayed by an offer from BFS to continue supplying HM Armed Forces during that period, as it did not consider it doubtful whether such a “stopgap” arrangement was permissible under the Procurement Rules. Certain “operational imperatives” required the signature of the new contract on or before October 1 and that would be impossible if conclusion were delayed until BFS’s trial had taken place;
- the interests of Purple, which was ultimately an innocent third party, would be harmed by delaying the conclusion of the agreement until after the trial. Imposing interim measures until that point was likely to prevent Purple from taking up the contract. Even if that eventuality

^{4b} *ibid* at [58].

One commentator has observed⁵ that the opposite conclusion may have been reached in this case had the new provisions on the negotiated procedure applied here. These are certainly more detailed in this area than their predecessors. In particular, the question of when the tenderer “needs” to negotiate is an interesting one. Perhaps one answer to that question is when it might have made a difference to the outcome of the award. As this case shows the courts may be reluctant to reach that conclusion. Thus the precise scope of the “right” of a bidder to negotiate under the negotiated procedure remains very much a live issue under the new Regulations.

⁵ Practical Law Company, “High Court rejects application for injunction in procurement case” June 28, 2006.