

## Interim Relief in the Standstill Period

**Rob Williams**  
**September 2006**

### ***Rapiscan Systems Limited v HM Revenue and Customs*** **2006 EWHC 2067 (QB)**

To give effect to the decision of the ECJ in *Alcatel*, (C-81/98), the Public Contracts Regulations 2006 provide for a mandatory "standstill" period between contract award and the conclusion of a contract with the successful tenderer. The 10 day standstill period, which is 10 days long,<sup>1</sup> gives the tenderer a window within which to apply to the court for an interim injunction to restrain the conclusion of the contract, at least in the short term. A tenderer can thus ensure that the contract is not wrongly awarded to another party, a course which might leave him with a remedy in damages but no opportunity to have the contract award set aside.<sup>2</sup>

What are the rights of a tenderer who does not wish to apply immediately to court, but wishes first to seek clarification of the reasons for the contract award? Is it practical for a tenderer to seek clarification of the award decision and, failing that, to obtain interim relief in the standstill period? What are the obligations of a contracting authority in receipt of a request for reasons as the standstill period ticks away? A recent decision of the High Court, *Rapiscan Systems Limited v HMRC*, is relevant to any consideration of these important practical questions.

*Rapiscan* concerned a competition for the supply of "relocatable scanners" used to scan large vehicles entering the country. The contract was advertised in the Official Journal in July 2005 and a contract award decision was made on 14 July 2006. *Rapiscan* was among the unsuccessful tenderers. Although the competition was subject to the Public Supply Contracts Regulations 1995, HMRC adopted certain aspects of the procedure under the 2006 Regulations, including a standstill period.

HMRC planned to award the contract on 26 July 2006 and to hold a debrief, to which *Rapiscan* was invited, on 1 August. However, this timetable meant that any information received by *Rapiscan* at the debrief could not help *Rapiscan* to have the award decision set aside, because by then a contract might have been concluded and *Rapiscan* could at best recover only damages.

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<sup>1</sup> See r. 32(3) of the Public Contracts Regulations 2006.

<sup>2</sup> Under UK law, damages are the only remedy a can award once a contract has been entered into: see r. 47(9) of the Public Contracts Regulations 2006.

Rapiscan therefore wrote to HMRC on 20 July requesting further information in relation to the award decision, and pending receipt of that information, sought an extension of the standstill period (and thus a deferral of the contract award). On 21 July, HMRC refused the extension, and provided its response to the request for further information. Mrs Justice Dobbs later described HMRC's letter as "confusing, confused and at times contradictory".

Having received HMRC's letter of 21 July, Rapiscan formed the view that in breach of the procurement regulations, HMRC had not assessed its bid on the basis previously indicated. Further, notwithstanding HMRC's letter of 21 July, it remained unclear to Rapiscan how its bid had been assessed in certain respects. Rapiscan therefore informed HMRC of its intention to seek an interim injunction to restrain the contract award, and made an application to the High Court.

The matter came on before Dobbs J within a matter of days. Although the application was made without notice (*ex parte*), HMRC was also able to make representations to the Court.

A judgment in Rapiscan's favour was handed down on 27 July 2006, just 7 days after Rapiscan had requested further information and just 6 days after receiving the response from HMRC. *Rapiscan* therefore illustrates what can be achieved by tenderers in the standstill period if action is taken promptly and effectively.

Dobbs J considered Rapiscan's application by reference to the familiar *Amercian Cyanamid* principles. Argument was focussed on whether there was a serious issue to be tried, there being no issue between the parties as to whether damages were an adequate remedy in the circumstances, and whether the balance of convenience favoured an injunction. Rapiscan argued that HMRC had not complied with its obligation to provide information at a time and in a manner which would be of practical value to it (i.e. before contract award). Rapiscan also claimed that it had a strong substantive case that its bid had not been assessed in accordance with the requisite criteria.

In response, HMRC said that it had no obligation to provide the information, because Rapiscan's request for information had no procedural basis in the regulations. In support of this argument, HMRC relied on the CFI decision in *Strabag* (T-183/00), discussed below. HMRC also argued that, even if Rapiscan was entitled to request further information, its case had been answered by the letter of 21 July. Finally, HMRC denied that it had not carried out the assessment of bids consistently with the regulations.

Dobbs J held that there was "just sufficient material" to establish a serious issue to be tried. Of the points made by Rapiscan, she found that there was some merit in two in particular. First, Rapiscan's concern that the assessment of bids had not been carried out as originally indicated. Secondly, Rapiscan's complaint that the "criteria marking mechanism" remained unclear. In particular, Dobbs J said that further information was needed to clarify the relationship between the criteria under two headings, commercial and technical, so as to allow meaningful assessment of the decision making process. Dobbs J did not accept that the position had been sufficiently clarified by HMRC's letter of 21 July; indeed, it is apparent that in certain respects that letter was the source of the confusion.

Dobbs J thus rejected a submission by HMRC that its request for information had no procedural basis in the regulations. The 1995 regulations in fact state that reasons for a contract award must be provided to a tenderer within 15 days of a request,<sup>3</sup> but it is apparent that this timetable is subsidiary to an overall need to ensure that transparency is achieved when it matters i.e. whilst the tenderer still has the opportunity to set aside the contract award decision.

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<sup>3</sup> The Public Supply Contracts Regulations 1995 r 23(1).

The judge also rejected HMRC's argument that the principle of transparency is simply parasitic on the key principles of non-discrimination and equal treatment - in other words, transparency is only required in so far as necessary to give effect to those aims. The judge rather accepted Rapiscan's submission that a broad approach should be taken to transparency, both as a matter of law and as a matter of common sense.

As indicated above, HMRC relied on the CFI decision in *Strabag*. In *Strabag*, an unsuccessful tenderer (Strabag itself) complained that the contracting authority (in that case, the EU Council of Ministers) had not provided adequate reasons for its decision. The CFI rejected that argument, because in fact, Strabag could immediately identify the specific reason for the rejection of its tender, namely that its price was too high. However, as Dobbs J pointed out, the same was not true in Rapiscan's case. *Strabag* was therefore distinguished as a decision on its different facts.

Having dealt with the legal submissions, Dobbs J also made two essentially practical points. First, although Rapiscan sought clarification of HMRC's position as a separate head of complaint, the need for clarification of HMRC's position actually pervaded the entire case. This was because, without clarification of HMRC's position, the court could not resolve the substantive claim for a declaration. Indeed, if clarification was provided, it was possible that Rapiscan's substantive complaints would fall away altogether. It is therefore apparent that a failure by a contracting authority to provide information as requested may well weaken its position in relation to other substantive allegations if an interim injunction is sought.

Secondly, Dobbs J indicated that she had been troubled by HMRC's refusal to extend the standstill period, particularly given that the contract was not urgent and given that Rapiscan had indicated that further information might avoid the need for proceedings. Dobbs J emphasised that parties should not frustrate the rights of others, deliberately or otherwise, even if they have complied strictly with the relevant rules. The judge concluded that HMRC should have extended the standstill period as requested by Rapiscan, indicating that if undertakings were not offered by HMRC, an injunction would be ordered.

*Rapiscan* contains lessons for both tenderers and contracting authorities. Tenderers who enter the standstill period unsure as to why they have been unsuccessful should write to the contracting authority as quickly as possible, clearly stating the information and clarification sought. Given the time pressures on the authority, the request should be carefully formulated. If matters are not properly clarified within the standstill period, the tenderer can then apply to court to restrain the conclusion of the contract. This approach is likely to strengthen the tenderer's hand if he has a good argument, and equally to avoid unnecessary proceedings if he does not.

Contracting authorities, on the other hand, should attempt to respond clearly and as comprehensively as possible to requests for reasons received within the standstill period. They should make best efforts to provide a meaningful response notwithstanding the time pressures, and ensure that the reasons for the decision are clearly set out. If matters remain unresolved, they should consider whether it is proportionate to extend the period by a matter of days, even if it appears to the authority that the complaint is unfounded. Overall, the authority should recognise that if the matter comes before the court, a lack of transparency in the process will surely militate in favour of the court granting interim relief.

*Michael Bowsher and Jennifer Skilbeck appeared for the Claimant, Rapiscan, in this case.*

**For more information on Rob Williams, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section on [www.monckton.com](http://www.monckton.com).**

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