Neutral Citation Number: [2012] EWHC 2093 (QB)

Case No: HQ12X02768

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/07/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

The Newcastle upon Tyne Hospital NHS Foundation Trust	**Claimant**
- and -	
(1) Newcastle Primary Care Trust **(2) North Tyneside Primary Care Trust** **(3) Northumberland Primary Care Trust** **(4) Stockton on Tees Teaching Primary Care Trust**	**Defendant**

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Peter Oldham QC (instructed by **Samuel Phillips**) for the **Claimant**
Rob Williams (instructed by **Hempsons**) for the **Defendants**

Hearing dates: 18, 19 July 2012

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Judgment

Mr Justice Tugendhat :

1. The Claimant in this action is a NHS Foundation Trust. The Defendants are all NHS Primary Care Trusts. The Fourth Defendant hosts a procurement service for the NHS in the north east of England. The Defendants are contracting authorities for the purposes of the Public Contracts Regulations 2006 ("the Regulations"), the EU Directive 2004/18 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts ("the Directive") and the applicable EU Treaty principles.

2. The Claimant has for some time been providing diabetic retinopathy screening services ("DRS") in parts of north east England, but it is not the only provider.

3. In October 2011 the Defendants invited tenders for contracts to provide DRS in the north of Tyne and Gateshead regions. The Claimant submitted tenders. By letters dated 3 February 2012 the Claimant was informed that its tender had been unsuccessful. The successful tenderer was Medical Imaging UK Limited ("MIUK").

THE REGULATIONS

4. Regulations 47A and 5(2)(a) provide that the Defendants as contracting authorities, owed the Claimant, as an economic operator, the following duties under regulation 4(3) in relation to the procurement exercise:

> "A contracting authority shall (in accordance with article 2 of the Public Sector Directive) – (a) treat economic operators equally and in a non-discriminatory way; and (b) act in a transparent way".

5. The Claimant alleges that the Defendants have acted in breach of their duties under regulation 4(3) and in breach of the similar duties under the Directive.

6. By regulation 47C a breach of the duty owed in accordance with regulation 47A is actionable by any economic operator which, in consequence, suffers or risks suffering loss or damage. There is no dispute that for the purposes of this litigation the Claimant is an economic operator. An economic operator is defined as a contractor, a supplier or a services provider: regulation 4(1). A "service provider" is defined in regulation 2 as a person who

> "offers on the market services and (a) who sought, who seeks, or who would have wished (i) to be the person to whom a public services contract is awarded; …"

7. There are strict time limits for starting proceedings set out in regulation 47D. The general rule under regulation 47D(2) is that proceedings must be started within 30 days beginning with the date when the economic operator first knew, or ought to have known, that grounds for starting the proceedings had arisen. The court may extend the time limit where the court considers there is good reason for doing so. But the court must not exercise that power so as to permit proceedings to be started more than three months after the date when the economic operator first knew or ought to have known that grounds for starting the dealings had arisen: regulation 47D(4), (5).

8. If an economic operator issues a claim form challenging the decision to award a contract subject to the Regulations, that has the effect that the contracting authority is required to refrain from entering into the contract: Regulation 47G. But by regulation 47H the court has the power to bring that suspensory effect to an end. That is what the Defendants are asking this court to do now.

9. It is common ground that the effect of Regulation 47H(2) is that the issue has to be determined by the court in accordance with the principles applicable to the grant of an interim injunction as laid down in *American Cyanamid v Ethicon Ltd* [1975] AC 396. There are thus three basic questions: (1) Does the Claimant's claim raise a serious question to be tried? If the answer to that question is Yes, then (2) Would damages be an adequate remedy for a party (whether the Claimant or one of the Defendants) injured by the court's grant of, or by its failure to grant, an injunction? (3) If not, where does the "balance of convenience" lie? In the context of litigation under the Regulation, it is common ground that in considering the last question the court is entitled to have regard to the interests not only of the immediate parties to the litigation, but also to the public interest, where the interests of the public are or may be affected one way or the other (*ALSTOM Transport v Eurostar International Ltd* [2010] EWHC 2747 (Ch) para [80].

10. On 9 March 2012 the Claimant issued its claim form. On 30 March 2012 it served its Particulars of Claim. On 27 April the Defendants served their Defence. On 11 June 2012 the Claimant served a Reply.

11. Both sides to this dispute raise issues of delay. The Defendants say that the claim has been brought outside the period permitted by the Regulations. The Claimant denies that, and argues that the Defendants delayed in the issue of the application notice issued on 1 June 2012, which is now before the court, and by which the Defendants ask the court to bring to an end the suspension automatically imposed by Regulation 47G(1).

THE PROCUREMENT PROCESS

12. The Defendants invited bidders to complete a template which the Claimant completed and dated 25 November 2011. The invitation to tender was dated 21 October 2011. It is a long detailed document. It states that the contract for NHS North of Tyne was to procure a single service provision for DRS for approximately 38,500 patients across Newcastle North Tyneside and Northumberland. It states that the number of people diagnosed with diabetes has been steadily increasing at a rate of about 5% per annum and it is expected that this trend is forecast to continue into the foreseeable future. It continues as follows:

> "As such the number of people eligible to be offered retinal screening is likely to continue rising for a number of years to come. The service is expected to actively work as part of the integrated pathway of diabetic care and help to reduce the risk of sight loss amongst people with diabetes aged 12 years and over. The current service is provided through a complex set of arrangements with multiple providers using various models of delivery which no longer meets national requirements. Following procurement the current diabetic retinal screening service will be fully decommissioned and replaced with an new fit-for-purpose service which is expected to commence on 1 October 2012".

13. The word "eligible" is important. The eligible population is not the same as the total population. The total population of people diagnosed with diabetes may include people who are not eligible for screening for one reason or another. An obvious reason would be if they were already blind.

14. Some of the boxes in the template had been pre-populated with information. The service to be provided under the proposed contract is stated to commence on 1 October 2012 and to run for three years until 30 September 2015. The invitation to tender sets out in a spreadsheet information on how bids will be scored. Each of nine sections is divided into a number of different questions. Section 9 is headed Finance. In that section there are three questions which are given a maximum weighting totalling 30% of the final score.

15. In the event the total score given to the Claimant was 62.38% and the total score given to MIUK was 85.2%, a difference of over 23%. In the section Finance the score given to the Claimant was 0% and that given to MIUK was 30%. But the

scores in this section are given according to which is the best bidder. Thus in relation to the activity level, the bidder with the highest activity will be awarded the maximum score of 10% and the lowest activity will be awarded the minimum 0%. The Claimant was awarded 0% in each of the three questions under the heading Finance. It is not easy to foresee what difference it would make if the Claimant were to be found at trial to be correct in the criticisms that it makes of the procurement process.

16. In the Financial Model template there are six relevant columns. The sixth column gives the grand total over the three year expected period of activity for the provision of the service to what is said in the first column to be the "Total North of Tyne diabetic population estimate" (underlining added). The four columns in the middle give the estimated activity in each of the four periods making up the three year total (the first and fourth are for periods of less than 12 months). One row of the template is pre-populated with the total estimated diabetic population increasing from year to year. There is below that a row in which the bidder is invited to insert the numbers the bidder will screen. There is then a row which expresses the bidder's figure as a percentage of the pre-populated figure. And finally there is a row which indicates the "distance from minimum activity (percentage less/percentage greater)". The figures entered by the Claimant for each period fall below the minimum activity required by the Defendant. The shortfall is between 9% and 4.4%.

17. In the invitation to tender the Defendants had specified that the minimum required activity was screening of 80% of the total North of Tyne diabetic population. The figures inserted by the Claimant were shown in the document to amount to between 72.7% and 76.5% of the figures inserted by the Defendants in the pre-populated row.

18. There is no dispute that the template was perfectly clear on this point: it referred to the "Total Population".

19. However, the Claimant considered that it was an error on the part of the Defendants. As pleaded in the Particulars of Claim, there is a standard specified by the National Diabetic Screening Programme. One of the documents provided by the Defendants to tenderers was the Service Specification prepared by Vivienne Braithwaite and dated 13 October 2011. In paragraph 8.1, under the heading "Performance Management Framework Indicators" it lists a number of indicators. Against each indicator there is listed a threshold, a method of measurement and the frequency of monitoring. One of the indicators listed is "Uptake of Screening". The specified threshold is "80% of eligible people with diabetes receive a conclusive screening test" (underlining added). The introductory words in that paragraph set out what is to happen where performance falls outside the standard.

20. In their Defence the Defendants admit that "a certain, albeit a small, proportion of persons falling within" the total population would not be eligible for the screening programme. But the Defendants deny that is relevant to the completion of the financial model template. They admit that the 80% key performance indicator ("KPI") in the service specification reflects the national standard which the Defendants are required to report against, but state that the financial template did not incorporate that. They designed their template to require bidders to state how many persons within the total population estimate they would screen in each year of the contract.

21. There are other points made in the Particulars of Claim. But having regard to the percentage of points awarded in scoring each question, it is the issue arising in the Finance section which is by far the most significant in this case. If the Claimant cannot succeed on that point, it does not at present appear that it could succeed solely on the others.

22. In spite of the admitted clarity of the template, the Claimant points to a number of documents in which it alleges there appears to be confusion on the part of the Defendants between the total population and the eligible population. The Claimant alleges that this confusion even occurs in one sub-paragraph of the Defence. That led to a late exchange of evidence including a statement from Vivienne Braithwaite by which the Defendants asserted that there was no confusion on their part, save an admitted confusion which had occurred in the writing of a letter dated 17 February 2012.

23. The Claimant submits that this alleged confusion on the part of the Defendants arguably amounts to a breach of duty under Regulation 4(3). Reference is made to *SIAC Construction v Mayo County Council* [2001] 3 CMLR 59 para 42 where the Court of Justice of the European Communities said:

> "…the award criteria must be formulated in the contract documents or the contract notice in such a way as to allow all reasonably informed and normally diligent tenderers to interpret them in the same way".

24. The Defendants have also adduced a witness statement from Mr Hildred of MIUK. That evidence is primarily directed to the balance of convenience. But in the last paragraph he states that MIUK considered that the Financial Model Template was clear in requiring the bidder to offer a minimum level of activity under which 80% of the total diabetic population would be screened on the basis of the total population estimates given in the template.

25. The evidence for the Claimant on this issue is in the form of witness statements from Professor Taylor. He is Professor of Medicine and Metabolism and Director of Magnetic Resonance Centre, Campus for Ageing and Health, University of Newcastle. It is clear that he has very great experience in the development of processes for DRS, and in delivery of DRS, amongst other things. He states that it was as early as mid November 2011 that his attention was drawn to what appeared to be an error in the financial model template for the Defendants' tender document. He states that in a total population of people with diabetes the number excluded for purposes of screening is most commonly 5-15%. He thinks that it would be impossible to screen 80% of a total population.

26. Referring to the NHS UK Atlas of Variation, where statistics on the point are given, he notes that only a very small number of services appear to deliver at better than 80% of a total population, and he expresses the view that these are outlying entries which are probably due to data entry or other statistical anomalies. The pre-populated box for the first full year of the contract contained the figure 44,829 (a figure calculated after allowing for the annual increase of 5% already referred to). From his own knowledge of the area, he states that he knew that that corresponded to the total number of diabetics within the North of Tyne region. From this he calculated that the

eligible population would be 38,720. In his opinion the total population, the figure given in the template, bore no relevance to the universally used standard, and he therefore suspected a mistake. He suspected that the figure that the template should have contained was the figure for the eligible population.

27. Accordingly, on 18 November 2011 the Claimant addressed a question to the Defendants:

> "we have a concern that the 80% figure relates to the whole diabetic population and the actual performance figure is based on those eligible for screening. We are therefore not sure whether this is an oversight or whether this is how you wanted that tab to be recorded".

28. The answer was less than clear, but the Claimant put in their tender nevertheless, still assuming that the figure in the pre-populated box for the first complete year had been intended to be 38,750 (with the other three boxes adjusted correspondingly).

29. There is more to the evidence than what I have summarised above. But Mr Williams makes two main submissions in relation to what Professor Taylor recounts. First he submits that this evidence does not disclose an arguable breach of the duty that arises under the Regulation. Second, he submits that even if it does, then it is plain that the Claimant knew the relevant matters in mid or late November 2011, and so that the 30 day time limit for commencing proceedings, and the maximum extension of time which a court is empowered to grant (three months after the date when the economic operator first knew or ought to have known that grounds for starting the proceedings had arisen), had both expired before the issue of the claim form on 9 March 2012.

30. Mr Oldham submits that time did not begin to run until the letter of 17 February 2012 from the Defendants in which it is admitted that the writer confused the eligible population with the total population.

31. In my judgment Mr Williams had very much the better of this argument on both of these points. However, the threshold in the first of the three questions to be asked according to *Cyanamid* is a low one, and I prefer not to decide the case on the basis that there is no seriously triable issue. I indicated in argument that it was likely that I would decide the case on the second and third questions. That is what I propose to do.

DELAY BY THE DEFENDANTS

32. The explanation given by the Defendants for their decision to issue this Application Notice on 1 June, and not before, is as follows. The DRS services currently commissioned are provided partly by the Claimant (for over 14,000 patients) and partly by Northumbria Healthcare NHS Foundation Trust ("NHCFT") (for over 22,000 patients). This fragmented arrangement is itself a cause for concerns about inequalities and accessibility in the service. The existing contracts expire on 30 September 2012.

33. On 17 May NHCFT indicated by e-mail, and on 22 May confirmed by letter, that it is unable to provide an extension to its contract beyond 1 October. While the Claimant has offered to provide the service hitherto provided by NHFCT, as well as the service

it is currently providing, the Defendants do not consider that suitable arrangements are, or can be put, in place. This is a factor to be considered under the balance of convenience.

34. Mr Oldham submits that the Defendants should have foreseen this earlier, assuming in their favour that it is a real problem.

35. In so far as the Claimant criticises the Defendants for delay in making this application, I see no basis for the criticism. The communications from NHCFT speak for themselves, and on an application such as the present one there is no basis for me to doubt that that is what has led to the making of the application at this time. I do not accept that the Defendants are to be criticised for not making the application earlier.

THE ADEQUACY OF DAMAGES AS A REMEDY

36. The evidence for the Claimant contains little on the question whether damages would be an adequate remedy for it. The primary concern of the Claimant's witnesses appears to be for the delivery of the service to the population in need of it. Professor Taylor believes that the award of the contract to MIUK will lead to a loss of clinical performance. This is a legitimate concern for a person in his position, and Professor Taylor's views must be given great weight. Nothing in this judgment should be taken as a criticism by me of the views he has expressed. Although the public interest is a relevant consideration in deciding where the balance of justice lies, it is not for me to decide on this application whether or not the Defendants would have been better advised to act in the manner which Professor Taylor thinks most advantageous for the public.

37. The fact remains, that little is said for the Claimant to explain whether, and if so why, damages would not be an adequate remedy to it in its capacity as the economic operator, which is the capacity in which it sues. I accept that if the Claimant is not awarded this contract, it will not only suffer direct loss, but it may also suffer an indirect effect in its ability to win or perform other contracts, and in the maintenance of its existing structures.

38. Mr Oldham submits, and I accept, that there is a public interest in the Regulations being observed. It is regrettable if a claimant may have a good ground for challenging the award of a contract, but that ground cannot in practice be pursued so as to lead to compliance with the Regulations. Damages are not a substitute for the procurement process being implemented according to the Regulations.

39. But in my judgment Mr Williams is correct in his submission that the Claimant has not made out a case that damages would not be an adequate remedy for the loss that I accept it is likely to suffer as a result of any wrongdoing it may prove.

40. For the Defendants it is submitted that the procurement process was instituted to address concerns that had been raised independently about the existing service. They rely on prejudice to the exercise of their functions, and their view as to what is in the best interests of the population of patients which the DRS is to serve. The Claimant has offered to provide the service hitherto provided by NHCFT. But even if that offer were acceptable (and the Defendants do not accept that it is), it is a short term interim solution. It would involve staff being transferred from NHCFT to the Claimant and

then, again, from the Claimant to MIUK or to another service provider if this litigation does not ultimately lead to the award of the contract to the Claimant.

41. In my judgment damages would not be an adequate remedy for the Defendants.

BALANCE OF JUSTICE

42. The Defendants submit that the continuation of the suspension would have an effect not only upon prospective patients, but also upon those who are providing and will provide the service. For example, optometrists' contracts require a 3 month period of notice, and notice was due to be served on 30 June. A number of concerns about current arrangements were raised by the External Quality Assessment Process operated by NHS Diabetic Eye Screening Programme.

43. The Claimant's proposal that it should provide an interim service would in effect put the Defendants in the position of awarding to the unsuccessful bidder the contract which it had chosen to award to MIUK. This is not just either to the Defendants or to MIUK. I cannot decide on this application where the best interests of the diabetic population lie. The Defendants do not have a choice whether to provide the service or not. So it would not be just for the court to put the Defendants in the position where they had in practice no choice but to enter into a short term contract with the Claimant when they assert that they do not consider that that would be the proper course.

44. The Claimant submits that what the Defendants should have done is to obtain an early date for a trial, when the matter can be resolved on the merits, and not on the *Cyanamid* principles.

45. There are cases in which issues under the Regulations might be capable of resolution at a speedy trial. In the present case I am not convinced that that is so, having regard to the way that the Claimant advances its case. Disclosure of documents is required, but has not yet taken place. The parties have not delayed unduly in the exchange of statements of case, but the long vacation is nearly upon us. The issues raised require the court to investigate statistics with the assistance of experts in the field on both sides. It would be a serious matter for the court to conclude that the Defendants' witnesses have misunderstood the statistics as Professor Taylor alleges that they have. These are matters which can require prolonged consideration if the court is properly to understand them.

46. The case advanced by the Claimant seems to me to involve novel issues of law. It is not unreasonable for Mr Williams to submit, as he does, that there could be delays in the form of possible amendments of case or even appeals.

47. The prospect of the merits of the dispute being resolved before the end of the year is not good. A delay of a year or more in the commencement of a contract which was due to commence on 1 October 2012, and to run for three years, is a very significant delay.

48. In my judgment, for the reasons advanced for the Defendants by Mr Williams, in the circumstances as they now are, the balance of justice falls in favour of lifting the suspension.

CONCLUSION

49. For these reasons this application succeeds and the suspension will be lifted.