Lifting the automatic suspension in procurement claims (Alstom v Network Rail)

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Public Law analysis: The court provided a closely reasoned judgment granting Network Rail's application to lift the automatic suspension which arose on issue of a procurement challenge by Alstom pursuant to Regulation 110 of the Utilities Contracts Regulations 2016 (SI 2016/274). The court's approach and the principles that it employed are likely to be equally applicable to an application to lift the automatic suspension under the Public Contracts Regulations 2015 (SI 2015/102). As the court found that damages would be an adequate remedy for Alstom but not an adequate remedy for Network Rail, Network Rail's application was granted. Written by Jonathan Lewis, barrister, at Henderson Chambers.

Alstom Transport UK Ltd v Network Rail Infrastructure Ltd [2019] EWHC 3585 (TCC) (20 December 2019)

What are the practical implications of this case?

In terms of the *American Cyanamid* test, Network Rail having conceded that there was serious issue to be tried, both it and Alstom advanced a number of reasons why damages would not be an adequate remedy for them. However, the court was reluctant to accept that the potential losses identified could not adequately be quantified and compensated by way of damages. It was the potential losses in terms of detriment to the public (such as the fact that delays in replacing ageing equipment could pose safety concerns) that appears to have been determinative. It is clear from this case, as has been established in others, that where the delay in awarding a contract, whether it be for public services or utilities, increases safety risks to the public or undermines the level of services that a contracting authority will be able to provide to the public, it might prove difficult to persuade the court to maintain the automatic suspension.

What was the background?

Network Rail, which owns, operates and is responsible for the maintenance and development of Britain's railway infrastructure, sought to procure a train control partner for delivery of a digital train control system on the East Coast Main Line. The contract would comprise a single supplier framework agreement using two main types of call-off contracts. The control system was expected to reduce delays, enable quicker recovery from adverse incidents and reduce the risk of train collision or derailment. Siemens won the bid by a narrow margin.

Alstom issued proceedings alleging that Network Rail breached its obligations of equal treatment, transparency, good administration, proportionality and had made manifest errors. It sought an order setting aside the contract award decision, a declaration that the contract should have been awarded to it and claimed damages for lost profits and wasted tender costs. Network Rail applied to lift the automatic suspension which arose on issue of a procurement challenge by Alstom. The application was supported by Siemens, the interested party.

What did the court decide?

O'Farrell J noted that the law governing such applications is well settled (citing *Covanta Energy Ltd v Merseyside Waste Disposal Authority* [2013] EWHC 2922, [2013] All ER (D) 46 (Oct)—*OpenView Security Solutions Limited v Merton LBC* [2015] EWHC 2694, [2015] All ER (D) 01 (Oct)—*Alstom v London Underground* [2017] EWHC 1521, [2017] All ER (D) 05 (Jul) and *Lancashire Care NHS Foundation Trust v Lancashire County Council* [2018] EWHC 200), [2018] All ER (D) 82 (Feb). She did not appear to consider that it mattered under which procurement regulations the automatic suspension had been imposed.

As Network Rail conceded that there was a serious issue to be tried, O'Farrell J turned to the question of whether damages would be an adequate remedy for each party. Alstom argued that given that Network Rail had maintained in its defence that the alleged breaches would not be sufficiently serious to warrant the award of damages (as required by *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2017] 1 WLR 1373), [2017] 4 All ER 1, [2017] All ER (D) 53 (Apr), it risked not recovering any damages even if it established its case. In response to this point, Network Rail changed its position, conceding that the breaches were sufficiently serious to warrant damages and the point fell away.

Alstom then advanced a number of other reasons why damages would not be an adequate remedy (at para [40]). It suggested that:

- the winning bidder would enjoy a substantial involvement in Network Rail's long term strategy
- it was a prestigious and lucrative contract offering a unique opportunity
- the successful bidder would have an advantage in future tender competitions by reason of its experience on the project
- loss of the procurement would have a negative impact on Alstom's resources and employees

O'Farrell J was not prepared to accept any of these reasons, finding that they were either not made out on the evidence or that the losses could be quantified, and damages awarded in compensation. She therefore found that damages would be an adequate remedy for Alstom.

By contrast, she found that damages would not be an adequate remedy for Network Rail. This was primarily because '…the delayed improvements to safety, and the wider impact on businesses and the travelling public caused by delays and disruption to rail services, are matters that could not be quantified properly or fairly compensated for by way of damages' (at para [48]).

Although obiter, O'Farrell J went on to consider where the balance of convenience lay. She noted that in doing so, the court would consider all of the circumstances, which included:

- how long the suspension might have to be kept in force if an expedited trial could be ordered (noting that the court had to take into account the time required for judgment to be given and the time taken for any likely appeal (at para [53]))
- what the public interest required (noting that the signalling equipment was reaching the end of its design life (at para [55])—that if the contract was not awarded Network Rail would have to carry out conventional signalling asset replacement works (at para [56])—and that if Network Rail could not proceed with the contract, the business case for funding the project will be adversely affected (at [56]))
- the interests of the interested party

In essence, she found that Alstom had not been able to address the urgent need to replace the degraded signalling assets which could not wait until after trial (at para [67]).

Alstom complained that there was delay on the part of Network Rail in issuing its application to lift the automatic suspension. However, O'Farrell J took the realistic view that in 'large, complex cases such as this case, greater speed is not always possible' (at para [68]). In any event, she found that the timing of the application in this case was not a material factor in deciding where the balance of convenience lay. She rejected two arguments made by Alstom as to the public interest. First, Alstom relied on the detriment to the public interest if Network Rail had to pay twice (under the contract itself to Siemens and by way of lost profit to Alstom if it lost the claim) (at para [69]). She held that it is a matter for the parties to assess the risks of the litigation. Second, Alstom relied on the public interest in Network Rail complying with its legal obligations in respect of a public procurement. However, that was to be balanced against the public interest in Network Rail's entitlement to proceed with the successful tenderer following a lawful and fair procurement exercise. As she could not at that stage judge which would prevail, the point was a neutral one (at para [70]).

Case details

- Court: High Court, Property and Business Courts
- Judge: Mrs Justice O'Farrell DBE
- Date of judgment: 20 December 2019

Jonathan Lewis is a barrister at Henderson Chambers, and a member of LexisPSL's Case Analysis Expert Panel. Suitable candidates are welcome to apply to become members of the panel. Please contact caseanalysis@lexisnexis.co.uk.

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