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Dispatch

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Dispatch highlights a selection of the important legal developments during the last month.

EU Procurement - potential remedies

■ **McLaughlin & Harvey Ltd v Department of Finance and Personnel.**

[2008] NIQB 122

Following a liability hearing the Judge held that the tender process in respect of a proposed Framework Agreement was flawed. However, despite the judgment, the parties were unable to agree on a remedy for M&H so the matter came back before Deeny J again. He made it clear that the matters complained of entitled M&H to some substantive remedy. In fact even a modest improvement in the marking of M&H's tender could have materially affected the outcome of the procurement process. The key issue was the extent of the court's powers to grant remedies. M&H's first preference was for the court to order the Department to add it to the list of preferred economic operators under the Framework. Alternatively M&H asked that the court set aside the contract award leaving the Department either to rerun the competition or dispense with the Framework altogether. The third alternative, preferred by the Department was to award M&H damages.

One problem with M&H's preferred remedy was that the European Regulations provide that a court does not have power to order any remedy other than an award of damages in respect of a breach of the duty if the contract in relation to which the breach occurred has been entered into. The Department said that this prevented the court from granting any remedy other than an award of damages. However the Judge rejected this argument. In his view, the wording of the Regulations specifically referred to a breach in relation to "the contract" which had been entered into. By that was meant a contract as defined in the Regulations. Whilst this would extend to a specific contract under a Framework, it did not include the Framework Agreement itself.

It was possible that by the time a matter was before the court, a contractor may well be engaged in the works under the contract. It would therefore be unfair on that party to interfere in that contract which has been made. For the court to set aside a contract which may be partly or wholly performed would be contrary to principle. Therefore damages would be an appropriate remedy. However, the position was different with regard to a Framework. Indeed, here the Department had not made any promises to the operators under the Framework, and it had not yet, in fact, awarded any specific contracts.

The court considered but dismissed the suggestion that the Department would be at risk of significant litigation from the five successful operators if the tender had to be re-run. Whilst they may not succeed the second time, the fact was that the first procedure was conducted unlawfully. Therefore they had not lost anything to which they were lawfully entitled. If in fact they were the best economic operators under the Framework, it is likely that they would succeed on a re-run of the procedure. The position was less clear-cut with regard to adding M&H under the Framework. In that event the work available to the other five economic operators would be diluted to the extent of having an additional competitor. Thus the likelihood of the successful tenderers being able to take action against the Department was not "beyond the bounds of possibility".

Deeny J said that the aim of the court was to achieve fairness and transparency according to law. The setting aside of the decision would probably lead to a rerun of the Framework competition. It would be rerun in the more transparent way indicated by the court. It would also be in the public interest to secure the most economically advantageous tenderers. If M&H was right it may well improve its performance but if it did not improve, the fairer new procedure should in any event lead to the five best tenderers succeeding.

The Department submitted that that the proper remedy here was one of damages. The Judge accepted that the appropriate way to proceed on any assessment of those damages would be on the basis of the loss of chance principles. However, reliably fixing the value of that percentage loss of chance would take time, face difficulties and be costly. Would the profits of the operators under the Framework be publicly available? Indeed as some of the contracts were likely to be of a very substantial nature it may take years for before one would know what profit, if any, the operator made out of a particular contract.

There was no legal precedent for the proposal that the Judge here should simply add M & H to the list of contractors. However, ultimately the court here felt that to insert M&H into the Framework, whilst it could be done, it could only be done by a "somewhat strained" interpretation of the legislation. On the other hand the Judge was entirely satisfied that the court had the power to set aside the decision to enter into a Framework Agreement with five parties but excluding M&H.

The Judge was faced with a difficult decision. However, ultimately, on balance, he decided that whilst the Department was entitled to maintain that damages could be an adequate remedy, in his view they were an inferior remedy here to that of setting aside the Framework Agreement. Deeny J concluded:

"I say that not only for the reasons set out above but for public policy reasons. At the present time there is a question mark over whether the best five economic operators were selected under this Framework Agreement. Given that some £800m of works are said by the Department to be at stake here it must be in the public interest to try and ensure that the best five, whether or not that includes the plaintiff, are in fact selected. Secondly it cannot be in the public interest for the public to pay for these new buildings and to pay the plaintiff again a percentage of the profits of the contractor who actually builds the new buildings. That is in the most literal sense of the word a waste of money. It may be that in some circumstances there is no alternative to such an award being made, but where, as here, there is a much better alternative I consider it preferable to opt for it."

Summary judgment - the applicable tests

- **Jacobs UK Ltd v Skidmore Owings & Merrill LLP**

[2008] EWHC 2847

SOM sublet the performance of certain architectural and engineering services to Jacobs in relation to part of the Qatar Petroleum complex project. Works were carried out between April 2006 and February 2008, but no contract was agreed. Jacobs sought payment of some £4.7m in unpaid fees. There were seven invoices, and Jacobs sought summary judgment in respect of three of them. SOM said that no further sums were due and raised claims of set off and counterclaim in excess of £2.5m. The court may order summary judgment if it considers that a party has no real prospects of succeeding or successfully defending the claim at issue. Equally, Mr Justice Coulson noted that when a court hears a summary judgment application, it can make a conditional order, requiring a party to pay a sum of money into court. Such an order is appropriate if the court considers that it is possible that the defence may succeed, but that on the evidence before the ccurt, it is improbable that it will do so.

For example, here, in relation to one of the invoices, there was contemporary evidence in relation to the percentage progress made by Jacobs on a number of tasks. This evidence showed that giving credit for the first two invoices, no sum could be due in respect of the third invoice. The percentage completion figures came from the ultimate employer. The Judge noted that it may be that when the claims went to a full trial, Jacobs would be able to demonstrate that these percentage completion figures were wrong. However, for the purposes of a summary judgment application, his only concern is to see whether or not there was a real prospect of a party defending a particular head of claim. Here, the origin of the figures strongly suggested that SOM's position was correct. That said, the Judge did consider that Jacobs was entitled to summary judgment in respect of two of the invoices. Having so decided, he then went on to consider whether SOM had a real prospect of successfully defending these claims by way of set-off and counterclaim.

Mr Justice Coulson said that the counterclaim needed to be treated with some scepticism. For example, at the time that Jacobs' contract was terminated, there was no suggestion by SOM that Jacobs was in breach of contract or had failed to perform in accordance with its terms. No specific allegations of defective or poor performance had been made. The termination was not for reasons of default. The majority of the criticisms now being made had only been made for the first time in the statements produced in answer to the application for summary judgment. There was also an absence of any independent or third party evidence in support of the allegations of breach. As the allegations made were ones of professional negligence one would expect some sort of expert evidence to back them up. In addition, SOM had employed other consultants to complete the work performed by Jacobs, but there was no evidence from them which supported any of the criticisms now being made by SOM. That said, the Judge then considered the elements of the counterclaim "armed with the necessary scepticism".

In respect of one of the nine items, the Judge concluded that SOM demonstrated they had a real prospect of success of establishing one. This served to reduce the amount Jacobs could recover. In relation to three items, the chance of success could not be said to be "higher than merely possible". Accordingly, whilst these served to reduce the amount awarded to Jacobs, SOM were ordered to pay a sum of money in respect of those claims into court. For the other claims, SOM had not demonstrated the real prospects of success and they were ignored for the purposes of the application. There was also a claim in relation to the "costs of completing and validating [Jacob's] scheme design". This too was ignored. No specific allegations of breach had been made and the claim was entirely global. If the costs were in reality the costs of rectifying the breaches of contract, then this needed to be identified. The complete absence of evidence meant that for the purposes of the application, the claim had no prospect of success.

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