Fenwick Elliott
The construction law specialists

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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Public procurement - automatic suspension

Exel Europe Ltd v University Hospitals Coventry and Warwickshire NHS Trust
[2010] EWHC 3332 (TCC)

Following hard on the heels of our report on the Indigo case last month, this is the second case to consider an application to lift an automatic suspension of the procurement process. Here, Mr Justice Akenhead affirmed the approach outlined in the Indigo case and considered how the courts should go about dealing with public procurements which have been automatically suspended under the Regulations.

In about 2009, the NHS Trust decided to transfer their responsibility for managing and operating the Healthcare Purchasing Consortium ("HPC") by establishing a framework agreement with a single operator. In February 2010, it was resolved that a competitive public procurement process should be undertaken and the framework agreement should be established by no later than 30 September 2010. This date was significant as the agreements with all the current HPC subscribers expired on 31 March 2010. The Contract Notice was published on 11 March 2010. On 19 April 2010, five tenderers pre-qualified, including Exel and HCA International Ltd. From an early stage, Exel believed that the information provided in the Invitation to Tender ("ITT") was insufficient for the restricted procedure which had been identified in the Contract Notice. As a result, Exel eventually withdrew from the process on 28 May 2010. The only tenderer to submit a bid was HCA International. In due course the NHS Trust chose HCA International as its preferred bidder and notified Exel Europe on 15 July 2010. Exel complained about the NHS Trust's lack of communication and lack of a response to its repeated requests for information. It ultimately issued its claim in the TCC on 28 September 2010, alleging six breaches of duty. This automatically suspended the procurement process. On 29 October 2010, the Defendant applied to have the suspension lifted.

Mr Justice Akenhead found that the Regulations do not favour maintaining the prohibition on the contracting authority against entering into the contract in question. Accordingly, the Judge reiterated that the principles in American Cyanamid require that the first question to be answered is whether or not there is a serious question to be tried and the second question involves considering whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought. The governing principle in relation to the balance of convenience test is whether or not the claimant would be adequately compensated by an award of damages. He went on to state:

"In reality, however, whether one adopts a strict Cyanamid approach or not probably matters little in many procurement cases. If the claim made by the tenderer was so weak as not to amount to a serious claim, it would be inevitable in most cases that the balance of convenience and discretion of the Court would militate against granting or maintaining the relief… the public interest can be taken into account on a consideration of the balance of convenience… However, that aspect of the public interest does not have, necessarily, an overriding impact."

Exel had complained about the NHS Trust's discussions/ negotiations with HCA International five months immediately prior to the open public procurement process saying this distorted competition or breached the principles of equal treatment and transparency. Mr Justice Akenhead found that this was the only serious issued to be tried and that the remaining five issues were at best weak. With respect to the balance of convenience test, the Judge found that this was an appropriate case which required that public interest to be taken into account. He held that an important area of public interest is the efficient and economic running of the NHS and the procurement of medical goods, drugs, equipment and services. Here, there was an urgency for the procurement of this contract, as the existing agreements for the provision of the services had expired in March 2010. If the suspension was not lifted, a judgment would not likely be procured before May or June 2011, thereby further jeopardising the services currently provided by the HPC. Finally, the Judge was wholly satisfied that damages would be an adequate remedy.

Those wishing to bring a claim against a contracting authority must be mindful of two further factors Mr Justice Akenhead considered when determining whether or not the issues raised by Exel were "serious issues to be tried". First the Judge pointed out that several of Exel's claims may be time barred. As it had dropped out of the tender process on 28 May 2010, some four months had elapsed before it commenced proceedings. Accordingly, any cause of action for matters about which Exel had knowledge of or ought to have known about prior to 28 June 2010 might well be time barred. Secondly, Mr Justice Akenhead noted that: *"If an economic operator drops out of the tendering process for good or bad reason, it is difficult to see that it suffers or risks suffering loss or damage as a result of any breach of duty occurring after it dropped out."* He found that it was difficult to see that Exel Europe was a "service provider" in accordance with the definition under the Regulations, after it had dropped out. As it did not wish to be considered for the award of the contract, whether or not it is allowed to claim for a breach of duty after it dropped out is arguable. Accordingly, a tenderer who withdraws from a public procurement process should carefully analyse its claims prior to commencing any proceedings.

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Adjudication - same dispute

Redwing Construction Ltd v Wishart

[2010] EWHC 3366 (TCC)

Amongst the questions here was whether the dispute decided in a second adjudication had been effectively decided in an earlier adjudication. In the first adjudication Redwing sought an extension of time and payment for loss and/or expense. During that adjudication, the adjudicator sent a note to the parties in relation to the contract conditions concerning the fixed Contract Fee. He noted that on his reading of the contract any difference between the estimated prime cost and the actual prime cost would generate a pro rata adjustment to the Contract Fee. He asked if that was right? Wishart's solicitor's replied that Redwing had not advanced an argument that they were entitled to an adjustment of the Contract Fee. Thus this question did not fall within the adjudicator's jurisdiction. There was no response by Redwing.

In the first decision, the first adjudicator awarded Redwing some time and money, although not everything sought but also addressed the question as to how the Contract Fee should be calculated. In response, Redwing noted that the decision precluded any adjustment of the Contract Fee and said that this was not a matter that had been referred. The matter referred was for the payment of the Contract Fee for the period of the extension of time and not for the adjustment of the Contract Fee. The first adjudicator disagreed noting amongst other things that in construing a term of the contract he had to do so in the context of the contract as a whole and that he was entitled to take the initiative to determine the facts and the law relevant to the dispute.

A second dispute then arose over the assessment of the final account. Following the referral, Wishart's solicitor's raised a number of jurisdictional objections including that, in so far as Redwing claimed for an adjusted Contract Fee, it had already been decided in the First Adjudication.

Mr. Justice Akenhead noted that basic approach of the courts in these circumstances was that the dispute as decided in the first adjudication is binding upon the parties unless and until it is overturned by the tribunal of final resort. There was however one possible variance, where it is clear that the dispute in the earlier adjudication is materially different from the second dispute but the reasoning of the adjudicator effectively establishes a proposition which directly relates to the second adjudication. Accordingly, the Judge said what steps should be taken:

(i) Determine what the dispute referred in the first or earlier arbitration was. That dispute may be wide or narrow.
(ii) Determine whether and to what extent the parties gave the adjudicator in that adjudication jurisdiction to address matters not obviously within the ambit of the referred dispute. This could cover a defence not raised before the referral but legitimately raised as a defence to the referral. The adjudicator will need to rule on that.
(iii) Examine what the adjudicator has decided, first in relation to the referred dispute and any arguable defence put up and secondly if he has purported to decide something which has not been referred or which has not become within his jurisdiction.
(iv) Any decision which can be described as deciding the dispute, as referred or as expanded effectively within the adjudication process, is binding and cannot be raised or adjudicated upon again in any later adjudication.
(v) In contrast, any decision or part of a decision which can be described as not deciding the dispute, as referred or as expanded effectively within the adjudication process, is not binding and can be raised or adjudicated upon again in any later adjudication.

Therefore, where an adjudicator who, in court terms, offers an "obiter" opinion on a point which is not part of the dispute for which he does have jurisdiction, that opinion is not jurisdictionally part of his decision.

Here, it was accepted that the dispute which had arisen in the first adjudication involved only two elements, the first being the extension of time claim and the second being any consequential entitlement to the Contract Fee at the rate of £3,500 a week. There was no hint that there was any crystallised dispute before the notice of adjudication relating to any possible adjustment to that rate. As the crystallised dispute did not as such encompass any claim for an adjustment of the Contract Fee weekly "rate", the claim for "such other sum as the adjudicator shall determine" could not relate to any claim for an adjustment of that rate.

The Judge therefore needed to consider what happened in the First Adjudication. There was nothing in the written submissions, the arguments or in correspondence that showed that the parties gave the first adjudicator jurisdiction over the issue. Indeed, even when the first adjudicator raised the possibility of addressing the issue, the only party who responded made it clear that he at least believed that the first adjudicator did not have jurisdiction; that was not challenged by Redwing.

The Judge then asked whether or not what the adjudicator said was in some material way a critical part of his decision and the reasoning for it. On analysis, it was clear that the comments about the adjustment to the Contract Fee rate was a wholly unnecessary part of the decision in that it was not reasoning which underpinned or supported his finding about the weekly rate or the period to which it related. It therefore followed that the second adjudicator did have jurisdiction to rule upon the issue as to whether Redwing was entitled to an adjustment of the Contract Fee rate and that accordingly the second decision was enforceable.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.
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