Browne Jacobson

Braceurself Ltd v NHS England 2024: Court of Appeal procurement case decision

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A claim was issued in in 2022 by Braceurself Limited (Braceurself), the unsuccessful bidder in a procurement for the provision of orthodontic services run by NHS England (NHSE), in relation to Lot PR002368 (Lot).

There were only two bidders who submitted bids for this Lot with the resulting contract to run for seven years with an estimated value of £32.7m. The outcome of the procurement was very close with Braceurself scoring 80.25% and the successful bidder (PAL) scoring 82.5%.

Braceurself brought the claim on the basis that NHSE were in breach of the Public Contracts Regulations 2015 (PCR) for three reasons:

(a) the treatment Braceurself received was not transparent,

(b) Braceurself did not receive equal treatment to that of PAL and

(c) there were manifest errors in NHSE's evaluation of the bids.

The court concluded there was no breach of transparency, both bidders were treated equally; and all claims of manifest error failed with the exception of the claim around scoring in relation to accessibility of premises for the services. On the latter point, the Judge held that due to confusion over content within Braceurself's bid, Braceurself had been awarded a score of 3 (good) rather than a score of 4 (excellent) and this could be considered material to the outcome as Braceurself would have scored 0.25% higher than PAL overall were it not for this.

Braceurself queried "if there was or there might have been a material difference to the scoring of the bids, were the breaches sufficiently serious to justify an award of Francovich damages?" The Court concluded that no remedy of damages should be awarded as this was not sufficiently serious, the breach was inadvertent and had occurred in good faith. The high threshold of the test to determine whether damages should be awarded (considering the approach taken from previous case law including R v Secretary of State for Transport ex p. Factortame [2000] (Factortame) and the list of factors determined in Factortame to assess whether a breach of EU law was sufficiently serious) was not met. The Judge did however grant permission for "the court of appeal to clarify the application of the Francovich principle in the context of procurement cases, and particularly, the extent to which a failure to award a contract to the most economically advantageous tender is, in and of itself, sufficient to render the breach sufficiently serious".

On the 30 January 2024, the Court of Appeal set out their judgement in relation to the appeal of the Braceurself Limited v NHS England case. In the Court of Appeal, Braceurself claimed that:

1. If a breach of procurement law resulted in the wrong bidder being selected, i.e., the effect of the breach meant the contract was awarded to the wrong bidder, should that automatically be determined a 'sufficiently serious' breach?
2. In the absence of bad faith, were excusability of error and the contracting authority's state of mind relevant?
3. That Braceurself had been denied an effective remedy - where a bidder had been deprived of a contract which it ought to have won, then one of two results should be provided; either the automatic suspension should not be lifted or damages should be awarded. A bidder should not be left without a remedy at all.

The Court of Appeal considered each claim in turn:

Did the effect of the breach meet the sufficiently serious test?

The Court determined that when considering if the breach met the sufficiently serious test, what mattered was the breach itself, not the effect that the breach had. The Judge stated that:

> *"any approach ... which favours the consequence or effect of the breach, as opposed to the nature and qualify of that breach, is wrong in principle. Further, that the 'sufficiently serious' hurdle arises from the test as to whether the contracting authority 'manifestly and gravely disregarded' the relevant Regulations. That is not concerned with consequences at all: it is properly concerned with the nature and qualify of the breach itself."*

Therefore, it was considered that the breach did not amount to one which was sufficiently serious for these purposes.

In the absence of bad faith, were excusability of error and the contracting authority's state of mind relevant?

The Court considered whether or not what went wrong was excusable as this concerned both errors of fact and of law, but there was no difference between these for the purposes of the sufficiently serious test. The Judge stated that:

> *"an error may be held, in hindsight, to be manifest because...the evaluator made an obvious factual error. But that does not mean that the error cannot be found to be excusable when considering the 'sufficiently serious' test."*

Here, the obvious factual error being referred to was the mistaken difference between the stair climber and stairlift; this was an understandable mistake and inadvertently made. As part of the conclusion to this claim, the Judge confirmed that in the absence of bad faith, it was not the case that "questions as to excusability and state of mind, and whether the breach had been deliberate or inadvertent, were irrelevant" when considering the second Francovich condition.

Was Braceurself denied an effective remedy?

This could only really be considered if the test for sufficiently serious could be met, i.e., this claim could only arise to consider whether an effective remedy for Braceurself could be given if Braceurself's rights under the PCR had been breached. As it was determined that this was not the case and the breach was not considered sufficiently serious, then damages were not recoverable and there was no need for an effective remedy to be given.

The Court concluded the matter by dismissing the appeal, noting that this was a "very unusual" and "most unfortunate" situation.

Contracting authorities and suppliers should note this decision in relation to the recoverability of damages in procurement claims as going forward, it may be more difficult to recover damages in procurement claims. If a breach of the PCR is committed, it should be noted that the focus of the breach should be on the nature and quality of the breach as opposed to the effect of a breach upon an aggrieved bidder. Where there has been a breach, the effect of such breach should not be determinative of the question of whether or not the breach was sufficiently serious enough to warrant damages.

Should you require any assistance or have any queries in relation to any procurement matters, please do get in touch with the team and we would be delighted to help.

Contact

Athina Agrafioti

Associate

athina.agrafioti@brownejacobson.com

+44 (0)330 045 2650

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