public matters newsletter

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Following the discovery of 'serious anomalies' in billing practices under the Ministry of Justice's ('MoJ') electronic monitoring contracts with G4S and Serco, government commissioned a series of reviews of contract management across government departments.

On 4 September 2014 the National Audit Office ('NAO') published its report, 'Transforming government's contract management', which sets out the results of its resulting review of government contracts with the private sector.

Background

On 11 July 2013, Chris Grayling, the Lord Chancellor and Secretary of State for Justice, told the House of Commons that an audit had found instances where G4S and Serco were charging for tagging where none was taking place, leading to over-billing to the tune of tens of millions of pounds.

> *Instances "… included charges for people who were back in prison and had had their tags removed, people who had left the country and those who had never been tagged in the first place but who had instead been returned to court. There are a small number of cases when the subject was known to have died. In some instances, charging continued for a period of many months and indeed years after active monitoring had ceased."*

Grayling described the management of the contracts as *"wholly inadequate"* and confirmed that an entirely new contract management team had been put in place, led by his procurement director and validated by the independent auditors.

The issues initially came to light during the re-tendering process for the G4S contract, with anomalies between the historic data provided by G4S to the procurement data room (as incumbent supplier) and the assumptions built into G4S's own pricing model in their bid for the new contract. Once the scale of the issue became apparent, the MoJ Permanent Secretary was informed, as was the Cabinet Secretary and the NAO.

The PWC Forensic Audit team were duly engaged and a full audit was jointly commissioned by the MoJ and the NAO; the MoJ commissioned further reviews of its other contracts and the Cabinet Office did the same for the major G4S and Serco contracts across government. The Home Office and the Department for Work & Pensions also commissioned internal reviews of contracts with a range of contractors. In total, government tested 60 contracts for overbilling and 73 for contract practice management.

The NAO Report

The NAO report ('Report') confirms that most of the contracts reviewed showed widespread weaknesses in the way in which the contracts were managed, including poor governance, record keeping and capacity issues. The Report sets out recommendations as to how the Crown Commercial Service and other departments can improve contract management going forward.

Key findings

Response to overbilling: The Report found that the Government reacted strongly in handling G4S's and Serco's overbilling but that, due to the size of the firms concerned, there was perhaps some reluctance to take more robust action due to concerns that the resulting failure of the firms concerned *"…could create widespread disruption to public services and government wanted their ongoing participation in competitions"*. It was instead demanded that both companies undergo a formal process of 'corporate renewal' to address the failures. Both firms were also reported to the Serious Fraud Office.

Payments of £104.4 million from G4S and £68.5 million from Serco were negotiated in relation to the overbilling on electronic monitoring contracts. A further £4.5 million was paid to government by G4S in respect of billing issues on two court facilities management contracts and Serco paid £2 million relating to its prisoner escorting and custodial services contract.

Problems with contract management: the reviews uncovered widespread issues with contract management, including poor planning and governance, administration, record keeping, reporting structures, risk management and a general lack of suitably experienced people within government to manage commercial contracts of this nature.

According to the NAO, government is taking the findings of its reviews very seriously and reforms are going in the right direction. Amyas Morse, head of the NAO, said:

"For several decades, governments have been increasing their use of contracts with the private sector to provide goods and services. This has produced successes but also thrown up major new challenges, which are not easy to surmount. Not the least of these is the need to build up the commercial skills of contract management staff, both in departments and in the centre, and enhance the status and profile of their role. Current reforms are going in the right direction and government is taking the issue seriously. I welcome the fact that the Ministry of justice, in particular, has responded promptly and positively with a wide-ranging improvement plan. There is, however, much to do, and the acid test will be whether the resources and effort need for sustained improvement are carried through into the future performance of the departments in procuring and managing contracts".

Next steps:

The Report sets out the steps which it regards as important in transforming contract management for the future. These include:

- putting in place the systems and processes to enable effective oversight and management of contracts;
- ensuring that responsibility for the delivery of contracted-out services properly rests with the contractors; and
- ensuring the Government finds ways of making the most of its commercially experienced staff, giving them the right skills and an enhanced role.

In order to ensure that the transformation envisaged by the Report comes to fruition, the NAO has recommended that the Cabinet Office set up a cross-government programme to improve contract management, building on the work of the Markets for Government Services (Officials) group, and that HM Treasury and the Cabinet Office continue to use commercial capability reviews to ensure reforms are embedded.

In a recent press statement, the Right Honourable Margaret Hodge MP, Chair of the Committee of Public Accounts, said: *"The discovery that G4S and Serco had massively over-charged the Ministry of Justice on public service contracts was an urgent wake-up call for the government's disastrous contract management"*, stating that the Government's responsibility for contract management does not end when the contract is signed but that it is essential that contract performance is monitored closely over the life of the contract *"…to protect the interests of taxpayers and those who rely on our public services"*.

How much of a wake-up call it has been will remain to be seen, but it is clear that the performance and management of government contracts with private sector providers will remain under close public scrutiny for some time to come.

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The message from the court that it is incumbent upon the parties to mediate has become even stronger. This time Mr Justice Ramsey, who has been responsible for much of the implementation of the Jackson reforms, has issued some strong guidance in the case of Northrop v BAE Systems [2014] EWHC 3148 TCC and the cost consequences of making a decision not to mediate.

In the case of Northrop the parties had an ongoing commercial relationship and the case concerned one party to the contract asking the court to make a series of declarations so that the contract could be terminated.

BAE believed that it had a very strong case and believed that Northrop was endeavouring to use the offer to mediate as a negotiation tool to engineer a better settlement than it was entitled to given their prospects of success. As a result BAE refused to mediate.

Mr Justice Ramsey looked at the refusal to mediate and whether it could be said that BAE had acted reasonably given its assessment of the merits of the case. Mr Justice Ramsey agreed with BAE's assessments of the merits of the case and said that BAE had a *"strong case"*.

However he was not sympathetic to the view that this would entitle a party to refuse to mediate and in expressing this view he departs from the views previously expressed in a number of judgments. He believes that a good mediator can engineer a settlement whatever the merits of a claim and that *"a mediator can bring a new independent perspective to the parties if using evaluative techniques and not every mediation ends in payment to a claimant."*

As a result he took the view that the parties should have considered mediation even if one of the parties believed that their prospects of success to be extremely high. He said:

"This was a classic case where I consider that a mediator could have brought the parties together. In assessing the prospects of success I do not consider that the court can merely look at the position taken by the parties. It is clear that if BAE did not want to pay anything and if NGM would not settle without payment then there would not be a settlement. However this is the position in many successful mediations. It ignores the ability of the mediator to find middle ground by analysing with each party its expressed position and making it reflect on that and the other parties' position. It allows the mediator to bring the necessary skills of evaluation and facilitation to find solutions which have not been considered. These may include such things as bringing other commercial arrangements or disputes into the discussion or, in this

case, resolving the consequences of termination or finding future opportunities for the software or licences.

"The published success rate of mediation (see para 13.03 of the Jackson ADR Handbook) shows that generally mediation is likely to be successful. In this case for the reasons set out above, I consider that this is a dispute between parties where a mediated settlement would have been likely. There were therefore reasonable prospects of success."

The clear message from this case is that parties should consider ADR in all cases or face financial penalties.

So on a practical level what should litigants do? Mediation can sometimes be expensive and where parties are litigating against say litigants in person there needs to be a financial reality check to ensure that litigation is being progressed and settled in the most cost effective way. It may also seem 'unfair' that there is an obligation to mediate where it is felt that the prospects of success are overwhelming.

Many people still think of mediation as a 'one size fits all' where mediation starts at 10am in the morning and the parties hammer out an agreement in the early hours of the morning. Alternatively the case is not settled and each party meets its own costs running into several thousands of pounds with those costs being irrecoverable in the litigation.

However mediation has evolved and there are a number of options to choose from and parties can tailor the choice of mediation to the circumstances of the case depending on the nature and value of the litigation, the financial circumstances of the litigants and the merits of the litigation. This can be particularly valuable when looking at claims with a lower value or where it is likely that the opponent is not going to be 'good for the money' when looking at the potential recoverability of costs or damages.

We can therefore look at mediation which will accommodate the following:

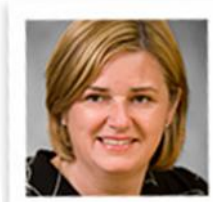
1. A telephone mediation which will be limited to a certain period of time and with a limited amount of documentation being provided to the mediator. Telephone mediations can be extremely useful for low value claims and have a good success rate for instance in landlord and tenant and debt claims.

2. A guillotined mediation in terms of either amount of documentation or time. Parties can be limited in terms of how long their position statements should be or how long the opening statements at the mediation should be. The parties can agree how long the mediation bundles should be limiting the documentation to the key documents involved in the dispute.

3. Mediators will take account of the time pressures people work under and early evening guillotined mediations are becoming more common. Parties can meet after work between say 5pm and 8pm to discuss their differences.

By looking at these different types of mediation parties to litigation can make a significant saving in cost, looking at hundreds rather than thousands of pounds in mediation costs but without losing out on the quality of experience of mediator. In addition by suggesting one of these options and explaining the reasons for making that suggestion, it is likely that the court will take the view that the question of ADR has been looked at reasonably by that party and hence any possible cost risk has been minimised.

Therefore although the message is that mediation should be considered in all cases, whatever the prospects of success, it is important to bear in mind that there are a number of options available to litigating parties and a suitable, cost effective option can be found.



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Wilmott Dixon Partnership Limited v London Borough of Hammersmith and Fulham

Wilmott Dixon Partnership (WDP) was the incumbent supplier of repair and maintenance services to the London Borough of Hammersmith & Fulham (HF). There had been problems with the performance of the initial contract which the authority acknowledged had not been the fault of WDP. In June 2012 HF ran a competitive procurement process to re procure the repair and maintenance services, in which WDP bid unsuccessfully. WDP then brought a challenge against HF which was heard in the High Court. The judgment was handed down on 9 October.

The procurement process

In June 2012 HF published an Official Journal of the European Union (OJEU) notice and subsequently ran a pre-qualification round. WDP was successful at the pre-qualification round. At that stage it intended to perform any contract without the assistance of a sub-contractor and it indicated the same in the pre-qualification questionnaire (PQQ). The tender was structured so that there was one lot which required the provision of services to the whole borough (lot 1) and two further lots which provided for the provision of services for the north and south of the borough separately (lots 2 and 3 respectively). WDP was invited to tender for lots 1 and 3.

HF issued an invitation to tender (ITT) which stated that the contract would be awarded on the basis of the most economically advantageous tender. Shortly before submitting its tender, WDP made the decision to appoint PH Jones Facilities Management Limited (Jones), an incumbent gas servicing contractor to HF, as its sub-contractor for the purposes of supplying the gas appliance services under the contract. HF became aware of the decision to sub contract to Jones at the time WDP's tender was submitted on 10 January 2013.

Following the evaluation process, WDP was informed by HF that it had decided to award a contract for the whole of the borough only (lot 1) and that WDP's bid had been unsuccessful. The contract was awarded to Mitie Property Services UK Limited (Mitie). WDP was advised that although the bids were extremely close (Mitie being awarded a total score of 86.5 as opposed to WDP's 85.32) and WDP's bid being the lowest overall price, Mitie had been awarded the contract because HF felt its submission, particularly on the ICT proposal had been of better quality. In particular WDP was told that HF was looking for a 'sea change' in the approach to the delivery of the services which had not come across in WDP's proposals. WDP had asked why, when the scores were so close it had not been favoured and was advised by HF that HF had concerns over WDP's performance of the original contracts.

In May 2013 WDP commenced proceedings against HF for breach of statutory duty under the Public Contracts Regulations 2006 (the 2006 Regulations); breaches of principles of EU law, and breaches of an implied contract.

WDP's claims included the following:

- That the tender had been evaluated by reference to criteria which were not aimed at identifying the most economically advantageous tender; in particular WDP claimed that HF had taken into account Jones' ability to provide the gas compliance services under the contract when it scored WDP's submission.

- That HF evaluated the tender by reference to award criteria which were not specified (or not clearly specified) in the ITT; including the requirement to demonstrate a 'sea change' in the way the services were provided, the general political desire to move from the incumbent supplier, and the evaluation of the ICT submission by reference to criteria not in the ITT.

- That HF failed to score the qualify submissions in accordance with the methodology specified in the ITT.

- That HF failed to treat the economic operators in a fair and non-discriminatory way when they scored the tenders, by scoring Mitie and WDP the same or scoring WDP worse than Mitie when WDP's submission was of the same or better quality than Mitie's.

- That, even if the scoring was fair, the award criteria were insufficiently sensitive to distinguish between different qualities of submission to the extent that this breached the principle of equality and non-discrimination?

- That HF failed to verify Mitie's compliance with the award criteria in breach of the principle of equal treatment.

- That there was an implied contract between HF and WDP that WDP would award the contract in accordance with the 2006 Regulations, general principles of EU law and common law principles of equality, non-discrimination, transparency and fairness.

Judgment

The High Court considered the law in relation to public sector procurement and confirmed the established position that under Regulation 4(3) of the 2006 Regulations HF was obliged to *"treat economic operators equally and in a non-discriminatory way; and act in a transparent way"*. It was also required to conduct the

procurement in a manner free from any manifest error, conduct an objective valuation of tenders by reference to criteria and sub-criteria which it was appropriate and lawful to apply to the process of tender evaluation and which had been sufficiently disclosed to the economic operators including WDP; and to evaluate all of the tenders fairly and objectively and without either actual or apparently basis.

Each of the above obligations was owed by HF to WDP and the breach of any of the above obligations was enforceable as a breach of statutory regulations.

Evaluation of the tender response by reference to criteria which were not aimed at identifying the most economically advantageous tender

WDP argued that HF's quality evaluation team (QET) had taken into account Jones' ability to provide the gas compliance services under the contract when it scored WDP's submission, and that this was contrary to the requirement upon HF only to take into account factors aimed at identifying the most economically advantageous tender. Evidence was heard which demonstrated that one of the concerns the QET had taken into account was the performance of Jones on the existing contract it had with HF, and that this was taken into account both in the evaluation and the final consensus making stage.

The High Court considered the case of Lianakis v Alexandroupolis (Case C-532/02), in which the court held that *"award criteria do not include criteria that are not aimed at identifying the tender which is economically the most advantageous, but are instead essentially linked to the evaluation of the tenderers ability to perform the contract in question"*. However, it considered that the concerns of the QET had been directed towards two considerations:

1) Why had WDP suddenly disclosed at a late stage that it would be sub-contracting the gas works to Jones?
2) Did this mean that there was not an established supply chain in place?

The court felt that these were legitimate matters which the QET was entitled to take into account under the published criteria. They had nothing to do with the past performance of Jones and therefore could not be seen to have taken into account criteria which were not appropriate to consider at the supply stage.

WDP had also raised a concern that the QET had interpreted wording used in WDP's bid to mean that WDP would guarantee Jones' compliance with gas servicing would be 99.75% rather than the 100% required by the ITT. The court felt that the wording as drafted could naturally read that WDP was proposing to maintain Jones' current level of performance, at 99.75 %, and that this was not such a plainly wrong interpretation as to amount to a manifest error. Ultimately, on this point the court found that HF did not wrongly take into account the ability of Jones to perform the services when it scored WDP's quality submission

Additionally, WDP argued that HF had formed an unfavourable view of the ability of its general manager and taken this into account in its scoring of WDP's quality submission. The court found that although there was evidence that the particular manager's ability was held in low esteem, there was no evidence that this had been taken into account in the scoring.

Evaluation of the tender by reference to award criteria which were not specified (or not clearly specified) in the ITT

HF informed WDP that one of the reasons it had been unsuccessful in its bid was that HF was expecting to see a 'sea change' in the proposal for running the contract because of the recognised problems with the way in which the current contracts were being run. HF said that they had *"never made a secret of the fact that [they] were looking for a significant change"*. The High Court felt that WDP had chosen at various places in their tender to *"place a great deal of emphasis on what they portrayed as the successes of the existing contract. They did so although HF thought that the existing contract was far from successful, had made that plain and that WDP were well aware that HF was looking for radical change"*. The court felt that HF was entitled to want a 'sea change' but that it did not follow that this meant that it wanted a new contractor. HF had made clear the change that it wanted to see: *"if a bidder included responses to a particular sub-criteria in a manner which did not recognise the need for change but suggested a future performance based on what had happened before, there is nothing objectionable about saying that this did not represent a good response to the sub-criterion"*. The court therefore held that HF had not impermissibly evaluated WDP's tender on the basis of criteria which were not in the ITT – they considered the manner in which WDP chose to demonstrate how it would comply with the requirements of the new contract.

In relation to the argument that HF had taken into account a general desire to move away from the incumbent supplier the court found that there was no evidence of any political pressure being applied through the chain of command on to the QET. In fact, at the PQQ stage WDP had been awarded the top score, which did not sit with the argument that there was pressure placed on officers to move away from WDP as a supplier.

WDP also claimed that its ICT submission had been marked with reference to criteria which were not included in the ITT, on the basis that the QET had marked it down because it did not use a specialist interfacing software tool and did not have a financial interface (conditions which were not specified in the ITT). The court considered the evidence and held that all bidders had been asked to provide an overview of their full ICT solution. On application of the case of Varney & Sons Waste Management Ltd v Hertfordshire County Council [2011] EWCA Civ 708, in which the court held that defining 'criterion' as the *"principle, standard or test by which a think is judged, assessed or identified"* was not appropriate because *"if that definition is appropriate it would mean that Regulation 30 requires every standard by which a bid is evaluated, no matter how minor or subsidiary to be disclosed as such with its proposed weighting. That would seem to me to be impracticable and I do not think it is what Community law requires."* It was

therefore not necessary for the contracting authority to spell out anything and everything that would improve a bid if it is included and lose credit if it was omitted. Accordingly, the court held that there was no evaluation by reference to criteria which had not been included in the ITT.

Failing to score quality submissions in accordance with specified methodology

WDP complained that three quarters of WDP's scores appeared to be the mode score which had been awarded by the QET without any discussion, and that accordingly this meant that different scores could be awarded to two tenderers without any discussion as to whether the different scores were justified on the basis of the tender submissions. In addition to this, some of the scores were awarded by majority vote, neither of which were methodologies set out in the ITT. The court held that the ITT should be interpreted in a way which was consistent with practical workability. It would have taken a great deal of time to have a meaningful substantive discussion about every score. The court felt that there was nothing in the word 'consensus' which required a specific discussion of every score and therefore there was no evidence that the quality element of the tender was not decided by way of consensus. The scoring was carried out with the methodology specified in the ITT.

Failing to treat the economic operators in a fair and non-discriminatory way when they scored the tenders

WDP argued that contrary to its obligation to treat all economic operators in a fair and non-discriminatory manner, HF had not applied the award criteria objectively and uniformly as the scores awarded to Mitie and WDP do not properly reflect the difference in quality between the submissions in relation to a number of areas. In considering the evidence on this point, the High Court took the approach set out by the decision in Letting International Ltd v Newham London Borough Council [2008] EWHC 1583 (QB) in which the judge said *"… it is not my task merely to embark on a re-marking exercise and to substitute my own view but to ascertain if there is a manifest error which is not established merely because of on mature reflection a different mark might have been awarded… the issue for me to determine is whether the combination of manifest errors made by Newham in marking the tenders would have led to a different result"*. The court therefore considered WDP's arguments as to the elements of the scoring that were wrong, and then took a view as to whether the complaints were justified, bearing in mind the level of discretion owing to the contracting authority.

The court found only one case where a manifest error had been made which had been carried through to the scoring but found that the error would not have changed the final outcome. Overall the court did not find that there had been any systematic unfairness in the marking of the bids and that WDP had therefore not established that there were numerous breaches of the principle of equality and non-discrimination.

If the scoring was fair, the award criteria were insufficiently sensitive to distinguish between different qualities of submission

The court held that on the basis that WDP had not been able to give an example of the criteria being insufficiently sensitive, nor of what would have made the criteria sufficiently sensitive the court was unable to conclude that the award criteria were insufficiently sensitive, or that in the design of the criteria HF breached the principles of equality and non-discrimination.

Failing to verify Mitie's compliance with the award criteria in breach of the principle of equal treatment

It was argued by WDP that aspects of Mitie's tender were unrealistic and accordingly should have been verified by HF. The court found that as a matter of common sense it would not be practical or necessary for HF to 'second guess' the relative effectiveness of different ways in which a bidder's business might be run. WDP had not established what it thought HF should have done in terms of verifying Mitie's compliance with award criteria. Ultimately the court did not feel that this was a case where verification after the PQQ process was required or would have been appropriate. Ultimately there was no breach of the principle of equal treatment.

An implied contract between HF and WDP that WDP would award the contract in accordance with the 2006 Regulations, general principles of EU law and common law principles of equality, non-discrimination, transparency and fairness

The court held that on the basis that this was a case governed by the 2006 Regulations, there was no room for implication of a contract.

Additional questions for the court to answer

WDP also asked the court to answer a number of other questions, including whether WDP would have won the contract but for the breach of statutory duty by HF. On the basis that WDP was not able to establish any breach of statutory duty by HF, it was held that there was no need to consider the question of whether WDP would have won but for the breach. Again, with regards to the question of whether WDP was deprived of the chance of winning the contract but for HF's breaches, the court found that there was no need to answer this question on the basis of the dismissal of WDP's other claims.

In reference to the argument of HF that a number of the issues raised by WDP were time barred, the court held that the claims which HF considered to be time barred were merely further, more specific pleadings on issues of the case which had already been pleaded in more general terms within the time limit. If this were not the case, the judge held that he would have allowed the amendments in any event under CPR 17.4 (2) which permits an amendment to be made *"if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in*

the proceedings". The court felt that no prejudice would have been caused to HF because they were able to deal adequately with the claims arising out of the amendments to the claim.

Ultimately, the High Court dismissed all of the claims made by WDP against HF. The approach taken in this case demonstrates the practical approach the courts are taking to procurement challenges, allowing contracting authorities some measure of discretion in scoring bids, in particular moderating to achieve a 'consensus' score. Nevertheless, the case demonstrates the importance for local authorities of carefully planning their procurement processes and ensuring that as far as possible every aspect is compliant with procurement law, and in particular the overriding considerations of transparency, non-discrimination and equal treatment of all economic entities as potential claimants will draw out any potential flaws in order to strengthen their chances of success.

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automatic suspension: two very different views

Over the last few years the courts have had to address the issue of the automatic suspension under the Public Contract Regulations 2006 (as amended) (PCRs) a number of times. In this article we look at two cases that are covered by the other procurement regulations, the Defence and Security Public Contract Regulations 2011 (the 2001 Regulations) and the Utilities Contracts Regulations 2006 (the Utilities Regulations). It is fair to say that the 2011 Regulations and the Utilities Regulations contain many of the same features as the PCRs and offer further, useful, insight into the approach of the courts generally. The cases were both brought by incumbent contractors as well, adding another layer of complexity to the arguments.

Since the Remedies Directive came into force in England and Wales, Regulation 47G of the Regulations states that a contract that has been awarded, but not yet entered into, cannot be completed until either an interim order is granted that the contract can be entered into or the case is dismissed or discontinued at first instance (Regulation 47H). At a preliminary hearing, the aim of the contracting authority in question is to get an interim order that allows them to enter into the contract and for the judge to decide that there is no serious issue to be tried that could result in a damages claim at the full trial.

Historically, the courts have in most cases considered that the decision whether to lift the automatic suspension in public procurement cases should follow the principles and approach laid down in House of Lords decision in American Cyanamid Co v Ethicon [1975] AC 396. In brief this provided that any court considering the lifting of an injunction must determine the answer to three tests:

1. Whether there is there a serious question or issue to be tried;
2. Whether damages are or would be an adequate remedy; and,
3. The balance of convenience by comparing the difficulties, problems or prejudice to be suffered by each party (and other interests) if the statutory suspension is or is not continued.

In this article we refer to this as the ‘AC Test’.

The interim injunction boat was rocked (a little bit) earlier this year by the Irish High Court when it ruled that the AC Test wasn't the correct test to use when deciding whether the automatic suspension of a procurement process should be lifted or an interim injunction put in place. In the case of OCS One Complete Solution Ltd v The Dublin Airport Authority PLC [2014] IEHC 306, the Irish High Court ruled that the AC Test was not the correct test to use when considering whether the automatic suspension that occurs when a challenge is brought under the procurement directive should be lifted. Instead, the Irish court held that the correct test was simply a balance of interests test and that to include the questions of whether damages

were an adequate remedy and whether a cross-undertaking could be given was to add to the requirements under the Remedies Directive in a way that the directive did not allow for. In both the cases in this article, it seems that the English courts don't have any current appetite to follow this change of position.

NP Aerospace case

NP Aerospace Limited and Ministry of Defence [2014] EWHC 2741 (the NP Aerospace Case) is a case looking at a public procurement run by the MoD involving the conversion of armed vehicles. The claimant in this case (NP Aerospace) was the incumbent provider of a vehicle conversion services to the MoD but had been unsuccessful in the tendering process which had been run by the MoD to seek a new provider. NP Aerospace had commenced proceedings on the 19 May 2014 and the statutory suspension on the placing of the contract with the successful tenderer had come into force on that date. The case raises some very interesting issues about alleged abnormally low tenderers and predatory pricing, although at this hearing those issues were not assessed as such although they were looked at for their seriousness in relation to whether or not the automatic suspension should be lifted.

Lord Akenhead in this judgment also referred to Araci v Fallon [2011] EWCA CIV 668 and Lord Jackson speech:

> *"The real question is whether it is just in all the circumstances that the Claimant should be confined to his remedy in damages".*

Lord Akenhead then looked at the three questions in the AC Test in relation to the issues in the case:

- Firstly, he looked at whether there was a serious question to be tried. Of the issues and claims made by the claimant it would seem that the most serious of these was whether the contracting authority (the MoD) was obliged to both investigate and indeed reject an abnormally low tender. In particular the claimant had claimed that the tender price was abnormally low due to a predatory pricing approach by the successful tenderer. Lord Akenhead did accept that there was a serious argument to be assessed. However, in line with the American Cyanamid decision did not make any further comments on his view of the potential success save to confirm that he did not consider that this proposition could be described as a weak one.

- Secondly, he looked at whether damages would be an adequate remedy. The position put forward by the claimant included a number of claims in relation to the damage it would suffer as a result of the contracts being awarded to the successful tenderer which would not be adequately compensated by monetary damages alone. These included difficulty in assessing its loss, reputational damage through losing the tender, workforce impact, damage to future chances of winning contracts and the advantage that the successful tenderer would receive as a result of the information about NP

Aerospace current work for the MoD. Lord Akenhead dismissed all these points and was quite clear that damages in these circumstances would be both an adequate remedy and relatively straight forward to assess.

- Finally, the court looked at the balance of convenience and this, it would seem, was a particularly strong argument for the MoD. The MoD required this contract to progress as soon as possible in order that the national defence interests of the United Kingdom were not put at prejudice. There is no doubt that this was given some significant weight by the court and Lord Akenhead agreed that a continuation of the suspension had significant potential for a significant impact on the UK national interest. Accordingly the balance of convenience was with the MoD and the ending of the suspension.

This is another case where the automatic suspension has been lifted and this is clearly more good news for contracting authorities when defending public procurement challenges and entering into contracts which they genuinely need in order to fulfil their public duties. In that regard, this case is not surprising in its result in that it follows the majority of recent cases and the principles laid down in American Cyanamid. However, this clearly is quite an interesting case in relation to the assessment and approach that contracting authorities should take in relation to abnormally low tenders and will need to be monitored when it comes to full trial. Although, of course, that position is in any event due to change as a result of the requirements set out in the New Public Procurement Directives which will require contracting authorities to take a different approach to the assessment and indeed rejection of abnormally low tenders.

Gatwick Airport case

In complete contrast to the NP Aerospace Case, the very recent case of NATS (Services Ltd v Gatwick Airport Ltd and Anor [2014] EWHC 3133 (TCC) (the GAL Case) looked at the use of the AC Test in relation to the Utilities Regulations and came to very different conclusions for the three questions. For the purposes of this article the relevant sections of the Utilities Regulations are the same as in the Regulations and we have referred to the Regulations since they are more likely to be applicable to the readership of this newsletter.

The GAL Case is a challenge as to the use of undisclosed, irrational and inappropriate criteria in a tender process for air navigation services (air traffic control) and maintenance and repair of equipment at Gatwick Airport. The application for the proceedings included that the contract award process was automatically suspended under regulation 45G of the Utilities Regulations (the same wording as regulation 47G of the Regulations). GAL responded with an application for any automatic suspension to be lifted and, in the alternative, for NATS to provide an undertaking in damages.

The argument put forward by the applicant in the GAL Case was that the AC Test was not the correct test to determine whether the automatic suspension should be lifted and that the balance of interests test should

be used as it was in the Irish case. Despite the judge deciding that the correct test was in fact the AC Test, the applicant was successful in having an interim injunction put in place. The judge held that:

- There was no reason to move away from the use of the AC Test as there was nothing in the test which was inconsistent with Article 2 of the Remedies Directive as it did not seek to limit or define the way in which national courts exercise their discretion in balancing the interests of the parties;

- There was a serious issue to be tried on the question of whether GAL was a 'relevant person' under the Utilities Regulations. Alternatively, whether there was an implied contract in the tender that the Utilities Regulations would be used because the process was started under an OJEU notice that did not state that GAL was not covered by the Utilities Regulations. The first argument of the applicant was based on the 'special or exclusive right' to carry out an activity, such as running an airport, which is granted by a competent authority. GAL was granted various licences and other authorities from the Secretary of State and as set out in legislation and the applicant concluded that this met the necessary test. The judge agreed that it needed to looked at in more depth than was possible at the preliminary hearing and, indeed, GAL had said as much themselves;

- The calculation of damages for this claim would be very complicated and therefore, it cannot be said, at the preliminary hearing stage, that damages would be a sufficient remedy. This was because of the difficulty in estimating damages based on the mis-use of criteria and also because of the negative effect on NATS of no longer being able to claim that they held the contract with GAL;

- Due to the extended nature of the tender exercise run by GAL, which was over 2 years behind its original schedule, waiting between 6 and 12 months before entering into the new contract would not cause undue problems for GAL. Additionally, while GAL would gain efficiencies under the new contract, there was an existing contract in place that ensured that the services would continue to be performed. The judge said that there was a *"strong public interest in ensuring that complex and significant procurements are carried out in a proper and lawful manner"*.

For all of the reasons above, the judge held that the automatic suspension should not be lifted. He did recommend that there is an expedited full hearing so that the contract can be entered into as soon as possible.

The GAL Case is in a very small minority of cases where the automatic suspension has not been lifted. When looking at it in contrast with the NP Aerospace Case, a lot of the issues seemed to be the same. This indicates the sensitivity to the facts of the case, particularly the importance of the contract being entered into quickly.

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Cabinet Office consultation draft

You may recall from last month's edition of Public Sector Matters that we told you about the Cabinet Office's consultation on the new Public Contract Regulations which are designed to transpose directive 2014/24/EU. You may also recall that in our June edition of Public Sector Matters we did a comprehensive review of that underlying directive.

The draft regulations and accompanying consultation documents make it clear that the Cabinet Office, in line with governmental policy, will endeavour to transpose the directive as faithfully as possible without any 'gold-plating'. Accordingly, many of the things which were set out in our article in June will be copied into the regulations. Although I do not intend to go over that review again, I will however highlight those areas where the Cabinet Office has exercised areas of discretion and any other points which I think might be of interest. I will also reflect on the implementation of the Lord Young Reforms which have been designed to improve access to public sector contracting for small and medium sized enterprises.

It is also worth pointing out that the draft regulations have sought to consolidate the requirements of the Remedies Directive. The drafting has been lifted directly from the Public Contract Regulations 2006 (2006 Regulations) into the draft regulations without any significant amendment.

The lack of 'gold-plating' has limited the extent to which the directive has been deviated from and most of the directive is mandatory (although of course historically the UK drafting style has been to take the opportunity to transpose directives in a manner which utilises UK drafting conventions and clarifies any deemed ambiguity or inconsistencies). It is finally worth noting that much of the policy position and explanatory positions will be delivered by way of statutory guidance to be issued by the Cabinet Office in due course. Accordingly, it is difficult at this stage to fully outline the Government position which will not be fully explained until this guidance has been issued.

The consultation period is for four weeks only. Accordingly, by the time you are reading this article the date for responses to the consultation (the 17 October) will have passed. In any event, the consultation itself had a very limited scope this was partly because of the limitations on the drafting protocols, as highlighted above, and partly, one would imagine, in order to speed up the consultation process due to the delays in issuing these draft regulations. In total 20 questions were asked in the consultation in relation to the drafting, these largely revolved around the policy choices taken by the Cabinet Office over the non-mandated requirements of the directive. It is in relation to these questions that I will focus the remainder of the article as they by and large set out the things that contracting authorities need to be aware of over and above those matters which are set out in our June article.

In line with previous directives' transitional policies, the Cabinet Office has sought to only apply the new procurement processes to those procurements which begin on or after the effective date of the regulations. This seems to be a sensible approach in order to ensure that there is no misunderstanding in relation to how procurements are run by contracting authorities. Accordingly, the draft regulations have also taken advantage of the opportunity to postpone, amongst other things, the use of the mandatory electronic European single procurement document and to recourse to the e-Certis central certificate repository.

The Cabinet Office has not sought to implement the option which would require contracting authorities to split large contracts into lots. This of course is a welcome approach by the Cabinet Office and in line with the responses initially received at previous round of consultation on these non-mandatory provisions. It does however implement the provisions in relation to the ability to accept (where a procurement has been split into lots) a variety of combinations of different lots depending on what that solution means to the contracting authority.

Because the UK will still be at the forefront of implementation, it is possible that the new public procurement forms necessary for the new directive will not be ready. The Cabinet Office has set out its general approach to utilisation of the existing forms if the new forms are not ready. This largely surrounds putting the required additional or different information in the free text boxes on the existing forms.

As those of you who have monitored the progress of the public procurement directive from its initial draft will note, the European Commission was particularly concerned to try and ensure that the controls round conflicts of interests and exclusion for breaches of taxation and social environmental legislative obligations were towards the top of the agenda. The Cabinet Office has not elaborated further on the requirements for contracting authorities to identify and remedy conflicts of interest and will issue guidance in due course. The Cabinet Office has, in draft Regulation 57 (the mandatory exclusion grounds), set out the UK specific legislative framework, although they have not identified specific non-payment of tax as the directive does not set out specific European tax offences which have to be interpreted into UK law. Regulation 57 (4) does not make exclusion mandatory for breach of tax obligations short of a final judgment. The regulations also then go on to provide that mandatory exclusion grounds can be disregarded where disproportionate or for overriding public interests reasons.

The implementation of the light touch regime is set out in draft Regulations 74 to 77 and as with other drafting within the regulations the Cabinet Office has endeavoured not to over regulate or indeed go further than that which is absolutely required by the directive in this regard. For example the procurement timescales are not prescribed, merely that they need to be 'reasonable and proportionate'. However, at the moment the drafting is not particularly clear in some places and may require some clarification. It is however, worth noting that draft regulation 118 provides that the light touch regime for health and social

services which are governed by the NHS Procurement, Patient Choice and Competition Regulations 2013 (Patient Choice Regulations) will only apply as from the 18 April 2016. Up until that date the existing Part B service regime under the 2006 Regulations will be utilised and sit alongside the Patient Choice Regulations. It is also worth being aware that disappointingly the reservation for mutuals will not apply to any contract which is covered by the Patient Choice Regulations.

Draft regulations 105 to 109 seek to implement Lord Young's reforms standing from his report, Growing Your Business (published May 2013). These reforms are designed to open up access to SME's who have expressed concern about barriers to public procurement. In outline, these reforms provide for:

a) abolishing pre-qualification questionnaires for contracts below the EU threshold, standardised PQQ to be used for contracts above the EU threshold,
b) a requirement for 30 day payment terms are passed down the supply chain through a standard clause brought on late payment to invoices; and
c) mandating that all public sector contract opportunities are accessible on contracts finder.

These reforms have already been subject to consultation following Lord Young's initial report and therefore disappointingly the principles were not something that was subject to this consultation exercise. I think for local government, in particular, it is going to be very important to consider the impact that these reforms will have on its purchasing procedures. The drafting in draft regulation 106 in particular does require some redrafting as at the moment I am not clear that it works.

This consultation has now closed and I await the reworked regulations with interest. We will be running some training sessions in all of our offices in the New Year so please let me know if you would like to attend one of these sessions and we can send you details.

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