Neutral Citation Number: [2010] EWHC 3237 (QB)

IN THE HIGH COURT OF JUSTICE **Claim No: HQ10XO4065**
QUEEN'S BENCH DIVISION

BETWEEN:

INDIGO SERVICES (UK) LIMITED

Claimant

-and-

THE COLCHESTER INSTITUTE CORPORATION

Defendant

Before:
David Donaldson Q.C. sitting as a Deputy High Court Judge

Mr Denis Edwards (instructed by Mullis & Peake, Romford) for the Claimant/Respondent.
Mr Philip Moser (instructed by Mills & Reeve, Cambridge) for the Defendant/Applicant.

Date of hearing: 26 November 2010

REASONS FOR JUDGMENT GIVEN ON 1 DECEMBER 2010

Introduction and background

1. The Defendant ("the College"), a body constituted pursuant to the Further and Higher Education Act, 1992, is the second largest vocational college in Essex , offering both FE and HE full-time and part-time courses. Its main campus is at Sheepen Road in Colchester, where most of the staff and students are based; its next largest site is in Braintree. The present case is concerned with a proposed contract for the provision of cleaning services at these two sites for a period of three years from 1 January 2011 with optional annual extensions until 31 December 2015.

2. The cleaning services at Braintree are currently provided in-house by the College's own employees. At Colchester the services are contracted out to the Claimant ("Indigo"), a large UK company which is part of a Europe-wide group whose 2009 turnover was in excess of €875 million. Its contract, concluded in 2006, expires on 31 December 2010, and the College is taking the opportunity to include Braintree in a new contract. The College is a "contracting authority" for the purpose of the regulations on public procurement, the Public Contracts Regulations 2006, as amended by the Public Contracts (Amendment) Regulations 2009 ("the Regulations"). In a competition between 5 tenderers, scored by reference to a number of criteria, the highest score was obtained by Emprise Service plc ("Emprise"). Indigo came third, a considerable way behind the winner. Having specified at the outset that the contract would be awarded to *"the most economically advantageous tender"* having regard to the announced criteria, the College announced its decision in favour of Emprise and notified it to all the participants.

3. Following that decision on 14 October 2010 there was a standstill period expiring at midnight on 25 October 2010 imposed by regulation 32 A, during which the College was prohibited from signing the contract with Emprise. In the last day of that period Indigo commenced the present action challenging the College's award of the contract to Emprise. Under the recent amendments to the Regulations that had the effect of automatically extending the prohibition on the College entering into the contract: regulation 47G. Regulation 47H(1) (a) provides that the court may lift the prohibition, and in the application before me the College seeks such an order. There is some urgency in the matter since I am told that a 30 day mobilisation period is required, starting at the latest on 3 December 2010 (having regard to the fact that 1 and 2 January 2011 are not work-days), dictated by the need to transfer the employment contracts of the existing staff to the new contractors in accordance with TUPE regulations.

Legal considerations

4. Though this may be the first application for an order under regulation 47G(1), since it came into force, the applicable ground rules are fairly clear. Regulation 47(H)(2) provides that

> *"When deciding whether to make an order under paragraph (1)(a) -*
> *(a) the Court must consider whether, if regulation 47G(1) were not applicable, it would be appropriate to make an interim order requiring the contracting authority to refrain from entering into the contract; and*
> *(b) only if the Court considers that it would not be appropriate to make such an interim order may it make an order under paragraph (1)(a)".*

Accordingly, though the application is made by the contracting authority, the position is the same as if the unsuccessful tenderer were seeking an interim injunction (and for ease of presentation I will below proceed as if Indigo was the party applying for interim relief).

5. The court must therefore apply the *American Cyanamid* guide-lines as interpreted and glossed in subsequent case-law. In this connection both parties reminded me in particular of the observations of Lord Hoffman in *National Commercial Bank Jamaica Limited* [2009] UKPC where he referred to the

> *"underlying principle ... that the court should take which ever course seems likely to cause the least irremediable prejudice to one party or the other."*

He added that

> *"If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say that the court will feel, as Megarry J said in Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that the injunction was rightly granted."*

The application of that principle will of course be affected by the background of public procurement in which the present dispute arises, and in that context it is particularly appropriate to consider the principle as including irremediable prejudice to third parties and the wider general public (cf the observations of Vos J in *Alstom Transport v Eurostar International Limited*, [2010] EWHC 2747 at paras. 125 and 138(iv)).

6. It was suggested on behalf of Indigo that the Regulations provided a "steer" - said to be a bias not amounting to a presumption - in favour of

an injunction. Whether or not that is the case as regards final orders at trial (which I doubt), I can detect nothing of the sort as regards a decision at the interim stage. In any event, the conclusion which I reach at the end of this judgment would be unaffected, even if I factored in the suggested "steer".

7. The substantive cause of action which the claimant requires to demonstrate is determined by the Regulations.

8. Regulation 47A provides that Regulation 47 applies to the obligation on a contracting authority to comply with the provisions of the Regulation and any other relevant enforceable Community obligation, and that such an obligation is a duty owned to an economic operator (which would include Indigo).

9. Regulation 47C(1) provides that

> *"A breach of the duty owed in accordance with regulation 47A ... is actionable by any economic operator which, in consequence, suffers, or risks suffering, loss or damage."*

It would substantially emasculate the effect of the Regulations if this were interpreted as requiring the claimant challenging the award to establish, as a condition of obtaining any relief, that it would, but for the defects in the procurement process, have been awarded the contract. I therefore share the view expressed by others before me that Regulation 47C(1) is satisfied if the claimant can show that by reason of the defects it has lost, or will absent a re-run (of all or a relevant part of the process) lose, a chance of obtaining the contract, provided that the chance is more than fanciful: see per Silber J in *Letting International Ltd v London Borough of Newham,* [2008] EWHC 1583 (QB) at para. 141. It is to be noted that this requires a causative analysis and evaluation.

10. Demonstrating the loss, or threatened loss, of a non-fanciful chance does no more than establish a cause of action. It does not follow that the claimant would then automatically be entitled to have the award set aside. Even at trial, the court may consider that, having regard to all the circumstances, it is appropriate to confine the claimant to its remedy in damages, and one of the factors in the overall equation may be the degree of importance of the chance (in excess of the threshold test of being non-fanciful).

The procurement process

11. On 7 May 2010 the Contract Notice was published in the EU Official Journal. It contemplated that only a limited number of "economic operators" would be invited to tender. As part of this reduction process Indigo completed and submitted a Pre-Qualification Questionnaire on 17 July 2010. One of the six enquirers was eliminated and the remaining five, including Indigo, were notified of the result on 23 July 2010 and invited to download the Invitation to Tender (ITT). No clarification was sought of the ITT by Indigo and it submitted its tender on 13 September 2010, the last permissible day.

12. The ITT, designed by a specialist firm, Creative Consulting Partnership LLP ("CCP"), required each tenderer to respond to requests for information under a number of headings grouped in 3 sections. Schedule 4 (entitled *Tender Evaluation Matrix and Sub-Criteria schedule*) tabulated these together with their relative weightings. It also indicated that further marks, amounting to 2.4 % of the total were allocated to an interview. There followed a description of what was called the *"Scoring Methodology"*.

13. The tenders were then marked. The three markers, including one from CCP, each marked a separate section of each tender, with the CCP representative marking the financial section (section 3). They then met for a full day, during which the basis of the marking was explained by each marker to the others and discussed: this did not in the event lead to any change in marks. Each tenderer was then interviewed: this did not lead to any change in the ranking of any of the tenderers.

14. In the end result Emprise was a clear winner with a score of 55.70%. Indigo, with 48.51%, was in third position. I was not told the score of the second-placed bidder.

The Contract Notice

15. As part of the challenge to the award decision, the claim form begins with what it calls *"Errors of law in the advertisement of the Contract Notice in OJEU"*, alleging that the Notice was not in accordance with the established standard forms. These matters featured little in the submissions made by Indigo to me, and I shall endeavour to deal with them shortly.

16. Four of the complaints related to information relevant to the pre-qualification process. This was strange given that Indigo was successful in pre-qualifying. On any view these suggested defects could not have had any causative effect resulting in loss of a chance.

17. The remaining allegation complained of the absence of "precise" information as to remedies and time-limits if the tenderer wished to challenge any award decision. Since, in the event, this did not prevent

Indigo from commencing the present action in time to prolong the standstill, there is here also an absence of causative effect.

18. Moreover, the complaints under this head are of unlawfulness in the Contract Notice, issued on 7 May 2010. The College submits that any such challenge is now time-barred, and I agree.

19. Regulation 47D provides that proceedings for the enforcement of any duty owed by virtue of regulation 47A

> *"must be started promptly and in any event within 3 months beginning with the date when grounds for starting the proceedings first arose"*

As a result of a ruling by the ECJ earlier this year in *Uniplex (UK) Limited v NHS Business Services Authority* Case C-406/08 the requirement of promptness is no longer effective. The Court decided that the time-limit had to be certain and run from the date on which the claimant knew, or ought to have known, of the infringement relied upon.

20. Indigo submitted that time could not run until there was a completed cause of action; that, it argued, required damage, at the least in the form of a lost chance, which did not eventuate until the award decision. That submission suffers in my view from two linked flaws.

a. Firstly, the effect of the ECJ ruling is that the knowledge which starts time running is simply knowledge of the *infringement*. In this I am in full agreement with the conclusion of Mann J in *Sita UK Limited v Greater Manchester Waste Disposal Authority* [2010] EWHC 680, whether this is achieved by a compliant interpretation of the phrase *"the grounds for the bringing of the proceedings"* or by overriding it. In the present case, the suggested infringements were apparent *ex facie* from the Contract Notice itself, so that the relevant period expired in August.

b. Secondly, Regulation 47C permits a claim to be brought if the claimant *"risks suffering ... loss or damage"*. Even without this provision, English law would not require that a claimant must show realised loss, even of a chance, in so far as it seeks *quia timet* relief to prevent the conclusion of the contract which is the subject of the challenged award decision.

21. For these reasons, it is not appropriate to take account of the allegations relating to the content of the Contract Notice in deciding whether Indigo should be permitted to maintain the standstill.

The tendering process

22. A number of complaints are advanced relating to the tender process.

23. I am unimpressed by the complaint as regards the "moderation" process in paragraphs 20 to 22 of the Particulars of Claim. This is said to be a departure from the statement in Schedule 4 of the ITT that

> *"At the end of the first phase of the evaluation process, a moderation meeting will be convened and the panel will discuss why they awarded marks for each question and jointly agree the moderated score of the evaluation panel as a whole."*

It appears to me on the evidence as I have summarized it above that the announced procedure was indeed followed.

24. There is more substance in most of the remainder of the complaints which relate to the scoring methodology announced in the ITT and how it was applied.

25. The Scoring Methodology which followed the table in Schedule 4 of the ITT read as follows:

> *"For each question the evaluator gives a score of 0-5, scored as:*
>
> *0 = non compliant*
> *1 = poor (not satisfactorily meet all criteria requirements)*
> *3 = acceptance (performance satisfied all Criteria)*
> *4 = very good (Supplier exceed acceptable with at least 2 additional benefits)*
> *5 = exceptional (Supplier exceed all requirements, exceptional demonstrations"*

It was further stated the scores would be converted into a percentage of the available marks for each question.

26. Complaint is made that the words in brackets are opaque and insufficiently precise to avoid subjective and potentially arbitrary marking. I regard this criticism as unreasonably exigent in the real world. The same applies to a similar criticism of the allocation and scoring of marks for the interview. More fundamentally, if these matters had given genuine grounds for concern Indigo could at an earlier stage have sought clarification and even brought proceedings to challenge the ITT. As part of the court's discretion I do not think it would be appropriate now to permit reliance on them for the purpose of challenging the award.

27. The real meat of Indigo's criticism lies rather in its complaint that the scoring methodology described in the ITT was not applied. This has two main strands.

a. Though the scoring system did not provide for a mark of 2, the markers ignored this limitation in a number of cases.

b. The markers also used decimal fraction marks such as 3.5 on a number of occasions.

28. Factually, these allegations are not disputed by the College. Instead, it says that they had no causative effect, in that Indigo would still have lost if the markers had not departed from the scoring methodology set out in the ITT, and indeed by a larger margin. It claims that the same is true if the interview is left out of account and some further less substantial criticisms are assumed in Indigo's favour. This was said to be supported by a re-mark exercise of both bids tabulated in a schedule at page 168 of the court bundle. However, the re-mark was a re-run from scratch not attempting simply to correct for the criticisms made by Indigo. (Perhaps for reasons of confidentiality, I was not told what effect the re-mark would have had on the position of the second-placed bidder, whose position has been ignored throughout this litigation.)

29. Since the hearing, with my permission the parties have provided me with further submissions and tables in support. I do not regard any of them as entirely satisfactory.

30. As I pointed out at the hearing, it is possible to correct for the erroneous use of 2 as a mark simply by reducing all 2s (or 2 + a decimal fraction) to 1, since a scoring as 2 involved the judgment that the test demanded by 3 had not been met, and that is reflected in some of the further schedules. The use of decimal fractions in some of the scoring cannot be corrected by a similarly simple mechanical operation, but a "best case" result in favour of Indigo can be seen by rounding all fractions (other than those in the 2s) up to the nearest integer for the Indigo bid, and down for the Emprise bid: again this is done in at least one of the schedules. Similar "best-case" assumptions could be made by assuming a maximum score of 5 for Indigo and O for Emprise as regards interview marks and marks for certain elements in section 3 of which Indigo has advanced criticisms - though I should record that these are not accepted by the College. None of the schedules reflects all these elements, and it is not appropriate for the court to attempt the calculation on its own.

31. In these circumstances, I have not found it possible to conclude that the lack of any causative effect is plain beyond realistic counter-argument, and accept that there is a serious issue to be tried as to whether Indigo has suffered, or is threatened by, loss of a more than fanciful chance of obtaining the contract.

32. However, I consider that the material does permit me to form the view

that

(1) the College's case on causation would be more likely than not to be accepted at trial;

(2) even if it failed there is only a low likelihood that the court would assess that chance of loss as much more than the minimum threshold level of non-fanciful.

In certain circumstances, that may be relevant on consideration of the balance of convenience.

Balance of convenience

Damages as an adequate remedy

33. The proposed contract is for a period of three years, with two possible annual extensions. While Indigo has experience relating to Colchester, the scope of the operation has been extended to include Braintree. Estimates and predictions can be made of future wage levels and other costs, but given the time-scale these must necessarily be uncertain. For at least these obvious reasons, quantification of the profits which would be earned by Indigo over the period of the contract would be inherently difficult, and necessarily very imprecise, though of course an operation which the court can, if required, carry out.

34. Some might consider a discounted monetary remedy is in principle preferable to an all-or-nothing gamble of possibly obtaining the contract on a re-run of all or part of the tender process. I do not however consider that this evaluation is one with which the court should be involved.

35. I have therefore concluded that a claim for damages would not be intrinsically an adequate remedy, and that in that regard failure to continue the standstill could properly be regarded as a prejudice to Indigo.

Impact of a further standstill on the College

36. Given the scheme of the Regulations, where the application is made by the authority to terminate the automatic standstill and the challenger is the respondent, there would be no cross-undertaking in damages. Regulation 47H gives however the court power to require an undertaking from the tenderer as a condition of continuing the standstill. I see no reason why this should not extend to requiring an undertaking from Indigo to compensate the College in the event of failure at trial, and my understanding is that Indigo would be prepared to comply with that.

37. The problem with a continuation of the standstill, so far as the College is concerned, is however not primarily, or even significantly, financial. The present contract expires on 31 December 2010, and a mobilisation period is required before then, whether or not of the full four weeks suggested by the College. To be deprived of cleaning services would force closure of the Colchester site, if only because of the impact of health and safety regulations. Quite apart from the effect on the College itself and its staff, this engages the interests of the students and the wider public interest in the proper and continued provision of further and higher education.

38. Counsel for Indigo quite properly and candidly recognized the importance and force of this problem. Indigo's response is that it can easily be avoided by simply extending the existing contract at Colchester until after trial, for which he suggested a period of three months. This period might well be inadequate, and ignores the possibility of appeal. It further ignores the point that the relief Indigo would be seeking from the court at trial would involve a yet further delay while the tender process was, at least to some extent, re-run. The difficulties are however more deep-seated than that.

39. At the hearing before me the argument proceeded on the basis of common ground that the existing contract for Colchester terminated on 31 December 2010. On this basis, the College submitted that any agreement to extend it further would fall foul of the Regulations.

40. Subsequent to the hearing Counsel for Indigo sent me a witness statement and further submission suggesting that the existing contract contained a power to extend again until 31 March 2011. This is said to be the effect of Condition 1.1.5, which reads

> *" "**Contract period**" means the period from 7th April 2006 to 31st March 2009. Subject to satisfactory performance the Corporation and the Contractor may agree to extend the contract ... for a 12 month period, or for a maximum of 24 month period."*

In the event the extension agreed was for 21 months expiring on 31 December 2010. It is in my view clear that the contract provided only for one extension, which could have been - but was not - for a full 2 years. It does not provide for a further extension.

41. Indigo's alternative submission, and that advanced at the hearing, is that an extension, even if not provided for in the contract, does not call for a public procurement process. That suggestion appeared to me counter-intuitive, since agreement of an extension, even if termed an amendment, would involve a contract for services to be rendered during a new period, and would therefore be a contract for new services. Counsel for Indigo

argued however that his submission was supported by the decision of the ECJ in *Pressetext Nachrichtenagentur GmbH v Austria*, Case C-454/06. In that case, the court responded to three questions asking *"in which circumstances amendments to an existing agreement between a contracting authority and a service provider may be regarded as constituting a new award of a public services contract"*. None of them concerned a temporal extension to a contract. The Court did however make general observations which offer some assistance in approaching that question:

> *"34. ....amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract ... when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract ...*
>
> *35. An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the ... acceptance of a tender other than the one initially accepted.*
>
> *36. Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered."*

Far from supporting Indigo's submission, the Court's remarks in my view point to the contrary position. An extension of the contract into a new period of necessity *"encompasses"* services not previously covered by the contract, when the extension is not foreseen in the contract.

42. In a yet further argument, it was suggested that the Regulations would permit an ad hoc extension in a case of urgency. Reference to regulations 14 and 17 reveals however that, though in a case of extreme urgency an authority can dispense with publication of a contract notice and use a reduced version of the negotiated procedure, it must still comply with regulation 16(9) and (10), which import regulations 23, 24, 25, 26 and 30. It is not therefore possible to avoid a competitive procurement process, which might not be won by Indigo. Nor does it appear possible to complete any such process in time to meet the imminent deadlines to ensure the provision of cleaning facilities from 3 January 2010.

Comparative prejudice

43. In these circumstances, the prejudicial impact on the College and the wider public of continuing the standstill far outweighs any prejudice which may be caused to Indigo by lifting it and relegating it to a claim in damages.

Merits - what would happen at trial

44. Though I have concluded that Indigo has for the purposes of interim relief passed the threshold of a serious issue as regards the existence of a cause of action, that does not mean that a court would grant an injunction at trial, even if it were possible to hear the matter immediately. Three considerations militate against such a result and in my judgment make it improbable.

45. Firstly, the factors relating to comparative prejudice would be effectively the same.

46. Secondly, I regard it as more likely than not that the court would find in favour of the College on the causation question.

47. Thirdly, even if the trial court were to accept Indigo's case that the defects had caused the loss of a non-fanciful chance, I think it most improbable (as I observed earlier) that it would view the chance as significantly in excess of that. Such a conclusion would reduce the attractions of ordering some form of re-run.

Conclusion

48. In summary, the balance of irremediable prejudice points clearly in favour of lifting the standstill so as to permit immediate signature of the contract with Emprise. Even if I had regarded the balance as finer, the limited prospects of an injunction being ordered at trial would have made it inappropriate to do other than terminate the standstill as requested by the College.

49. I therefore make the order sought by the College under regulation 47H(1)(a).