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PROCUREMENT DISPUTES: CHALLENGES FOR SPV CLAIMANTS

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In *Teleperformance Contact Ltd v Secretary of State for the Home Department [2023]* EWHC 2481 (TCC)[1], the English High Court confirmed that losses suffered by intra-group companies are generally irrelevant when lifting the automatic suspension on the Home Office's £1.2 billion global visa and citizenship services procurement.

The case is the latest in a series of judgments in the English Courts which narrow the availability of procurement remedies to aggrieved third parties and will be of particular interest to multinationals and other businesses that deliver public contracts through a network of intra-group companies or as subcontractor to prime contractors outside their group.

Background

On 8 December 2021, the Secretary of State for the Home Department (the **Home Secretary**) advertised a procurement for the provision of visa and citizenship application services comprising five jurisdiction-specific contracts (the **Procurement**).

On 20 May 2022, Teleperformance Contact Limited (**TCL**), which is part of the Teleperformance group (a global digital services business), submitted bids for all five lots.

On 15 June 2023, the Home Secretary awarded Lots 1 – 4 to VF Worldwide Holdings Ltd (**VFW**) and Lot 5 to TCL.

On 12 July 2023, TCL challenged the Home Secretary's decision to award Lots 1 – 3 to VFW. Consequently, the Home Secretary was precluded from entering into the contracts for Lots 1 – 3 with VFW pursuant to the 'automatic suspension' provisions in Regulation 95 of the Public Contracts Regulations 2015 (**PCR**).

The case relates to the Home Secretary's application to lift the automatic suspension pursuant to PCR Regulation 96(1)(a).

Key issues

- *American Cyanamid* test continues to be applied by courts when assessing applications to lift automatic suspensions.
- In most cases, courts will only consider losses suffered by the complaining party itself (e.g. unsuccessful bidder) when determining the "adequacy of damages".
- The losses suffered by intra-group companies will only be considered in exceptional circumstances and if appropriate.
- Bidders should factor in the potential loss of rights when deciding how to deliver public contracts and structure contractual relationships.
- Claimants seeking to resist applications to lift should provide clear and robust evidence (e.g. internal analyses, assessments or papers evidencing) to substantiate asserted losses.

1 https://www.bailii.org/ew/cases/EWHC/TCC/2023/2481.html

Lifting Automatic Suspensions

It is well-established that the test to be applied in determining an application to lift an automatic suspension under PCR Regulation 96(1)(a) is the four-limb American Cyanamid test (*American Cyanamid v Ethicon* [1975] AC 396) as recently summarised in *Camelot Global Lottery Solutions Ltd v Gambling Commission* [2022] EWHC 1664:

- Is there a serious issue to be tried?
- If so, would damages be an adequate remedy for the claimant if the suspension were lifted and it succeeded at trial; is it just in all the circumstances that the claimant should be confined to a remedy of damages?
- If not, would damages be an adequate remedy for the defendant if the suspension remained in place and it succeeded at trial?
- Where there is doubt as to the adequacy of damages for either of the parties, which course of action is likely to carry the least risk of injustice if it transpires that it was wrong; that is, where does the balance of convenience lie?

Applying the test in this case, the court found that, while there was a serious issue to be tried, damages would be an adequate remedy for TCL, whereas damages would be an inadequate remedy for the Home Secretary; and, accordingly, that the balance of convenience militated in favour of lifting the automatic suspension.

Adequacy of damages for the claimant: can bidders "pray in aid" the irrecoverable losses of its wider group?

The point of principle for the court was whether TCL could "pray in aid" the irrecoverable losses of its wider group when considering whether damages would be an adequate remedy for the claimant if the suspension were lifted and it succeeded at trial (limb 2 of *American Cyanamid*).

The Teleperformance group delivers visa and consular services through various group companies, referred to collectively by the group's trading name TLScontact. **TLScontact** delivers on-the-ground aspects of visa and consular services (e.g. hiring staff, entering into leases and compliance with local law) through special purpose vehicles (**SPVs**) incorporated in specific jurisdictions.

The losses which TCL suffered itself appeared to be quantifiable and adequate. TCL therefore sought to rely on losses that would be sustained primarily by *other* entities within TLScontact. For example, a claimed 71% reduction in revenue was not exclusively TCL's revenue, but rather the aggregate revenue generated by TLScontact entities.

Counsel for TCL contended that a claimant SPV in TCL's position would never be able to identify an inadequate remedy (and therefore resist a hearing to lift an automatic suspension) if it was denied an ability to rely on irrecoverable losses of its wider group, which would be an "absurd" and "impactful" outcome given the prevalence of the approach by bidders in large procurement processes.

Against this, counsel for the Home Secretary and VFW (which joined the proceedings as an interested party) argued that it was simply not open to the court as a matter of principle.

The court considered a range of cases relating to the issue, and distilled the following principles:

- courts have a broad discretion when granting injunctive relief;
- in most cases, courts will only consider the losses suffered by the party who is entitled to claim;
- there may exceptionally be circumstances in which the losses of third parties may be considered relevant, particularly if there is a nexus between such losses and the losses suffered by the claiming party; and
- when considering whether it is just in all circumstances to confine the claiming party to its remedy in damages, the court may look to the objective expectations created within the relevant relationship between the parties (whether by a contract, by the regulatory regime giving rise to the obligations and available remedies, or otherwise).

Applying these principles to the facts of this case, the court concluded that it was not appropriate in the circumstances to consider the losses suffered by other entities within the TLScontact or wider Teleperformance group for the following reasons:

- bidders were afforded commercial freedom to determine their delivery structure, and the loss of rights to recover losses sustained by other group companies was effectively *a quid pro quo* of Teleperformance group's proposed SPV approach;
- there may circumstances in which an SPV can show other, unquantifiable losses such that damages would be inadequate and each case will turn on its own analysis (i.e. a restriction on the consideration of the adequacy of damages to the claiming party's losses does not automatically foreclose SPV from resisting applications to lift);
- under the PCR, the Home Secretary owes no duties to the TLScontact entities, save to TCL as the contracting entity. Furthermore, save for TCL, the TLScontact entities do not have standing to bring their own challenge against the Home Secretary and their losses are not recoverable against the Home Secretary. It is appropriate in these circumstances therefore to ignore their losses when considering whether to lift an automatic suspension; and
- there was an insufficient nexus between the losses caused to TLScontact entities and TCL's own losses. In particular, TCL was under no existential threat (whether due to the losses sustained by TCL itself or other TLScontact entities)

On this basis, the court found that damages would have been an adequate remedy for TCL.

Conclusions

Choice of delivery model

This decision is the latest in a series of judgments that have the effect of narrowing the availability of procurement remedies to aggrieved third parties, particularly multinationals and other businesses that deliver public contracts through a network of intra-group companies or as subcontractor to prime contractors outside their corporate group:

- only the actual bidder – not sub-contractors or group companies (including sister or parent companies) of bidders – has standing to bring procurement challenges: *International Game Technology plc and other v Gambling Commission* [2023] EWHC 1961 (TCC). Having dismissed a claim by IGT, a sub-contractor to an unsuccessful bidder (Camelot), the court went on to order IGT to pay the costs of both the defendant (Gambling Commission) **and** the successful bidder (Alwyn) which had joined proceedings as an interested party;
- interests of sub-contractors are not generally relevant when considering the adequacy of damages for the claimant: *Boxxe Limited v Secretary of The State for Justice* [2023] EWHC 533 (TCC)[2]; and
- no automatic right to damages – breach must be sufficiently serious: *Nuclear Decommissioning Authority v ATK Energy EU Ltd* [2017] UKSC 34.

Bidders should therefore factor the potential loss of rights when deciding how to deliver public contracts and structure contractual relationships.

Resisting applications to lift – evidential burden

The court went on to confirm that it would have found damages to be an adequate remedy even if, contrary to the conclusions above, the court had considered it appropriate to consider the irrecoverable losses of its wider group. The court was unpersuaded by the evidence provided by TCL to sustain its assertion that the wider corporate group faced "far-reaching harm and prejudice":

> *A common theme running through the following consideration of this is the absence of any internal analyses, assessments or papers evidencing the contents of Mr Peachey's statement, the absence of which would be most surprising if they were fears which were held with conviction within the corporate structure. Moreover, the evidence is imprecise and vague.*

Claimants should therefore be prepared to provide robust and clear evidence to substantiate asserted losses, as courts are unlikely to be persuaded by witness testimony alone.

2 See Clifford Chance's briefing: https://www.cliffordchance.com/briefings/2023/05/un-boxxed-ministry-of-justice-gets-the-greenlight-to-award-contr.html

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