

CCGs' conduct "sufficiently serious" for award of damages in High Court procurement case

This case provides a reminder to contracting authorities that whilst the bar for an award of damages in procurement cases is high, following the Supreme Court ruling in *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2017] 1 WLR 1373, it is not insurmountable when a contracting authority has acted with disregard to the Public Contracts Regulations 2015 (PCRs). There is also further guidance as to the use of frameworks

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The High Court has recently handed down its judgment in the case of *Consultant Connect Limited v NHS Bath and North East Somerset, Swindon and Wiltshire Integrated Care Board, NHS Gloucestershire Integrated Care Board, NHS Bristol, North Somerset and South Gloucestershire Integrated Care Board v Monmedical Limited (t/a Cinapsis)* [2022] EWHC 2037 (TCC) and it provides a reminder to contracting authorities that whilst the bar for an award of damages in procurement cases is high, following the Supreme Court ruling in *Energy Solutions EU Ltd v Nuclear Decommissioning Authority* [2017] 1 WLR 1373, it is not insurmountable when a contracting authority has acted with disregard to the Public Contracts Regulations 2015 (PCRs).

Not only this, but it also raises some novel points in relation to standing and some further guidance as to the use of frameworks.

The Facts

Consultant Connect (CC) is a provider of electronic communication services to NHS bodies. The defendants were NHS clinical commissioning groups (CCGs). They ran a joint procurement for a contract to provide "advice and guidance" services. Following a product demonstration event at which the CCGs scored CC's and Cinapsis' products against undisclosed criteria, the CCGs decided to award the contract using the "Clinical Communications Tools for NHS Trusts" Framework (the **Framework**), which CC was not a member of. The CCGs then conducted a mini-competition under the Framework but only invited a bid from Cinapsis, and no other parties, and also substantially negotiated particular terms of the contract (particularly with regard to pricing) away from what was set out in the Framework.

The key issues for determination by the Court were:

1. whether CC had standing to bring a claim even though they were not a party to the Framework;
2. whether the CCGs' decision to use the Framework to effect the direct award of the contract to Cinapsis breached Regulations 18(2) and (3) of the PCR 2015 and the duties of transparency and equal treatment, given the design of the procurement was made with the intention of artificially narrowing competition and the intention of unduly favouring or disadvantaging certain economic operators;
3. whether the process by which the CCGs awarded the contract to Cinapsis under the Framework was unlawful and in breach of the requirements in Regulation 33 of the PCRs;
4. insofar as any breaches of duty were established, whether those breaches (individually or together) caused any loss or damage to CC, and if so, the remedy that the Court should grant.

Issue 1: Did CC have standing?

The Court ruled that, notwithstanding the fact that CC was not on the Framework, it still had standing to bring the challenge. The Court concluded that the structure of the PCRs did not rule out claims by a non-member of the relevant framework if the facts showed that the contract award breached a relevant duty owed to them and that the non-member risked suffering a loss.

The Court did clarify that normally a non-member of a framework will not be able to satisfy the causation of loss test in Regulation 91(1). If the entire exercise is carried out within the parameters of the relevant framework agreement, the parties most likely to be prejudiced and in a position to claim are disappointed framework members. Non-membership of the framework will often be a complete answer to a claim on the evidence, but it is not a legal bar creating a lack of "standing" to bring a claim.

In this particular case, the Court went on to conclude that there had been several breaches of duty by the CCGs which resulted in CC being able to satisfy the Regulation 91(1) causation of loss test, notwithstanding it not being a Framework member.

Issue 2: Whether the CCGs' decision to use the Framework to effect the direct award of the contract to Cinapsis breached the regulations

The Courts rationale is detailed and very fact focused in terms of evaluating the procedure used by the CCGs and determining specific issues relating to the procurement. However, the conclusion was that the use of the Framework did breach the PCRs. In essence, the Court held that Cinapsis was clearly favoured through the procurement process via the product demonstration day and the drafting of the specification, which was crafted so that Cinapsis could meet it. The Framework was then used by the CCGs "*as a shield to justify the exclusion of CC and others*". The Court also looked at how the CCGs conducted the procurement process under the Framework as further evidence that it was being used as a mechanism in order to illegally directly award the contract to Cinapsis (see issue 3 below for more details).

Issue 3: Whether the process by which the CCGs awarded the contract to Cinapsis under the Framework was unlawful and in breach of the requirements in Regulation 33 of the PCRs

Again, the Court concluded that the CCGs' conduct in running the mini-competition under the Framework breached the PCRs; in particular, Regulation 33. Several reasons were pointed to, the main ones being:

- The Court held that it is an inherent feature of a mini-competition run under Regulation 33(8)(c) that there is more than one competitor, pointing at the language of the regulation itself and the reference to "*economic operators*". Here, as the CCGs only sent tender documents out to one bidder considered suitable, the others were not given the chance to compete and this contravened the PCRs. The Court distinguished this from a situation where it is established that there is only one capable framework member after sending tender documents out to at least two framework members and only receiving one bid; in that instance, there is a competition but the sole bidder wins it by default
- The method of pricing included in the contract bore little resemblance to the structure included in the Framework. The Framework set out bands of prices depending on the number of users of devices, whereas the pricing in the contract was for an "*enterprise licence*" per NHS service. The Court held that this change fell on the wrong side of the dividing line of "*substantial modification*" to the Framework terms under Regulation 33(6) (which is not permissible) and Regulation 33(11), which allows for more precisely formulated terms to be introduced in a mini-competition.

Issue 4: Whether those breaches (individually or together) caused any loss or damage to the CC, and if so, the remedy that the Court should grant

The Court awarded a variety of different remedies due to the severity of the CCGs' conduct. It awarded an order shortening the contract between the CCGs and Cinapsis to allow the CCGs to conduct a lawful procurement (this is the first time this remedy has been given in English courts). It also ordered the CCGs to pay civil penalties to the Minister for the Cabinet Office as a result of the breach. Finally, it also held that the breaches gave rise to a claim for damages on loss of chance principles and were sufficiently serious to justify an award of damages.

The Court did, however, stop short of issuing a declaration of ineffectiveness (instead imposing the contract shortening order and the financial penalties) due to the "*overriding reasons relating to a general interest requiring that the effects of the contract should be maintained*" (this is outlined in Regulation 100 of the PCRs, and states that if the Court believes this is satisfied, then it must not make a declaration of ineffectiveness). The reasoning for this was that stopping the A and G service being provided under the contract would adversely affect patient care and cause disruption to hospital admission decisions.

Comment

As well as providing useful guidance on standing to bring procurement challenges and being a novel case when it comes to the remedies applied by the Court, this case serves as a welcome reminder to contracting authorities that procuring under framework agreements does not give rise to a cast-iron defensible procurement position. It is still necessary to follow the PCRs and to abide by the terms of those frameworks in order to be protected. Where you wish to depart from the terms of a framework during a mini-competition process, you should have careful regard to the scope of the proposed changes to ensure they fall on the right side of the line and are seen as more precisely-formulated terms, rather than substantial modifications.

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